

[Cite as *Dayton v. Murph*, 2003-Ohio-3243.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

CITY OF DAYTON :

Plaintiff-Appellee : C.A. CASE NO. 19612

vs. : T.C. CASE NO. 01TRD14865

THOMAS MURPH : (Criminal Appeal from
Municipal Court)

Defendant-Appellant :

.

O P I N I O N

Rendered on the _____ day of June, 2003.

.

Patrick J. Bonfield, Director of Law; Deirdre Logan, Chief
Prosecutor; Addie J. King, Asst. City Prosecutor; Mary E.
Welsh, Asst. City Prosecutor, 335 W. Third Street, Rm. 372,
Dayton, Ohio 45402, Atty. Reg. No. 0067542
Attorney for Plaintiff-Appellee

James R. Kirkland, 111 West First Street, Suite 518,
Dayton, Ohio 45402, Atty. Reg. No. 0009731
Attorney for Defendant-Appellant

.

GRADY, J.

{¶1} Defendant, Thomas D. Murph, appeals from a
judgment of the Dayton Municipal Court, which convicted
Murph on an alleged speeding violation and imposed a fine
of thirty-five dollars and costs.

{¶2} The court's judgment adopted the decision of its

magistrate and overruled objections to the magistrate's decision Murph had filed. Those objections challenged the magistrate's rulings excluding evidence Murph offered at his hearing before the magistrate and argued that the magistrate's finding of guilt was against the manifest weight of the evidence.

{¶3} The magistrate's decision was filed on July 1, 2002. Murph filed timely objections to the magistrate's decision ten days later on July 11, 2002. His objections bears a request that a transcript of the proceedings before the magistrate be prepared and filed.

{¶4} The City of Dayton filed responses to Murph's objections on July 24, 2002. The City argued, *inter alia*, that Murph's evidentiary objections should be overruled because he failed to file a transcript of the proceedings before the magistrate from which the alleged error could be determined.

{¶5} On October 1, 2002, the court overruled Murph's objections and adopted its magistrate's decision. The court rejected those objections, primarily, because Murph had not filed a transcript of the magistrate's proceedings.

{¶6} Murph filed a timely notice of appeal from the municipal court's judgment on October 28, 2002. He

presents two assignments of error. We will address the second of those first to facilitate our determination of the issues the appeal presents.

SECOND ASSIGNMENT OF ERROR

{¶7} "THE TRIAL COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION WITHOUT CONSIDERING THE TRANSCRIPT OF THE JUNE 13, 2002 HEARING THAT APPELLANT HAD PROPERLY ORDERED."

{¶8} A transcript of the proceedings before the magistrate was filed in this court on November 4, 2002. It was not a part of the record when Murph's October 28, 2002 notice of appeal was filed, so it is not properly before us. More to the point of the issue presented, the transcript was not a part of the trial court's record when, on October 1, 2002, the court overruled Murph's objections and entered judgment on the magistrate's decision.

{¶9} Murph was charged with a violation of Dayton R.C.G.O. 71.50, which prohibits driving at a speed in excess of the posted speed limit. The magistrate found that, at the time and place charged, Murph had operated a motor vehicle at a speed of forty-seven miles per hour in a district where the posted speed limit is thirty-five miles per hour. The magistrate entered a guilty verdict on that finding. The trial court entered judgment on the

magistrate's decision by adopting it, over Murph's objections.

{¶10} Murph was charged in a "traffic case," as that is defined by Traf.R.2(A). The alleged offense is a minor misdemeanor. Per Traf.R. 14(B), the court may refer the trial of such cases to a magistrate for a determination of guilt or innocence. Paragraph (C) of Traf.R. 14 provides: "Proceedings before the magistrate shall be conducted as provided in Crim.R. 19(D) and (E)." Crim.R. 19(D)(2) states that "all proceedings before a magistrate shall be recorded in accordance with procedures established by the court."

{¶11} Paragraph (E)(2)(b) of Crim.R. 19 provides that "[o]bjections (to a magistrate's decision) shall be specific and state with particularity the grounds for the objections." However, and unlike Civ.R. 53(E)(3)(b), Crim.R. 19 imposes no express duty on a party who files an objection to a magistrate's finding of fact to support the objection with either a transcript of the evidence or an affidavit of that evidence if a transcript is not available. Nevertheless, as the proponent of the motion, it is the burden of a party who files objections to also file a transcript of the proceedings which portrays the grounds on which the motion relies.

{¶12} Transcripts take time to prepare. Therefore, it has become the practice in civil cases to file objections to a magistrate's decision in some form within fourteen days thereafter, requesting additional time within to obtain and file a transcript. Alternatively, a party may ask for more time to file objections, until after the transcript is prepared and filed. Authority to do either is conferred on the court by Civ.R. 6(B), upon the request of a party or the court's own motion. There is no comparable provision in the Criminal Rules. However, Crim.R. 57(B) permits the court to grant a form of extension that Civ.R. 6(B) would allow in the same circumstance.

{¶13} Murph appeared pro se. While he is charged by law with notice of the rules of practice and procedure promulgated by the Supreme Court, he was most likely unaware of how they are implemented. It was for that reason, perhaps, that Murph did not ask the court for additional time in which to file objections or to present his arguments concerning them, until after a transcript was filed. Instead, Murph appears to have relied on the request in the objections he timely filed on July 11, 2002, in which he asked the court to prepare a transcript of the proceedings before its magistrate. Clearly, the court had

not fulfilled that request when it overruled Murph's objections for lack of a transcript.

{¶14} When it overruled Murph's objections for lack of a transcript, the trial court reasoned that Murph was required by App.R. 9 to obtain and file a transcript of the proceedings before the magistrate. The Rules of Appellate Procedure govern the Ohio Courts of Appeals when they exercise the jurisdiction conferred on them by Article IV, Section 3(B)(2) of the Ohio Constitution to review the final orders and judgments of inferior courts, which are invested by law with a jurisdiction separate from the jurisdiction conferred on the courts of appeals.

{¶15} A magistrate appointed pursuant to any of the rules of procedure, including the traffic rules, is not independent of the court that makes the appointment. The magistrate is an arm of the court, exercising the very same jurisdiction conferred by law on the court, and governed in doing that by the particular rule of procedure applicable to magistrates in that instance. In consequence, the Rules of Appellate Procedure do not apply to a trial court's determination of its magistrate's decision or any timely objections to it.

{¶16} R.C. 1901.21(A) provides that in the municipal court the practice and procedure in criminal cases and the

mode of bringing and conducting prosecutions for offenses shall be as provided in the Criminal Rules. As we have noted, Crim.R. 19(D)(2) requires all proceedings before a magistrate to be recorded in accordance with procedures established by the court, and Traf.R. 14(C) adopts the criminal rules for cases of this kind. The effect of these provisions is to also require the court to cause a transcript of its recorded proceedings to be made available to a defendant in a traffic case who requests one, upon payment of the reasonable cost of preparation.

{¶17} Murph requested a copy of the transcript in the objections that he filed on July 11, 2002. None was prepared and filed when the trial court overruled those objections on October 1, 2002, for lack of a transcript. Murph argues that it was the duty of the Clerk of the Dayton Municipal Court to prepare and file the requested transcript. We are unaware of any such duty imposed on the clerk. The duty might be provided by local rule, but we are unaware of any such local rule.

{¶18} Attached to the brief filed by the City of Dayton is an affidavit of Kelly Weinert, who states that she is the person responsible for preparing transcripts of proceedings in cases of this kind, that Murph requested a transcript and was advised that as a pro se defendant he

must first pay a deposit, which Murph never paid, and that Weinert later prepared and filed the transcript at the request of an attorney whom Murph subsequently retained. Weinert also states that she was unaware of any other request by Murph and was not served with a copy of his objections.

{¶19} Weinert's affidavit was not evidence that was before the trial court. New evidence may not be added to the record during or for purposes of an appellate court's proceedings. Therefore, we cannot rely on the averments in Weinert's affidavit to decide the issues which this appeal presents. Even so, Weinert relates the substance of practices which the trial courts generally follow, and of which we are aware, concerning preparation of transcripts.

{¶20} There are sound reasons for requiring agreements concerning payment before a requested transcript is prepared and filed. A reporter may even impose a deposit requirement when the reporter has had no prior dealings with the person making the request which assure the reporter that payment will be made. We assume that Kelly Weinert performs the duties she describes as an employee of the Dayton Municipal Court or by agreement with it. Therefore, we must look to the court for compliance with the obligations imposed on it by Crim.R. 19(D)(2) and by

any reasonable extension of its provisions.

{¶21} Notice and opportunity to be heard are fundamental tenets of due process of law. *State v. Edwards* (1952), 157 Ohio St. 175. The right to due process is guaranteed by Article I, Section 16 of the Ohio Constitution. States are barred from denying the right to due process by the Fourteenth Amendment to the United States Constitution. "As a general rule, due process in each particular case means such an exertion of powers of government as the settled maximum of the law permit and sanction and under such safeguards for the protection of the individual's rights as those maximums prescribe for the class of cases to which the one in question belongs." 17 Ohio Jurisprudence 3d, Constitutional Law, Section 509, at p. 96.

{¶22} Except in criminal cases and in certain civil cases in which a party whose fundamental rights are affected cannot afford to pay for a transcript of trial proceedings, which is not involved in the matter before us, no duty is expressly imposed on the courts to order a transcript prepared when one is requested. However, as custodian of the record of its proceedings which Crim.R. 19(D)(2) requires the court to make, the court is necessarily charged with a duty to cooperate with a

defendant's proper request to prepare a transcript. That may be done by the court's own employee, or by a reporter whose services are secured by contract. Performance of those services may be conditioned on payment of a fee or prior deposit, or upon other reasonable condition attached to the request.

{¶23} None of the foregoing requirements deprive a criminal defendant of his due process rights. However, when a defendant who has requested a transcript of the court is subject to an adverse determination of his rights if no transcript is prepared, the defendant is entitled to some form of notice and an opportunity to be heard regarding the lack of a transcript before the court proceeds to judgment. A formal order to show cause is not required, at least so long as the record before the court demonstrates that some effective form of notice was given. Neither is a hearing required, so long as the notice offers the defendant an opportunity to satisfy whatever requirement might have prevented preparation of the transcript the defendant requested.

{¶24} The record before the trial court when it proceeded to judgment and overruled Murph's objections for lack of a transcript of the proceedings before the court's magistrate fails to demonstrate that Murph had notice that

11

the court might do that, after a stated time, if no transcript was filed. One might surmise that the difficulty here was Murph's failure to pay a fee for the transcript or a deposit for the service involved in preparing it, as Kelly Weinert's affidavit suggests. We cannot rely on those assertions, as we have said. More importantly, however, neither could the trial court proceed to judgment against Murph in reliance on the court's knowledge or understanding of the same matters absent some minimal form of notice to Murph that it would do that, giving him at the same time a reasonable opportunity to avoid that consequence.

{¶25} In addition to his specific evidentiary objections, Murph had objected that the magistrate's decision is against the manifest weight of the evidence. The Court of Appeals of Wayne County has held:

{¶26} "While the burden is on the objecting party to provide a transcript of the proceedings before the referee, the court's refusal to order the transcript upon the request of the objecting party constitutes an abuse of discretion where that party's objections are based on the manifest weight of the evidence." *Easch v. Easch* (1984), 14 Ohio App.3d 298, Syllabus by the Court.

{¶27} The holding in *Easch* stands for the proposition

we have discussed. The objecting party who has requested a transcript must be given notice when no transcript will be prepared for the court's consideration, and why a transcript will not be prepared. The party should also be told how to correct the impediment to preparation, and given a reasonable opportunity to do that. Otherwise, if the court then proceeds to judgment adverse to the party because it has no transcript before it, the party is denied his right of due process. This requirement is, of course, contingent on the party's having filed a proper and timely request for a transcript, as Murph did here. It has no application when no timely and proper request is made. Then, and after the time for objections, the court may proceed to judgment without a transcript before it.

{¶28} The judgment from which Murph took this appeal will be reversed and the matter remanded for further proceedings on his objections. Murph has the burden to file the transcript that he filed in our case in the municipal court as well. The transcript is not before that court unless it is timely filed, and the trial court may set reasonable time requirements for filing it.

{¶29} The second assignment of error is sustained.

FIRST ASSIGNMENT OF ERROR

{¶30} "THE TRIAL COURT ERRED ON ITS EVIDENTIARY RULINGS

THAT PREVENTED APPELLANT FROM TESTIFYING AS AN EXPERT WITNESS AND FROM PRESENTING SEVERAL EXHIBITS THAT WERE RELEVANT TO THIS CASE.”

{¶31} Our ruling in the second assignment of error renders this assignment moot. Therefore, per App.R. 12(A)(1)(c), we decline to rule on the first assignment of error.

Conclusion

{¶32} Having sustained the second assignment of error, we will reverse the judgment from which the appeal is taken and remand the case for further proceedings consistent with this opinion.

WOLFF, J. and YOUNG, J., concur.

Copies mailed to:

Mary E. Welsh, Esq.
James R. Kirkland, Esq.
Hon. Risa McCray