

[Cite as *McDermott v. State*, 2004-Ohio-5560.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CRAIG MCDERMOTT	:	JUDGES:
	:	Hon: W. Scott Gwin, P.J.
Appellant	:	Hon: Julie A. Edwards, J.
	:	Hon: John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2004-CA-00178
STATE OF OHIO	:	
	:	
Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Case No. 2004CVO0384

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 18, 2004

APPEARANCES:

For-Appellant

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Gwin, P.J.

For-Appellee

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{¶1} Plaintiff-appellant Craig McDermott appeals the trial court's judgment denying his petition to be declared a wrongfully imprisoned person pursuant to R.C. 2743.48. Finding no error, we affirm.

{¶2} On January 31, 2002, a jury found appellant guilty of possession of cocaine, in violation of R.C. 2925.11(A), a felony of the fifth degree, and illegal use or possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1), a misdemeanor of the fourth degree.

{¶3} Appellant was ordered to serve 12 months incarceration on the felony charge, and 180 days in the Stark County Jail on the misdemeanor charge. The sentences were ordered to be served concurrently. In addition, appellant's driver's license was suspended for 5 years. We do recognize the trial court's sentence on the misdemeanor charge exceeded the maximum penalty allowed by law for violation of that statute. This error was corrected upon appellant's return to court on January 6, 2003.

{¶4} Appellant appealed his conviction. This court held that the jury verdicts were against the manifest weight of the evidence and reversed the judgment of conviction. See, *State v. McDermott* (Dec. 16, 2002), 5th Dist. No. 2002CA00110. Appellant's case was remanded to the trial court for a new trial. *Id.*

{¶5} On January 6, 2003, the appellant entered a plea to the misdemeanor charge. The felony offense was dismissed upon motion of the State. Appellant was sentenced to thirty days, and given credit for time served. Appellant had served approximately 344 days of incarceration before his felony conviction was overturned and the plea was entered.

{¶6} On February 3, 2004, appellant filed a petition in the court of common pleas seeking a judicial determination that he had been a wrongfully imprisoned person. The trial court conducted a hearing on appellant's claim on April 23, 2004. After review of the evidence, the trial court determined that appellant had not been a wrongfully imprisoned person as defined in R.C. 2743.48(A), and denied his petition to be so declared.

{¶7} It is from the May 12, 2004 Judgment Entry appellant prosecutes this appeal, assigning as error:

{¶8} "I. DID THE TRIAL COURT ERR IN RULING ON THIS CASE OF WRONGFUL IMPRISONMENT WITHOUT COMPLYING WITH THE STATUTORY CRITERIA OR MAKE THE REQUISITE FINDINGS?

{¶9} "II. WAS THE APPELLANT'S DISMISSAL OF WRONGFUL IMPRISONMENT CLAIM AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE?

{¶10} "III. WAS THE APPELLANT PREJUDICIALLY DEPRIVED OF HIS UNITED STATES AND OHIO CONSTITUTIONAL RIGHTS TO A FAIR HEARING DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL?"

I. & II.

{¶11} In his first two assignments of error, Mr. McDermott claims (1) that the trial court's decision was erroneous as a matter of law, and (2) that the court decision was against the manifest weight of the evidence. We address both assignments of error together.

{¶12} The Supreme Court of Ohio has summarized the process involved in bringing a statutory cause of action for wrongful imprisonment as follows:

{¶13} “The Ohio Revised Code provides a two-step process whereby a person claiming wrongful imprisonment may sue the State of Ohio for damages incurred due to the alleged wrongful imprisonment. * * * The first action, in the common pleas court under R.C. 2305.02, seeks a preliminary factual determination of wrongful imprisonment; the second action, in the Court of Claims under R.C. 2743.48, provides for damages. Prior to filing suit in the Court of Claims for damages, a petitioner must establish the following: (1) the petitioner was convicted of a felony; (2) the petitioner was sentenced for that conviction; (3) the conviction was vacated, dismissed, or reversed; (4) no further prosecution was attempted or allowed for that conviction or any act associated with that conviction; and (5) the offense of which the petitioner was found guilty was not committed by the petitioner or was not committed at all. * * * The petitioner carries the burden of proof in affirmatively establishing his or her innocence under R.C. 2743.48(A) (5). If the common pleas court makes such a finding, then the petitioner may file a civil suit for money damages against the state. * * * The claim must be commenced in the Court of Claims within two years of the common pleas court's determination that the petitioner had been wrongfully incarcerated.” (Citations omitted.) *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 72, 701 N.E.2d 1002.

{¶14} A de novo determination of innocence is prerequisite to a declaration of status as a wrongfully imprisoned individual. *Chandler v. State* (1994), 95 Ohio App.3d 142, 149, 641 N.E.2d 1382. See, also, *Walden v. State* (1989), 47 Ohio St.3d 47, 52, 547 N.E.2d 962. “[A] verdict or judgment of acquittal in a criminal trial is a determination

that the state has not met its burden of proof on the essential elements of the crime. It is not necessarily a finding that the accused is innocent." *Walden*, supra, at 52, 547 N.E.2d 962. Consequently, a judgment of acquittal subsequent to conviction is not determinative of innocence on a petition under R.C. 2743.48(A). See *Id.* at paragraph two of the syllabus. The petitioner carries the burden of proof in affirmatively establishing his innocence under R.C. 2743.48(A) (5). *Walden*, supra, at paragraph three of the syllabus.

{¶15} Because a judgment of acquittal is not to be given controlling effect in a proceeding under R.C. 2305.02 and 2743.48(A), "the very same transcript of a criminal proceeding which results in a conviction and which is subsequently overturned on the weight or sufficiency of the evidence may nonetheless be insufficient to support a claimant's innocence by a preponderance of the evidence." *Chandler v. State* (1994), 95 Ohio App.3d 142, 149, 641 N.E.2d 1382, 1386. A petitioner seeking compensation for wrongful imprisonment must prove that, at the time of the incident for which he was charged, he was not engaging in any criminal conduct arising out of the incident. *Gover v. State* (1993), 67 Ohio St.3d 93, 616 N.E.2d 207, syllabus.

{¶16} When reviewing a trial court's ruling on a claimant's failure to demonstrate by a preponderance of the evidence that he qualifies as a wrongfully imprisoned individual, our function is to review the record to determine if the trial court's judgment is supported by competent, credible evidence going to all the essential elements of the case. *Ratcliff v. State* (1994), 94 Ohio App.3d 179, 182, 640 N.E.2d 560, 562. As to facts, we are to defer to the trial court that was in the best position to view the witnesses, observe their demeanor, gestures, and voice inflections, and use these

observations in weighing credibility. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶17} In the case at bar, appellant has failed to provide this court with the transcript of his plea hearing and the transcript of R.C. 2305.02 hearing conducted by the trial court.

{¶18} Appellant has the responsibility of providing the reviewing court with a record of the facts, testimony, and evidentiary matters which are necessary to support the appellant's assignments of error. *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 409, 629 N.E.2d 500, 506; *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 314, 549 N.E.2d 1237, 1238-1239. 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 the assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384, 385. If a partial record does not conclusively support the trial court's decision, it is presumed that the omitted portion provides the necessary support. *Wozniak*, 90 Ohio App.3d at 409, 629 N.E.2d at 506; *In re Adoption of Foster* (1985), 22 Ohio App.3d 129, 131, 489 N.E.2d 1070, 1072-1073.

{¶19} The Eighth Appellate District has considered and rejected an indigent's request for a free transcript in a civil proceeding in *Matyaszek v. Howell* (Mar. 12, 1987), Cuyahoga App. No. 51813. In that case, the court stated:

{¶20} “* * * [D]ue process does not require that indigent civil litigants be provided free trial transcripts for purposes of appeal. Indeed, there are only three situations in which indigents must be provided trial transcripts at state's expense: where the indigent party suffers the possibility of criminal conviction and incarceration. *Griffin v. Illinois* (1956), 351 U.S. 12; where an indigent party suffers the possibility of criminal conviction and fine. *Mayer v. Chicago* (1971), 404 U.S. 189; and where the indigent party suffers the possibility of permanent, involuntary termination of parental rights. *State, ex rel Heller v. Miller* (1980), 61 Ohio St.2d 6. All of these situations involve a fact pattern in which the state, as a party to the litigation, was attempting to deprive an indigent of a fundamental right. Appellant's case is obviously distinguishable. The state is not a party to this lawsuit, and has not attempted to deny the appellant a fundamental right. Therefore, we hold that due process does not require that an indigent civil litigant be provided with a trial transcript at state's expense for purposes of appeal.”

{¶21} In *Murphy v. Dept. of Rehabilitation and Correction* (Nov. 11, 1993), 10th Dist. No. 93AP-521, the court noted: “[a]lthough the state is a party to the lawsuit in the case at bar, there has been no attempt to deny plaintiff a fundamental right; therefore, plaintiff has no due process right to a free transcript.

{¶22} “Furthermore, as this court has stated: ‘While in criminal appeals a single copy of the transcript must be prepared at government expense and filed with the court for those who are demonstrated to be indigent, no similar responsibility must be borne

by the government in the appeal of civil cases. Assuming that appellant is in fact indigent, so that no transcript is available as a practical matter, he would have to proceed under App. R. 9(C).” *Duff v. Ohio Dept. of Rehab. and Corr.* (June 30, 1992), Franklin App. No. 92AP-146, unreported (1992 Opinions 2756, 2758).” Id. at *2.

{¶23} App.R. 9 governs the record on appeal, and pursuant to subsection (B), where there is no record, a statement of the evidence may be prepared in accordance with either subsection (C) or (D). App.R. 9(C) reads:

{¶24} "Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statements within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal."

{¶25} It is well-settled that a transcript is unavailable for the purposes of App.R. 9(C) to an indigent appellant who is unable to bear the cost of providing a transcript. *State ex rel. Motley v. Capers* (1986), 23 Ohio St.3d 56, 58. See, also *Murphy, supra*.

{¶26} Appellant has made no attempt to utilize App.R. 9(C) to supplement the record in this case.

{¶27} In the case at bar, the record establishes that upon remand by this court, the appellant entered a plea of guilty to the crime of illegal use or possession of drug paraphernalia, R.C. 2925.14(C)(1), in Case No. 001CR1547(B). Accordingly, appellant failed to carry his burden of proof that he was a wrongfully imprisoned individual. Therefore, the trial court's decision is supported by competent, credible evidence and will not be set aside.

{¶28} Because appellant has failed to provide this Court with those portions of the transcript necessary for resolution of his arguments, (i.e. transcript of the plea conducted on January 6, 2003, and transcript of the R.C. 2305.02 hearing conducted on April 23, 2004) we must presume the regularity of the proceedings below and affirm pursuant to the directive set forth in *Knapp*.

{¶29} Appellant's assignment of error one and assignment of error two are overruled.

III.

{¶30} In his third assignment of error, appellant argues he was denied effective assistance of trial counsel.

{¶31} We will not address the arguments contained in appellant's third assignment of error as appellant failed to request a transcript pursuant to App.R. 9(B) or submit a statement of evidence pursuant to App.R. 9(C). 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. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶32} Appellant's third assignment of error is overruled.

{¶33} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas, of Stark County, Ohio, is affirmed.

JUDGES

WSG:clw 0921

EDWARDS, J., CONCURRING OPINION

{¶34} I concur with the disposition of this case by the majority but do so at this time solely on the basis that appellant failed to produce a transcript of the proceeding.

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CRAIG MCDERMOTT

:
:

Appellant :
: :
-vs- : JUDGMENT ENTRY
: :
STATE OF OHIO : :
: :
Appellee : CASE NO. 2004-CA-00178

{¶34} For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas, of Stark County, Ohio, is affirmed. Costs to appellee.

JUDGES