[Cite as *Mansfield v. Snell*, 2009-Ohio-5177.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF MANSFIELD	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-47
DOUGLAS D. SNELL	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Mansfield Municipal Court Case No. 08-TRC-9281

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 29, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Assistant Law Director
City of Mansfield
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For Defendant-Appellant:

DOUGLAS SNELL pro se
7340 Garber Road
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Delaney, J.

{¶1} Defendant-Appellant, Douglas Snell, appeals from the judgment of the City of Mansfield Municipal Court, finding him guilty of one count of OVI, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1). The City of Mansfield is Plaintiff-Appellee.

{¶2} On September 28, 2008, Appellant was issued a traffic citation for OVI and a marked lanes violation. At his arraignment on September 30, 2008, he entered a not guilty plea and requested to appeal his Administrative License Suspension ("ALS"). The hearing for the ALS was set for October 6, 2008, a pretrial was scheduled for October 20, 2008, and a bench trial was set for November 6, 2008.

{¶3} At the October 6, 2008, ALS hearing, Appellant's appeal was granted and his driving privileges were reinstated. Appellant filed a jury demand on October 10 and his case was set for a November 17, 2008, jury trial.

{¶4} On October 20, 2008, a pretrial was held. On November 7, 2008, Appellant filed for a continuance, and on November 14, 2008, the continuance was granted and the jury trial was moved to January 26, 2009.

{¶5} On January 26, 2009, Appellant made an oral motion to suppress any statements or evidence prior to when he was given his Miranda warnings. The state objected and the motion was denied. Additionally, the State made a written Motion in Limine to prevent Appellant from discussing the adverse effects that a conviction of OVI would have on his family and his livelihood.

{¶6} Appellant proceeded to trial, where he represented himself. At the end of the trial, the jury convicted him on all counts.

{¶7} Appellant filed a premature notice of appeal on March 9, 2008, and he was sentenced on March 13, 2008. The trial court sentenced Appellant to sixty days in jail and Appellant was ordered to pay a $400 fine plus court costs. Additionally, the court suspended Appellant's driver's license for one year.

{¶8} Appellant raises five Assignments of Error:

{¶9} "I. THE COURT ERRORED [SIC] GROUNDS FOR RELIEF FOR DENIAL OF DUE PROCESS OR DENIAL OF FAIR TRIAL, OR ABUSE OF DISCRETION OR PLAIN ERROR CONCERNING THE SUBMISSION AS EVIDENCE WHAT WAS NOT SPECIFIED OR REVEAL [SIC] AS EVIDENCE TO BE PRESENTED AT TRIAL IN THE PROSECUTION'S DISCOVERY FROM STATE RESPONSE TO DEFENDANT'S DISCOVERY MOTION OR DISCOVERY REQUEST AND/OR THE COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPRESS [SIC] OR EXCLUDE SUCH PORTIONS THEREOF.

{¶10} "II. THE COURT ERRORED, [SIC] GROUNDS FOR RELIEF FOR DENIAL OF FAIR TRIAL, FOR ABUSE OF DISCRETION FOR BIAS OR PREJUDICE OF THE JURY AND/OR JUDGE, CONCERNING UNTRUE, INACCURATE OR MISLEADING STATEMENTS AND/OR INSTRUCTIONS MADE BY THE JUDGE TO THE JURY CONTRADICTING THE DEFENDANT DURING OPENING STATEMENTS WHICH CAUSED BIAS OR PREJUDICE AGAINST THE DEFENDANT BY THE JURY RESULTING IN A DENIAL OF A FAIR TRIAL OR A VIOLATION OF THE DEFENDANT'S SUBSTANTIAL RIGHTS.

{¶11} "III. THE COURT ERRORED, [SIC] GROUNDS FOR RELIEF FOR BIAS OR PREJUDICE OR ABUSE OF DISCRETION OR CRUEL AND UNUSUAL

PUNISHMENT, BY THE JUDGE IN SENTENCING THE DEFENDANT, A FIRST TIME OVI OFFENDER WITH NO EXTENUATING CIRCUMSTANCES LIKE AN ACCIDENT OR ANY VICTUMS [SIC] OR SERIOUS TRAFFIC VIOLATIONS CONCERNING THE INCIDENT OR ANY HISTORY OF DUI-OVI OR ALCOHOL USE OR ABUSE, FOR 60 DAYS IN JAIL AND 12 MONTH LICENSE SUSPENSION PLUS OTHER SANCTIONS.

{¶12} "IV. THE COURT ERRORED, [SIC] GROUNDS FOR RELIEF FOR TIME STATUTE VIOLATIONS CONCERNING THE ALS HEARING BEYOND THE 5 DAY STATE REQUIREMENT TO HAVE THE HEARING AND DOUBLE JEOPARDY VIOLATIONS CONCERNING THE STATE'S ALS VIOLATIONS-SUSPENSION AND/OR THE COURT'S IMPOSITION OR DISPOSITION OF A LICENSE SUSPENSION AT THE ALS APPEAL HEARING, OBJECTION IS MADE, GROUNDS FOR RELIEF ON VIOLATION OF TIME STATUTE CONCERNING THE ALS APPEAL HEARING BEYOND THE 5 DAY STATE REQUIREMENT TO HAVE THE ALS APPEAL HEARING AND, GROUNDS FOR RELIEF ON DOUBLE JEOPARDY VIOLATIONS AND ABUSE OF DISCRETION AND PLAIN ERROR.

{¶13} "V. THE COURT ERRORED, [SIC] GROUNDS FOR RELIEF FOR BIAS OR PREJUDICE OR ABUSE OF DISCRETION OF THE COURT, 1 – ALLOWING OR CONSIDERING THE PROSECUTIONS [SIC] COMMENTS AT DISPOSITION WHERE THE PROSECUTION MADE BIAS [SIC], UNTRUE, INACCURATE OR PREJUDICIAL STATEMENTS AGAINST THE DEFENDANT, NAMELY THAT "THIS IS JUST ONE MORE OF A LONG LINE OF RUN INS WITH THE LAW THE DEFENDANT HAS HAD", AND 2 – ALLOWING, MAKING OR CONSIDERING INACCURATE, MISLEADING OR UNTRUE STATEMENTS MADE BY THE COURT CONCERNING THE ALS

STATEMENTS IN OPENING STATEMENTS OF THE ACCUSED. WHERE THERE IS NO EVIDENCE TO SUPPORT SUCH AN INFLAMATORY [SIC] STATEMENT BY THE PROSECUTIONS [SIC] NOR WOULD ANY SUCH EVIDENCE ADMISSIBLE REGARDING CONSIDERATION IN DISPOSITION IN THIS CASE, AND THE COURTS COMMENTS DURING OPENING STATEMENTS WERE UNTRUE, INACCURATE AND CAUSED BIAS AND PREJUDICE AGAINST THE ACCUSED."

I, II, IV, V

{¶14} We would begin by noting that Appellant has failed to comply with multiple parts of Appellate Rule 16. App. R. 16 provides, in pertinent part:

{¶15} "(A) Brief of the appellant

{¶16} "The appellant shall include in its brief, under the headings and in the order indicated, all of the following:

{¶17} "(1) A table of contents, with page references.

{¶18} "(2) A table of cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where cited.

{¶19} "(3) A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected.

{¶20} "(4) A statement of the issues presented for review, with references to the assignments of error to which each issue relates.

{¶21} "(5) A statement of the case briefly describing the nature of the case, the course of proceedings, and the disposition in the court below.

{¶22} "(6) A statement of facts relevant to the assignments of error presented for review, with appropriate references to the record in accordance with division (D) of this rule.

{¶23} "(7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.

{¶24} "(8) A conclusion briefly stating the precise relief sought.

{¶25} "* * *

{¶26} "(D) References in briefs to the record

{¶27} "References in the briefs to parts of the record shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected."

{¶28} Moreover, the Ohio Supreme Court has stated in *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 284, "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162, 372 N.E.2d 1355. This principle is recognized in App.R. 9(B), which provides, in part, that ' * * * the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record * * *.'

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."

{¶29} Appellant failed to meet several of these requirements when filing his brief. First, Appellant failed, under App.R. 16(A)(2), to provide a table of authorities in alphabetical order with reference to the pages in his brief where the authorities are cited.

{¶30} Second, Appellant failed to comply with App.R. 16(A)(3), in that he did not include any references to the record in his assignments of error.

{¶31} Third, Appellant failed to comply with App. R. 16(A)(6), in that he did not provide appropriate references to the record in accordance with App.R. 16(D) in his statement of facts.

{¶32} Fourth, Appellant failed to comply with App.R. 16(A)(7), in that he did not provide any reference to the record where his assignments of errors and reasons in support of his contentions could be found.

{¶33} Appellant failed to meet his burden by filing a transcript of the proceedings, and as such, there is a very limited record from which this court can discern what occurred in these proceedings. Even without a complete transcript, Appellant had other avenues by which he could have supplemented the record with a recollection of the trial. Namely, "App.R. 9(C) permits an appellant to submit a narrative transcript of the proceedings when a verbatim transcript is unavailable, subject to objections from the appellee and approval from the trial court. App.R. 9(D) authorizes

parties to submit an agreed statement of the case in lieu of the record. There is nothing in the record indicating that plaintiffs even attempted to avail themselves of these alternatives." *Knapp*, supra, at 200. Moreover, this court has previously held that [f]actual assertions appearing in a party's brief, but not in any papers submitted for consideration to the trial court below, do not constitute part of the official record on appeal, and an appellate court may not consider these assertions when deciding the merits of the case." *State v. Lewis*, 5th Dist. No. 2006-CA-00066, ¶7, citing *Akro-Plastics v. Drake Industries* (1996), 115 Ohio App.3d 221, 226, 685 N.E.2d 246, 249. Accordingly, as to those assignments of error dependent for their resolution upon a trial transcript, the judgment of the lower court is affirmed.

{¶34} Appellant's first assignment of error, which argues that the prosecutor failed to comply with discovery procedures, is not supported by any references to the record, and as such, we presume regularity. Appellant's first assignment of error is overruled.

{¶35} Moreover, Appellant's second, fourth, and fifth assignments of error refer to matters outside of the limited record before us. As such, Appellant's second, fourth, and fifth assignments of error are overruled.

{¶36} The only assignment of error which has any basis in the record for review is Appellant's third assignment of error, so we turn to an analysis of the trial court's sentencing of Appellant.

III.

{¶37} In his third assignment of error, Appellant essentially argues that the trial court erred in imposing a sixty day sentence on him for a first offense of OVI and that such a sentence amounts to cruel and unusual punishment.

{¶38} R.C. 4511.19 provides that a conviction for OVI is a misdemeanor of the first degree. As such, the maximum penalty for a misdemeanor of the first degree is a term of incarceration not to exceed six months.

{¶39} The trial court imposed a sentence of sixty days and a fine of $400.00, which is well within the proscribed sentencing range for a misdemeanor of the first degree.

{¶40} There is no record that Appellant objected to this sentence at the trial court level, and moreover, such a sentence is in compliance with Ohio's sentencing guidelines and with the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, 845 N.E.2d 470. After *Foster*, trial courts now have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. *Foster*, supra, at paragraph seven of the syllabus.

{¶41} Accordingly, Appellant's third assignment of error is overruled.

{¶42} Based on the foregoing, we find Appellant's assignments of error to be without merit. The judgment of the Mansfield Municipal Court is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

[Cite as *Mansfield v. Snell*, 2009-Ohio-5177.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CITY OF MANSFIELD	:	
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-vs-	:	JUDGMENT ENTRY
	:	
DOUGLAS D. SNELL	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-47
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Mansfield Municipal Court is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN