

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Erie County Sheriff/State of Ohio

Court of Appeals No. E-10-073

Appellee

Trial Court No. 1003024

v.

Andrew R. Dalton

DECISION AND JUDGMENT

Appellant

Decided: September 30, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Pamela A. Gross, Assistant Prosecuting Attorneys, for appellee.

Brent L. English, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Erie County Municipal Court in which appellant, Andrew Dalton, was convicted of failing to maintain reasonable control of his vehicle, a minor misdemeanor, in violation of R.C. 4511.202(A).

{¶ 2} Testimony elicited at a bench trial indicates that on June 14, 2010, Dalton was involved in an automobile accident. Dalton lost consciousness and the vehicle he was operating crashed into a store located on Burnham Orchards' property on State Route 113 in Berlin Township.

{¶ 3} At trial, Dalton testified that on the morning of the accident he awoke feeling "light headed and dizzy." After a phone conversation with his employer, Dalton determined that he still needed to report to work at a horse barn located near Burnham Orchards, despite not feeling well. Dalton testified that he felt fine up until the point that his vision blurred while he was driving on State Route 113. Dalton then testified that he lost consciousness before the accident and that he only remembers hitting the gravel on the side of the road, and attempting to pull his truck back over on the road. Dalton went on to state that he lost consciousness "somewhere before when [he] went in the ditch." The trial court determined that Dalton was not under the influence of drugs or alcohol at the time of the accident.

{¶ 4} Following the trial, Dalton was convicted of failure to maintain reasonable control of his vehicle and sentenced to pay a \$50 fine, and court costs of \$289.20. The trial court also imposed two years of probation on Dalton with the condition that Dalton "abide by the laws of the State of Ohio and its political subdivisions and have no convictions for 2 years from this date."

{¶ 5} Dalton now appeals, asserting the following assignment of error:

{¶ 6} "The Trial Court's Judgment convicting the Defendant-Appellant Andrew Dalton of failing to maintain reasonable control over a motor vehicle was against the manifest weight of the evidence because the uncontroverted evidence showed that [Dalton] lost control solely due to a medical emergency over which he had no control and thus involuntarily lost consciousness."

{¶ 7} Appellant asserts that he had an affirmative defense for his failure to maintain reasonable control over his vehicle. Namely, that he lost consciousness and fainted while driving. See *State v. McCaw* (Aug. 1, 1997), 2d Dist. No. 16202. At trial, appellant was required to prove his affirmative defense by a preponderance of the evidence. *Id.*, citing R.C. 2901.05(A). Thereafter, the state retained the burden of persuasion, beyond a reasonable doubt upon every issue necessary to convict. *Id.*, citing *State v. Humphries* (1977), 51 Ohio St.2d 95, paragraph three of the syllabus. From the record provided on appeal, we are unable to determine whether the trial court, in finding Dalton guilty, rejected Dalton's theory of an affirmative defense which would have been error; or whether the trial court found that Dalton failed to meet his burden of proof in proving his affirmative defense. The relevant portion of the trial transcript dealing squarely with this issue states:

{¶ 8} "DEFENDANT'S ATTORNEY: Your honor, (Lengthy inaudible) and in order for my client to be found guilty The State has to prove that he had the means to avoid lacking control in the circumstance.

{¶ 9} "And as you hear the evidence, my client, although he didn't feel good in the morning was asked to come into work. And he was driving, certainly had no indication that he couldn't drive effectively. As he's coming into work he gets double vision, he loses consciousness and he has an accident.

{¶ 10} "That's exactly what the law says is an affirmative defense.

{¶ 11} "* * *

{¶ 12} "THE COURT: * * *

{¶ 13} "The only thing I'm trying to determine here is number one, is it a defense.

{¶ 14} "And number two, if it is a defense has the burden been met. That's all I'm determining here.

{¶ 15} "DEFENDANT'S ATTORNEY: Well, certainly it is a defense and I would respectfully submit under these facts that certainly the burden has been met. Certainly by a preponderance of the evidence.

{¶ 16} "More probably than not he did not make a voluntarily action here by taking his vehicle off the road and into a ditch. You know, it's 8:41 in the morning, he's on his way to work, he gets sick, he loses consciousness. That is a defense to this charge.

{¶ 17} "THE COURT: Okay. I'll give the state the last (inaudible) before I rule on it.

{¶ 18} "THE PROSECUTOR: "Your Honor, I just - - (lengthy inaudible).

{¶ 19} "THE COURT: All right. Let the record reflect that this matter (lengthy inaudible)."

{¶ 20} Because the relevant portion of the transcript of proceedings only contains a "lengthy inaudible," we are left with no finding from the trial court regarding Dalton's affirmative defense.

{¶ 21} It is well established that "[t]he 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." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. This principle is recognized in App.R. 9(B)(1) which provides, "It is the obligation of the appellant to ensure that the proceedings the appellant considers necessary for inclusion in the record, however those proceedings were recorded, are transcribed in a form that meets the specifications of App. R. 9(B)(6)." Further, App.R. 9(B)(4) provides, in relevant part, "If the appellant intends to present an assignment of error on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of proceedings that includes all evidence relevant to the findings or conclusion."

{¶ 22} Appellant argues that the trial court's finding of guilt is against the manifest weight of the evidence. The portion of the transcript which contains the trial court's ruling on Dalton's affirmative defense is necessarily required for our review. Without a complete transcript of the proceedings, we are unable to determine whether the trial court erred by rejecting Dalton's theory of an affirmative defense or whether the trial court ruled that Dalton failed to meet his burden of proof of an affirmative defense. Therefore,

we must presume the regularity of the trial court proceedings and hold that the trial court did not err in convicting appellant. *Baker v. Tarsha*, 6th Dist. No. L-04-1040, 2004-Ohio-6315, ¶ 6.

{¶ 23} Accordingly, appellant's assignment of error is found not well-taken.

{¶ 24} Judgment of the Erie County Municipal Court is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.