

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Case No. 03-1766

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Common Pleas

ROBERT W. BETHEL,

Common Pleas Case
No. 00CR-11-6600

Defendant-Appellant.

DEATH PENALTY CASE

MEMORANDUM OF PLAINTIFF-APPELLEE STATE OF OHIO IN OPPOSITION
TO APPLICATION FOR REOPENING

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 14th Floor
Columbus, Ohio 43215
Phone: 614-462-3555
Fax: 614-462-6103

DAVID H. BOKIKER 0016590
Ohio Public Defender
8 East Long Street, Eleventh Floor
Columbus, Ohio 43215
Phone: 614-466-5394
Fax: 614-644-0708

and

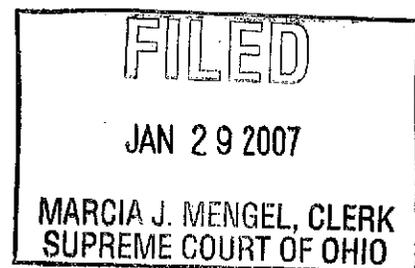
and

RICHARD TERMUHLEN, II 0023238
(Counsel of Record)
Assistant Prosecuting Attorney
KIMBERLY M. BOND 0076203
Assistant Prosecuting Attorney

T. KENNETH LEE 0065158
(Counsel of Record)
Assistant State Public Defender
RACHEL TROUTMAN 0076741
Assistant State Public Defender

COUNSEL FOR PLAINTIFF-
APPELLEE

COUNSEL FOR DEFENDANT-
APPELLANT



MEMORANDUM IN SUPPORT

Defendant's claims of ineffective assistance of appellate counsel lack merit. He cannot show there was a substantial probability of a different outcome had counsel raised the additional propositions of law in his brief. *Strickland v. Washington* (1984), 466 U.S. 668, governs whether the defendant has raised a "genuine issue" of appellate counsel ineffectiveness. *State v. Hill* (2001), 90 Ohio St.3d 571, 572. Appellate counsel need not raise every non-frivolous issue. *Jones v. Barnes* (1983), 463 U.S. 745, 752; *State v. Allen* (1996), 77 Ohio St.3d 172, 173. Defendant has not shown counsel was incompetent and, given the evidence and his own admissions, he cannot show prejudice.

Response to First Proposition of Law: Effective Assistance of Trial Counsel.

The defendant has failed to establish that his trial counsel were ineffective, and consequently has failed to show that his appellate counsel was ineffective for not presenting additional specific instances to this Court in his brief. Gary Phillips testified that he was an investigator who was brought into the case late. (T. 4, Vol. XIV) Nothing suggests that the State of Ohio had any part in Phillip's role on the defense team. In order for a statement to be subject to suppression as involuntary, it must have been the result of state action. *State v. Wiles* (1991), 59 Ohio St.3d 71. There was no basis to renew the suppression issue or to request a mistrial. It is well-settled that the decision whether to call a witness, such as Phillips, is trial strategy. *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, ¶82 (references omitted).

The defendant's *Miranda* rights were being observed at the time of his proffer; there was no need to object based on the perceived failure to reiterate the *Miranda* warnings. Defendant was accompanied by counsel. The plea agreement itself contained

language that the statement may be admissible against the defendant. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 36. This Court refused to find plain error: “[I]t is generally accepted that the presence of counsel during interrogation obviates the need for the [*Miranda*]warnings.” *Id.* at ¶ 73, citations and internal quotations omitted.

The scope of cross-examination falls cleanly within the ambit of trial strategy. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101. Donald Langbein was cross-examined about his juvenile probation. Counsel established that he had been at Cuyahoga Hills (youth correction center), and was violating house arrest merely by being on the corner of Fourth and Morrill, before the homicides. (T. 100, 104-106, Vol. XI) Langbein was lambasted; he was exposed as a gang member who sat on his knowledge of a double homicide until it proved useful to him in negotiating a lesser sentence. The fact that Langbein was on probation, with an ankle monitor, was brought out on direct examination. (T. 29, Vol. XI) Direct examination also established that Langbein got three months off a federal twenty-seven month sentence for his cooperation in this case. (T. 42, 79-80, Vol. XI) Having established that the witness was on probation, the relevant issue would have been the terms that he violated, not the terms that he was required to observe. It boggles the mind that the jury would have rejected Langbein’s testimony if, for example, it were established he was subject to periodic urine screens.

The *State v. Mills* (1992), 62 Ohio St.3d 357, 375, instruction (“[R]ecommend the appropriate sentence as though your recommendation will, in fact, be carried out.”) is not required. This Court held that the jury was appropriately instructed, and the instruction would not clearly have changed the outcome. *State v. Bethel*, supra at ¶ 155-156.

Obviously, trial counsel can only be second-guessed for failing to *proffer* exhibits; it is the province of the trial court to *admit* them or not. It is entirely speculative to suggest that the proffer and admission of all of the taped conversations between the defendant and Langbein would have advanced the defendant's cause. In fact, some parts of the tapes played to the jury were fast-forwarded by agreement. (T. 63, Vol. XI) There were apparently four conversations that were taped. (T. 83, Vol. XI) The State of Ohio used part of one, and conceded that the rule of completeness allowed the defense to present the remainder of that tape. (T. 45-80, 87, Vol. XI) The trial court ruled that the defense could present the remaining tapes in its case, although the State could not. (T. 88, Vol. XI) The defense did proffer selected portions of the other tapes. (T. 111-116, Vol. XI) **The remaining tapes, if offered by the defendant, would have been self-serving hearsay.** Trial counsel was not ineffective for focusing its proffer, rather than losing the relevant parts in a muddle of small talk between the defendant and Langbein. Appellate counsel was not ineffective in raising this issue which is largely *de hors* the record.

There is nothing in the record that substantiates the defendant's position that there is a taped statement between him and the police. (T. 130-137, Vol. III) Counsel cannot be ineffective on this record for failing to proffer such a statement.

In *State v. Jackson* (2001), 92 Ohio St.3d 436, 449, this Court held that an attorney is not ineffective for failing to object to leading questions, given the trial court's discretion in allowing them on direct examination. Trial counsel were wise to not object to the arguably leading questions asked of Mr. Bass, a sixty-five year old neighbor of the crime scene who admitted a memory problem that stemmed from an accident. (T. 2-8, Vol. XI) Mr. Bass established a time frame for the killings, and described the volleys of

shots. *Id.* He testified that his statement given to homicide detectives the next morning represented his “best recollection.” The information would properly have come in as refreshed recollection or past recollection recorded. Counsel did not need to alienate the jury by needlessly denigrating this gentleman, who added no inculpatory evidence against the defendant (except, of course, that his evidence meshed with the defendant’s confession). The other alleged use of leading questions, in the direct examination of Langbein, does not involve leading questions at all. (T. 25, Vol. XI)

Similarly, the failure to object to the challenges for cause of jurors must be viewed against the trial court’s discretion in determining whether the juror can be impartial. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 106. The failure to object to a State challenge for cause is not ineffective assistance of counsel if the juror was properly excused under *Wainwright v. Witt* (1985), 469 U.S. 412. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 391. Juror Eaton refused to consider the death penalty at all. Juror O’Harra (“absolutely no way”) and Carpenter (“I don’t care what the circumstance is.”) were also properly excused. Juror Johnston questioned whether he could participate in a mitigation hearing and said “No” to the possibility of ever signing a death verdict.

The gang affiliation evidence was seized upon by the defense counsel to discredit Langbein and to intimate that Cheveldes Chavis was the true murderer. By necessity, counsel had to paint with a wide brush, and some of the paint came off on the defendant. Nevertheless, the use of this evidence was within the realm of trial strategy. To the extent the State introduced this evidence, it properly illustrated the close relationship between the defendant, Jeremy Chavis, James Reynolds, and Tyrone Green.

Defense counsel was not ineffective in failing to object to the partially closed courtroom. The defendant's mother was there for support; those who might do him harm for turning State's evidence were not. It was a reasonable trial tactic to not expose to the public the defendant's intention to snitch. It was also harmless; there is no possibility that the outcome of the case would have been different if the plea agreement were recited in a completely open courtroom. As this Court noted, the plea agreement was "voided" by the defendant's breach, and the case proceeded to trial. *State v. Bethel*, supra, at ¶ 86.

Defendant's numerous claims of ineffective assistance based on failure to object also lack merit. When the alleged ineffectiveness involves failure to object, the defendant must show that the objection "is meritorious," and a reasonable probability that the verdict would have been different if the objection had been granted. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375; *State v. Santana* (2001), 90 Ohio St.3d 513.

Defendant's claim that trial counsel failed to investigate his case was raised in his fourth proposition. If the defendant is relying upon information *de hors* the record, direct appeal is an inappropriate vehicle. *Massaro v. United States* (2003), 538 U.S. 500, 505.

Response to Second Proposition of Law: Search Warrant was Properly Supported.

The affidavit survives scrutiny under *Illinois v. Gates* (1982), 462 U.S. 213. The warrant was based on information provided by Teresa Cobb on January 7, 1997, and was requested the next morning. The affidavit specified that the investigation concerned the homicides of Reynolds and Hawks, who were victims of numerous gunshot wounds. Detective McCann's affidavit relayed the information provided by Cobb; that defendant admitted his involvement in the murders to her; that defendant carried weapons on his person; and he had weapons in his home like those used in the homicides. (Tr. Vol. X,

115) McCann testified that he was not aware that Cobb was on psychotropic or depressant medication. (*Id.* at 116) The detective testified that the information in the affidavit was true and accurate. (*Id.* at 118)

The detective was not required to vouch for the reliability of Cobb. It is well settled that it is not necessary to show the same degree of reliability for a named informant as for an unnamed informant. See *Gates*, *supra*, at 233. Although an informant's veracity and reliability are relevant, they are not rigid requirements but, rather, "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." *Id.* at 230.

The totality of the facts and circumstances set forth by McCann's averments in his affidavit constituted sufficient probable cause to search defendant's residence. Even if the trial court had found error in the affidavit, exclusion would not have been required under *United States v. Leon* (1984), 468 U.S. 897.

Response to Third Proposition of Law: No Prosecutorial Misconduct.

A prosecutor's conduct cannot be grounds for error unless such conduct deprived the defendant of a fair trial. *State v. Evans* (1992), 63 Ohio St.3d 231, 240; *Darden v. Wainwright* (1986), 477 U.S. 168, 183 n. 15. Issues of prosecutorial misconduct must be addressed in the context of the entire trial. See *State v. Keenan* (1993), 66 Ohio St.3d 402, 410. "A conviction will be reversed only where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would not have found appellant guilty." *State v. Benge*, 75 Ohio St.3d 136, 141-42, 1996-Ohio-227, citation omitted. Defendant lists without analysis numerous claims of misconduct. Each claim lacks merit.

Prosecutors did not mislead the jury about whether defendant knew how Cobb would testify. In the first passage cited by defendant, Phillips was merely asked whether he recalled seeing videotapes and listening to audiotapes of witnesses. (Vol. XIV, 15-16) In defendant's other claimed error, the prosecutor fairly addresses witness consistency in his closing argument. (Vol. XIV, 123) Neither amounts to misconduct.

Prosecutors are given considerable latitude in closing argument and a prosecutor may comment on what the evidence has shown and what reasonable inferences may be drawn from the evidence. *State v. Clemons* (1998), 82 Ohio St.3d 438, 452. The prosecutor properly argued in rebuttal that the coroner's report supported the conclusion the bullet wounds came out the back of the head. (Vol. XIV, 118-119) The positioning of the victims when shot and whether the wounds on the front and back of the head constituted entrance or exit wounds were facts open to argument at trial.

The prosecutor did not shift the burden of proof in closing argument. Rather, the prosecutor informed the jury that the burden was on the State. The prosecutor stated:

It's the State's burden of proof. We have to prove every element of this case beyond a reasonable doubt. They don't have to do anything. But they could have if they wanted to.

(Vol. XIV, 125-126) The statement "they could have if they wanted to," in context with the entire rebuttal argument, shows only that the defendant's argument blaming the homicides on Cheveldes Chavis or Donny Langbein was based solely on speculation. The court informed the jury that the State had the burden of proof. (Vol. XIV, 132) As jurors are presumed to follow instructions, defendant has not shown constitutional error.

The allegations of improper vouching are based on the prosecutor's rhetorical question about why a witness would lie. Trial counsel did not raise an objection to the prosecutor's statements and thus waived all but plain error. Defendant cannot show plain

error; there was no basis for raising an objection. "In order to vouch for the witness, the prosecutor must imply knowledge of facts outside the record or place the prosecutor's personal credibility in issue." *State v. Jackson* 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 117 (argument that a witness had no motive to lie was not improper vouching).

Defendant's additional claims of misconduct are addressed in response to his first proposition, which claims ineffective assistance of trial counsel. None of these claims constitutes ineffective assistance or prosecutorial misconduct.

Response to Fourth Proposition of Law: Testimony of Theresa Cobb

The defendant claims that the prior statement of witness Theresa Cobb Campbell was improperly admitted as a recorded recollection, because she never adopted the prior statement *at the time it was made*. However, Evid.R. 803(5) does not require contemporaneous adoption; the memorandum or record must simply have been made *or* adopted at a time when the matter was fresh in the witness's memory. Mrs. Campbell indicated that she relayed the confession the appellant made to her to the police, on an unknown date but certainly within the same year. (T. 152, Vol. XI) The murders occurred in June, 1996; the statement to the police in January, 1997. At trial, the witness adopted the police summary of that conversation as an accurate reflection of her statement to the police. The summary utilized was virtually identical to the direct testimony; it added no new information. Its introduction, if error, was harmless beyond a reasonable doubt. The introduction of a prior statement under Evid.R. 803(5) has survived a harmless error analysis. *State v. Worthington*, 5th Dist. No. 2004-CA-0083, 2005-Ohio-4719, ¶ 35.

The use of the prior statement was not, however, offered as a recorded recollection. The trial objection, and the bench conference, all focused on Evid.R. 801(D)(1)(b), regarding a prior consistent statement. The witness's credibility had been attacked because of her ongoing use of serious prescription medicines for her mental illnesses. Some of the potential side effects, she admitted, were confusion, abnormal thinking and dreams, memory loss, and hallucinations. She admitted that she was bipolar, had a poor memory, had two serious head injuries, and had spent thirty days in a mental health facility for emotional issues. At least one of these issues, a stab wound to the head, occurred after the statement to the police was made. She could not recall when she had spoken to defense investigators. A prior consistent statement is not hearsay and is admissible as substantive evidence if it is offered to rebut an express or implied charge of recent fabrication or improper influence or motive.

An implication on cross-examination that a witness could not recall the events about which he testified permitted the use of a prior consistent statement to counter an implied charge of recent fabrication in *State v. Stringfield* (1992), 82 Ohio App.3d 705, 713. In *State v. Jones* (March 15, 1995), 4th Dist. No. 94CA11, a cross-examination suggesting that the witness had a faulty memory justified the use of a prior consistent statement on redirect examination for rehabilitation. An implied charge of fabrication or improper influence by other people was found to have been made in a cross-examination that suggested a child's lack of memory and explored the pre-testimony conversations the child had with adults in *State v. Bowens* (August 9, 1991), 11th Dist. No. 89-A-1463. In *People v. Basnett* (1960), 186 Cal.App.2d 108, 120-121, an implication that a witness was coached together with the fact that the witness testified to specific facts in spite of

allegations of lack of memory supplied an inference of improper influence. Similarly, questions such as Mrs. Campbell was asked about whether she had spoken to police or prosecutors about her testimony implied that she had been subjected to an improper influence and authorized the admission of a prior consistent statement in *Chambers v. State* (Sup. Ct. Wyoming, 1986), 726 P.2d 1269, 1273-1274 (the witness in *Chambers* was also asked whether she was in fact testifying from her review of previous preliminary hearing testimony).

Improper admission of a prior consistent statement is subject to a harmless error analysis. *State v. Fears* (1999), 86 Ohio St.3d 329, 339 (the witness was “not a key witness to the murder”); *United States v. Bishop* (C.A. 5, 2001), 264 F.3d 535, 548 (the admission of the prior statement “added little to the weight of the evidence”). The statement was properly admitted after the allegation of recent fabrication and improper influence. Given that the summary and the trial testimony were virtually identical, there was no harm to the defendant. In any event, the issue is not so much whether Mrs. Cobb should have been permitted to read and adopt the summary of her prior statement to the police, but whether appellate counsel was ineffective for failing to raise the issue.

Response to Fifth Proposition of Law: The Proffered Statement was Admissible.

The admissibility of defendant’s proffer was raised in Propositions 1, 2, and 19 of defendant’s direct appeal. This Court concluded that defendant “knowingly, voluntarily, and intelligently entered into the plea agreement” and that defendant was advised of and understood the consequences of breaching the agreement. *Bethel*, supra at ¶ 69.

Based on the forgoing, defendant’s motion to reopen his appeal should be denied.

Respectfully submitted,

RON O'BRIEN 0017245

Prosecuting Attorney



Richard Termuhlen, II 0023238

Assistant Prosecuting Attorney

373 South High Street-13th Fl.

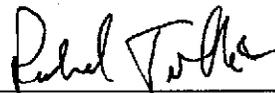
Columbus, Ohio 43215

614/462-3555

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, January 29, 2007, to T. Kenneth Lee, Assistant State Public Defender, 8 East Long Street, Eleventh Floor, Columbus, Ohio 43215, Counsel for Defendant-Appellant.



Richard Termuhlen, II 0023238

Assistant Prosecuting Attorney