

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102756

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAURICE L. BATES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580371-A

BEFORE: Blackmon, J., Keough, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: December 3, 2015

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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PATRICIA ANN BLACKMON, J.:

{¶1} In this accelerated appeal, Maurice L. Bates (“Bates) appeals pro se from the trial court’s denial of his motion for leave to file a delayed motion for a new trial.

Bates assigns one error for our review.

I. The trial court abused its discretion and erred to the prejudice of the defendant-appellant and committed plain error in violation of Crim.R. 52(B) when it denied defendant-appellant’s motion for leave to file a delayed motion for a new trial without holding an evidentiary hearing.

{¶2} Having reviewed the record and pertinent law, we affirm. The apposite facts follow.

{¶3} On June 24, 2014, Bates pled guilty to involuntary manslaughter in violation of R.C. 2903.04(A), with firearm specifications; felonious assault in violation of R.C. 2903.11(A)(1); and having a weapon while under disability in violation of R.C. 2923.13(A)(3), relating to a fatal shooting. The court sentenced Bates to an aggregate of ten years in prison.

{¶4} Subsequently, Bates filed various pro se postconviction relief motions, including the following:

- July 25, 2014 — motion to withdraw plea
- July 29, 2014 — motion for court records
- July 29, 2014 — motion to reduce the term of sentence
- August 18, 2014 — motion to withdraw plea
- August 18, 2014 — motion to vacate reinstatement fees
- February 24, 2015 — motion for leave to file a delayed motion for new trial

{¶5} The court denied all of Bates’s motions. On appeal, Bates argues that the court abused its discretion and erred when it denied his motion for leave to file a delayed motion for a new trial without holding an evidentiary hearing. Bates also argues that he is entitled to a new trial under Crim.R. 33(A)(1), (2), and (6), which states in pertinent part as follows:

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) misconduct of the jury, prosecuting attorney, or the witnesses for the state;

* * *

(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial * * *.

{¶6} In the instant case, there was no trial because Bates pled guilty. Therefore, a “new trial” is a nullity. *See State v. Cooper*, 8th Dist. Cuyahoga No. 100537, 2014-Ohio-2404, ¶ 20 (a Crim.R. 33 motion for a new trial “has no application to cases in which the defendant entered a guilty plea”). Accordingly, the court correctly denied Bates’s motion for leave to file a delayed motion for a new trial and his sole assignment of error is overruled.

{¶7} Within Bates’s appellate brief, he makes various arguments that do not necessarily fall under his stated assignment of error. For example, he argues: that he would not have pled guilty but for the ineffective assistance of counsel; the defense of

mere presence; prosecutorial withholding of evidence; and newly discovered evidence. However, as explained below, Bates's record on appeal does not contain a transcript of the proceedings in the trial court, and this court has no choice other than to presume regularity.

{¶8} On February 23, 2015, the trial court, “upon defense counsel’s oral request,” ordered transcripts of two hearings at the state’s expense — an April 23, 2014 hearing granting Bates’s request for a continuance to investigate new evidence, and the June 24, 2014 guilty plea and sentencing hearing.

{¶9} On March 20, 2015, Bates filed a timely notice of appeal regarding the trial court’s denial of his motion for leave to file a delayed motion for a new trial. The Loc.R. 9 praecipe that Bates filed with this appeal has the following box checked: “ * * * appellant will cause the record in this appeal to include [a] [c]omplete transcript under Appellate Rule 9(B).” Also, on March 20, 2015, Bates filed in the trial court a “motion for preparation of complete transcript of proceedings at state’s expense.” This motion remains pending. However, as noted, the trial court ordered transcripts at the state’s expense on February 23, 2015.

{¶10} Bates filed his appellate brief on June 8, 2015, and the state filed its appellate brief on July 20, 2015. Bates did not file a reply brief. On September 28, 2015, Bates filed in this court a motion “to obtain transcript for indigent person to properly rebut false facts in appellee’s brief.” On October 6, 2015, this court denied Bates’s motion, noting that the time for Bates to file a reply brief had expired.

{¶11} “[A]n indigent prisoner is entitled to relevant portions of a transcript upon, inter alia, appeal or in seeking post-conviction relief. However, the right is subject to certain limits. * * * [One] limit is that only one copy of a transcript need be provided.” *State ex rel. Murr v. Thierry*, 34 Ohio St.3d 45, 45, 517 N.E.2d 226 (1987) (citations omitted). *See also State v. Edwards*, 6th Dist. Lucas No. L-98-1079, 1998 Ohio App. LEXIS 3722, 1 (Aug. 14, 1998) (“A criminal appellant is not entitled to a second copy of his or her transcript at the state’s expense”).

{¶12} Another limitation as to when a transcript must be provided at the state’s expense is that the indigent party must be in jeopardy of deprivation of a fundamental right. *Matyaszek v. Howell*, 8th Dist. Cuyahoga No. 51813, 1987 Ohio App. LEXIS 7038, 5 (Mar. 12, 1987).

Indeed, there are only three situations in which indigents must be provided trial transcripts at [the] state’s expense: where the indigent party suffers the possibility of criminal conviction and incarceration; where an indigent party suffers the possibility of criminal conviction and fine; and where the indigent party suffers the possibility of permanent, involuntary termination of parental rights.

Id.

{¶13} In the case at hand, when Bates filed this appeal, he had already been convicted and sentenced; therefore he was not entitled to a transcript at the state’s expense. Nonetheless, a transcript was available to him because it was ordered by his counsel on February 23, 2015. Pursuant to App.R. 9(B), it is the appellant’s duty to provide the court with a transcript of “the proceedings the appellant considers necessary for inclusion in the record * * *.”

{¶14} Bates failed to file a copy of the transcript in the instant case. The burden to provide a transcript and show error by referring to matters in the record falls upon the appellant.

When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm.

Knapp v. Edwards Laboratories, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶15} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
ANITA LASTER MAYS, J., CONCUR

