2011 WL 766560

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Sixth District, Lucas County.

STATE of Ohio, Appellee
v.
Donna VASCIK, Appellant.

No. L–10–1130. | Decided March 4, 2011.

West KeySummary

1 **Automobiles**
Extent of Discipline in General; Hardship and Mitigating Circumstances

Trial court did not improperly sentence defendant convicted of driving while intoxicated when it suspended her operator's license for 365 days and ordered to display restricted yellow license plates and have an ignition interlock device installed on her vehicle as a condition of obtaining limited driving privileges during the term of her suspension. Defendant argued that she was a school teacher with no previous alcohol-related offenses, or any other traffic violations, and no criminal record. She argued that it was unfair to add penalties to her sentence for not submitting to a blood alcohol test. But defendant's sentence was within statutorily prescribed limits, and the record did not include a transcript of defendant's sentencing hearing. R.C. §§ 4511.19(A)(1)(a), 4510.02(A)(5), 4510.021(A), 4510.021(C).

Cases that cite this headnote

Attorneys and Law Firms

Melissa Purpura, for appellee.

George R. Royer, for appellant.

Opinion

OSOWIK, P.J.

***1** {¶ 1} This is an appeal from a judgment of the Maumee Municipal Court, following a no contest plea, in which the trial court found appellant, Donna Vascik, guilty of one count of operating a motor vehicle while under the influence of alcohol and/or drugs in violation of R.C. 4511.19(A)(1)(a). On appeal, appellant sets forth the following three assignments of error:

{¶ 2} "Assignment of Error Number 1

{¶ 3} "Defendant's suppression motion should have been granted.

{¶ 4} "Assignment of Error Number 2

{¶ 5} "The trial court should have permitted defendant to introduce character evidence at trial.

{¶ 6} "Assignment of Error Number 3

{¶ 7} "The court erred in sentencing appellant as said sentence imposed was excessive under the circumstances."

{¶ 8} The relevant, undisputed facts are as follows. On April 16, 2009, at 12:53 a.m., Officer Amanda Crosby pulled over a silver Jeep driven by appellant, after observing the vehicle repeatedly driving on and across the white fog line on a street in Whitehouse, Ohio. Upon speaking to appellant, Crosby observed that appellant's eyes were bloodshot, and that she had the odor of alcohol about her person. Crosby asked appellant if she had consumed any alcohol, to which appellant responded that she had "at least one shot," which she later described as a "mixed drink."

{¶ 9} Crosby asked appellant to exit the vehicle, after which she had appellant perform field sobriety tests, including the Horizontal Gaze Nystagmus test, standing on one leg, and walking a straight line by placing one foot directly in front of the other. Appellant failed all three tests. She was then placed under arrest for operating a motor vehicle while under the influence of alcohol and/or drugs pursuant to R.C. 4511.19(A)(1)(a), and a marked lanes violation pursuant to Whitehouse Ordinance 331.08(A). Appellant was advised of her Miranda rights and taken to Post 48 of the Ohio State Highway Patrol. At the station, appellant refused to perform

a breathalyzer test, which was initially offered within two hours of the time Crosby stopped appellant's vehicle. After unsuccessfully attempting to contact her husband and her attorney, appellant again refused to perform the breathalyzer test.

{¶ 10} Appellant was arraigned in Maumee Municipal Court on April 17, 2009, where she entered a not guilty plea. On May 26, 2009, appellant filed a motion in limine and a motion to suppress the evidence obtained during her arrest, including the results of the field sobriety tests and any statements she made to the officers at the time of her apprehension. Appellant also filed a motion for driving privileges, in which appellant stated that she is a teacher, and asked the trial court to grant her "reasonable work related driving privileges and other allowed driving privileges during the pendency of the this case." Appellant filed an amended motion to suppress and motion in limine on July 13, 2009. Appellee, the state of Ohio, filed a response on November 16, 2009.

***2** {¶ 11} The trial court held a pretrial hearing on November 17, 2009, at which testimony was presented by both parties. That same day, the trial court denied appellant's motion to suppress and motion in limine.

{¶ 12} On April 5, 2010, appellee filed a motion in limine, in which it asked the trial court to prohibit three witness from testifying at trial as to appellant's good character. Appellee also asked the trial court to conduct a hearing pursuant to *Daubert v. Merrill Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469. In support of its motion, appellee argued that a *Daubert* hearing was necessary to determine whether expert testimony was admissible at trial to show that appellant had a prior leg injury which caused her to appear impaired at the time of her arrest. On April 9, 2010, a hearing was held, during which appellant withdrew the name of one of her expert medical witnesses from the prospective witness list. The trial court determined that appellant had not established the relevance of her additional proposed expert medical witnesses.

{¶ 13} A jury trial commenced on April 14, 2010. Before the jury was impaneled, a hearing was held, on the record, in the judge's chambers, after which appellee's motion in limine as to appellant's proposed character witnesses was granted. Thereafter, the jury trial commenced; however, before the case was given to the jury, appellant changed her plea to that of no contest to the charge of driving while intoxicated. The trial court subsequently found her guilty and, that same day, sentenced her to serve 180 days at the Corrections Commission of Northwest Ohio, and to pay a $400 fine and court costs. The trial court also suspended appellant's operator's license for 365 days, but granted her limited driving privileges, on condition that she display restricted license plates and have an ignition interlock device installed on her vehicle.

{¶ 14} Because appellant had no prior alcohol-related offenses, the trial court suspended one-half of her license suspension, and 174 days of her sentence, on condition that she not have any more alcohol-related offenses for a period of three years. Finally, appellant was ordered to serve three days in a state-certified intervention program within six weeks of April 14, 2010, to participate in the victim impact panel program in May 2010, and to serve three days in an electronic home monitoring program within two weeks of April 14, 2010.

{¶ 15} Appellant filed a timely notice of appeal from the trial court's judgment on April 30, 2010. On May 11, 2010, appellant filed a motion for stay of execution of sentence pending appeal in the trial court, which was granted that same day.

{¶ 16} In her first assignment of error, appellant asserts that the trial court erred by denying her motion to suppress evidence related to the traffic stop, field sobriety test, and her resulting arrest. In support, appellant argues that there was no probable cause for either the stop or her arrest; there was insufficient evidence presented that she was intoxicated; and Officer Crosby's actions resulted in violations of her constitutional rights. In her second assignment of error, appellant asserts that the trial court should have denied appellee's motion in limine and allowed her to present character witnesses at trial. In support appellant argues that, pursuant to Evid.R. 404(A), the presentation of evidence as to an accused's good character may be offered at trial so long as such evidence is relevant.

***3** {¶ 17} A review of the record in this case reveals that, in the praecipe filed along with the notice of appeal, appellant asked for transcripts of the hearings on her motion to suppress and appellee's motion in limine, as well as the *Daubert* hearing and any other hearings "on ALL Pre-trial Motions." However, appellant has failed to timely file any of the above-requested transcripts, in spite of repeated extensions of time from this court.

{¶ 18} 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." [1] *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384, citing *State v. Skaggs* (1978), 53 Ohio St.2d 162, 372 N.E.2d 1355. This principle is also recognized in App.R. 9(B), which states, in relevant part, that "the appellant, in writing, shall 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 * * *." In cases where portions of the transcript that are necessary for the 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*, supra.

{¶ 19} In this case, since appellant has not provided this court with a transcript of the trial court's proceedings, we must presume the trial court's rulings with respect to the issues raised in appellant's first two assignments of error were correct. *Knapp*, supra; *State v. Boylen*, 5th Dist. Nos.2006 CA 00125, 2006 CA 00126, 2006–Ohio–5685, ¶ 13. See, also, *Citifinancial, Inc. v. Budzik*, 9th Dist. No. 02CA008155, 2003–Ohio–4149 (Transcript necessary for meaningful review of the trial court's rulings on evidentiary matters.); and *State v. Pirpich*, 12th Dist. No. CA2006–07–083, 2007–Ohio–6745. (Without a transcript of the suppression hearing, an appellate court must presume the trial court correctly denied a motion to suppress.) Accordingly, we cannot find that the trial court erred in denying appellant's motion to suppress, or by granting appellee's motion in limine. Appellant's first two assignments of error are not well-taken.

{¶ 20} In her third assignment of error, appellant asserts that the trial court improperly sentenced appellant when it gave her an "extended" license suspension and ordered her to display yellow license plates and have an interlock device installed on her vehicle as a condition of granting her occupational driving privileges during the term of the suspension. In support, appellant argues that she is a school teacher who has had no previous alcohol-related offenses, or any other traffic violations, and has no criminal record. Accordingly, "it is unfair to add penalties for [sic] her sentence for not submitting to a blood alcohol test."

***4** {¶ 21} It is well-settled that "[t]he imposition of a sentence is within the sound discretion of the trial court. No abuse of discretion can be found in a sentence for violation of an ordinance where the sentence is within prescribed limits, and there is nothing in the record to indicate that the trial court failed to give proper consideration to relevant facts." *State v. Mays* (1995), 104 Ohio App.3d 241, 249, 661 N.E.2d 791, citing *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, 213 N.E.2d 179, paragraph one of the syllabus.

{¶ 22} As set forth above, the record shows that appellant was convicted pursuant to R.C. 4511.19(A)(1)(a), a first degree misdemeanor. Pursuant to R.C. 4511.19(G)(1)(a)(iv), the trial court was required to impose a class five license suspension. Pursuant to R.C. 4510.02(A)(5), for a class five license suspension, the trial court may elect to suspend a defendant's license for a period of six months to three years. In this case, appellant's license was suspended for 365 days. Pursuant to R.C. 4511.19(G)(1)(a)(iii), for a first degree misdemeanor, the trial court was permitted to fine appellant in an amount between $375 and $1,075. Appellant was ordered to pay a $400 fine. Finally, appellant was ordered to display restricted yellow license plates and have an ignition interlock device installed on her vehicle as a condition of obtaining limited driving privileges during the term of her suspension. Pursuant to R.C. 4510.021(A) and (C), the trial court has discretion to order such devices and license plates "as a condition of granting limited driving privileges."

{¶ 23} On consideration of the foregoing, we find that appellant's sentence was, in all respects, within statutorily prescribed limits. In addition, we note that the record does not include a transcript of appellant's sentencing hearing. Accordingly, in the absence of a record to demonstrate any alleged failure to consider relevant factors, we cannot find that the sentence imposed by the trial court was an abuse of discretion. Appellant's third assignment of error is, therefore, not well-taken.

{¶ 24} The judgment of the Maumee Municipal Court if affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

PETER M. HANDWORK and ARLENE SINGER, JJ., and THOMAS J. OSOWIK, P .J., concur.

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Parallel Citations

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Footnotes

1 In addition to appellant's failure to file a transcript, the record shows that appellant's original appellate brief did not contain references to the record, as required by App.R. 16(A). Accordingly, on December 23, 2010, this court ordered appellant to file an amended brief on or before January 11, 2011. Instead of filing an amended brief, appellant asked for another extension of time. On February 7, 2011, we issued a decision and judgment entry denying appellant's request for further extensions of time and stating that "[t]his appeal shall be deemed submitted to the court on the existing briefs * * *."

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