

[Cite as *State v. Lett*, 2010-Ohio-800.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

|                      |   |                    |
|----------------------|---|--------------------|
| STATE OF OHIO,       | ) |                    |
|                      | ) | CASE NO. 08 MA 82  |
| PLAINTIFF-APPELLEE,  | ) |                    |
|                      | ) |                    |
| - VS -               | ) | OPINION            |
|                      | ) | AND JUDGMENT ENTRY |
| MARK LETT,           | ) |                    |
|                      | ) |                    |
| DEFENDANT-APPELLANT. | ) |                    |

CHARACTER OF PROCEEDINGS: Criminal Appeal from Youngstown  
Municipal Court, Case No. 07TRD2759

JUDGMENT: Affirmed.

APPEARANCES:

|                         |   |
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| For Plaintiff-Appellee: | Joseph Macejko<br>City Prosecutor<br>John H. Marsh, Jr.<br>Assistant City Prosecutor<br>26 S. Phelps Street<br>Youngstown, OH 44503 |
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| For Defendant-Appellant: | Attorney David J. Betras<br>6630 Seville Drive<br>Canfield, OH 44406 |
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JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Joseph J. Vukovich

Dated: January 26, 2010

PER CURIAM.

{¶1} This instant appeal concerns Appellant's probation violation conviction. From the appeal's inception there have been deficiencies in the record. This perhaps stems from the fact that Appellant has numerous appeals pending before this court concerning traffic-related convictions in the Youngstown Municipal Court.

{¶2} The notice of appeal in this case was originally filed, pro-se, on April 23, 2008, concerning a sentencing entry issued by the Youngstown Municipal Court on that same day in Case No. 07-TRD-2759. Retained counsel entered a notice of appearance on May 1, 2008. On July 15, 2008, this court granted Appellant thirty days to file a transcript, as part of the record, otherwise the appeal would be dismissed for want of prosecution. On October 27, 2008, because Appellant had failed to file a transcript, this court sua sponte dismissed the appeal.

{¶3} On March 13, 2009, Appellant filed an Application for Reopening through new counsel, which this court sustained on March 18, 2009, thereby reinstating the appeal. In the same judgment entry this court ordered Appellant to file transcripts of the relevant hearings within thirty days, cautioning that no continuances would be permitted.

{¶4} On April 24, 2009 Appellant filed a transcript of an October 16, 2007 plea hearing. This court subsequently overruled Appellee's April 28, 2009 motion to dismiss the appeal for want of prosecution. Appellant filed a merit brief on May 18, 2009 which listed one assignment of error: ineffective assistance of counsel.

{¶5} On June 10, 2009, Appellee filed a Motion to Complete the Record, in which it contended there was inadequate information in the appellate record to respond to Appellant's assignment of error. Appellee correctly noted that there were no transcripts of the March 10, 2008 probable cause hearing or the April 23, 2008 final probation violation/sentencing hearing contained in the record before this court. Therefore Appellee requested that this court order Appellant to order the transcript of those hearings in accordance with App.R. 9(B). Appellee submitted that without those transcripts any claim of ineffective assistance of counsel would be purely speculative.

{¶6} On June 25, 2009, Appellant filed a transcript of a March 10, 2008 probable cause hearing. On July 9, 2009, Appellant filed a transcript of an April 23, 2008 sentencing hearing. Notably, neither transcript contained any reference to the trial court case number. This court issued a judgment entry on July 10, 2009 noting the filing of the March 10, 2008 transcript and continuing Appellee's Motion to Complete the Record to afford Appellee an opportunity to determine whether an adequate record had been filed or to advise this court whether a deficiency remained. This court thus granted Appellee twenty days to file a notice of the status of the record or its answer brief.

{¶7} On July 28, 2009 Appellee filed an answer brief in which it claimed that Appellant had failed to ensure the transcript of the April 23, 2008 sentencing hearing was included in the record. Appellant replied on August 12, 2009.

{¶8} On November 19, 2009, this court issued a judgment entry sua sponte holding the appeal in abeyance for thirty days and remanding the case to the trial court for clarification of the record. This court noted there were two main problems with the record: (1) the transcripts of the October 16, 2007 and April 23, 2008 hearings did not indicate any Youngstown Municipal Court case number, and (2) the sentence indicated in the Journal Entry of the trial court and on the trial court's docket dated April 23, 2008 (90 days) is not consistent with the sentence imposed by the trial court in the transcript of proceedings dated April 23, 2008 (60 days). Thus this court ordered Appellant to resolve those issues or face dismissal of the matter. This court further ordered Appellee to assist in correction of the record where possible since Appellee's answer brief referenced an incorrect case number, to wit, 08-TRD-1316.

{¶9} On December 17, 2009, Appellant filed a Clarification of the Record. This was accompanied by an affidavit from the Youngstown Municipal Court Reporter. She stated that the October 16, 2007 transcript filed with this court in the present appeal concerned a hearing in Case No. 07-TRD-4978, and the April 23, 2008 transcript filed with this court in the present appeal concerned a hearing in Case No. 07-TRD-8037. The Court Reporter stated that she had amended the transcripts to show the correct trial court

case numbers, and corrected a typographical error concerning the sentence imposed during the April 23, 2008 hearing. The amended transcripts were also filed with this court.

{¶10} As indicated, the instant appeal involves Case No. 07-TRD-2759. As clarified by the Court Reporter, the transcripts of the October 16, 2007 and April 23, 2008 hearings belong to entirely different Youngstown Municipal Court cases, i.e., Case Nos. 07-TRD-4978 and 07-TRD-8037, respectively. As such, the appellate record remains incomplete.

{¶11} Under App.R. 9(B), it is the duty of the appellant to ensure that the record is complete. See *Rose Chevrolet Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19, 520 N.E.2d 564. Where a transcript of any proceeding is necessary for the disposition of any question on appeal, the appellant bears the burden of taking the steps required to have the transcripts prepared for inclusion in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. Absent a transcript, appellate courts must presume the regularity of the proceedings below. *Id.* "Where an authenticated transcript of proceedings in the trial court is necessary to exemplify the facts which determined the issues presented there, its absence requires a reviewing court to dismiss the appeal, or to affirm the judgment of the court from which the appeal is taken." *State v. Render* (1975), 43 Ohio St.2d 17, 330 N.E.2d 690.

{¶12} Here Appellant's sole assignment of error contends that counsel was ineffective in his handling of the probation violation proceedings:

{¶13} "The defendant-appellant was denied the effective assistance of counsel, contrary to his rights guaranteed by the United States Constitution and Section 10, Article I, of the Ohio Constitution."

{¶14} Appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674, see, also, *State v. Hamblin* (1988), 37 Ohio

St.3d 153, 155-156, 524 N.E.2d 476, certiorari denied (1988), 488 U.S. 975, 109 S.Ct. 515, 102 L.Ed.2d 550 ("In Ohio, a properly licensed attorney is presumed competent.")

{¶15} Absent review of the relevant transcripts in this case, it is not possible to discern how Appellant's counsel was ineffective. Therefore, this court must presume counsel's effectiveness and the regularity of the trial court proceedings below. This court has gone to great lengths to afford Appellant an opportunity to present an adequate record for this court to review. Despite every effort to reach a merit determination we cannot do so because of an incomplete record.

{¶16} Accordingly, Appellant's sole assignment of error is meritless and the judgment of the trial court is affirmed. Costs taxed against Appellant.

DeGenaro, J., concurs.

Donofrio, J., concurs.

Vukovich, J. concurs.