

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

CITY OF MENTOR,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-L-112
MATHEW S. MOLK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Mentor Municipal Court, Case No. 10 TRC 01443.

Judgment: Affirmed.

Lisa M. Klammer, Mentor City Prosecutor, 8500 Civic Center Boulevard, Mentor, OH 44060 (For Plaintiff-Appellee).

Mathew S. Molk, pro se, 7386 Parker Drive, Mentor, OH 44060 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Matthew S. Molk, appeals from the judgment of the Mentor Municipal Court, finding him guilty of Operation While Under the Influence, R.C. 4511.19(A)(1)(a) (“OVI”), and imposing sentence. Mr. Molk raises three assignments of error related to the trial court’s sentencing procedure and the quality of his legal representation. Given Mr. Molk’s failure to comply with this court’s briefing standards, to provide us with an adequate trial court record and to support his claims in a meaningful manner, his assignments of error are not well taken. For the foregoing reasons, we affirm the trial court’s judgment.

{¶2} Statement of the Facts and Procedural History

{¶3} On March 12, 2010, Mr. Molk was charged with one count of OVI (R.C. 4511.19(A)(1)(a)), one count of failure to stop at a stop sign (R.C. 4511.43(A)), and one count of failure to use his turn signal (R.C. 4511.39(A)). Mr. Molk entered a “not guilty plea” at arraignment and was assigned a public defender. Subsequently, Mr. Molk entered a “no contest” plea and the trial court passed the case for sentencing to a later date. Prior to sentencing, Mr. Molk filed a Motion to Vacate the Plea, which was granted. Preparing to move toward trial, Mr. Molk filed a Motion to Suppress, but prior to the suppression hearing, Mr. Molk withdrew his motion and again entered a “no contest” plea to the OVI charge. The trial court accepted this second “no contest” plea, found Mr. Molk guilty of the OVI, and sentenced him to the following: 365 days in jail, 320 of them suspended; the remaining 45 days to be replaced with 18 days in jail and 55 days of house arrest; 24 months of probation; 80 hours of community service; 180-day vehicle immobilization; 36 months of driver’s license suspension with certain privileges after 180 days of immobilization; ignition interlock device and restricted plates; driver awareness program; and fines/costs. The trial court based its sentencing on R.C. 4511.19(G)(1)(c), which establishes a particular sentencing scheme for defendants who were previously convicted of or pleaded guilty to two or more OVI offenses within six years of the offense.

{¶4} Mr. Molk filed a timely notice of appeal with this court and submitted his brief pro se, raising three (3) assignments of error:

{¶5} “[1.] The trial court erred in that it did not specify a specific statute that it found the appellant guilty of in it’s [sic] judgment entry and final appealable [sic] order.

{¶6} “[2.] The trial court erred in that it sentenced the appellant as if he had committed a 3d [sic] alcohol and or drugs [sic] offence [sic] within the past 6 years without any evidence [sic] any past convictions.

{¶7} “[3.] The pro se appellant lacked sufficient financial poweress [sic] to employ a competent attorney and maintains that he was not afforded adequate legal representation.”

{¶8} Procedural Deficiencies

{¶9} At the outset, Mr. Molk’s brief does not comply with App.R. 16(A), as he failed to include citations to case law authorities, statutes, and parts of the record upon which he relies. He failed to brief the assignments of error, as no authorities are offered in support of his arguments. “An appellate court is empowered to disregard an assignment of error presented for review due to a lack of briefing by the party presenting that assignment. Proper appellate briefing standards are set forth in App.R.16(A).’ *Keating v. Keating*, 11th Dist. No. 90611, 2008 Ohio 5345, ¶111, quoting *Cireddu v. Cireddu* (Sept. 7, 2000), 8th Dist. No. 76784, 2000 Ohio App. LEXIS 4076. As these assignments were not briefed, they should be disregarded ‘due to the complete lack of argument containing reasons in support of the contention and citations to authority.’ *Id.*, quoting *Cireddu* at *24.” *Pearlstein v. Pearlstein*, 11th Dist. No. 2008-G-2837, 2009-Ohio-2191, ¶81. We will, however, attempt to address Mr. Molk’s arguments on their merits.

{¶10} Further, it is incumbent upon the appellant to assure that the appellate court has before it the trial court’s record, which includes the original papers and exhibits filed in the case, the transcript of the proceedings and a certified copy of the docket and journal entries. See App.R. 9(A).

{¶11} App.R. 9 requires that an appellant arrange for the transmission of the trial court record and transcript to the appellate court. “An appellant is required to provide a transcript for appellate review.” *Warren v. Clay*, 11th Dist. No. 2003-T-0134, 2004-Ohio-4386, ¶4, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. “Such is necessary because an appellant shoulders the burden of demonstrating error by reference to matters within the record.” *Id.* This principle is embodied in App.R. 9(B), which states, in relevant part:

{¶12} “At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk.” Where a transcript necessary for the resolution of assigned errors is omitted from the record, an appellate court has nothing to pass upon. *Clay* at ¶7.

{¶13} A statement of evidence is permissible under App.R. 9(C) if no report or transcript of the proceedings is available. “[I]t is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review.” *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. In the absence of such a record, “[a]n appellate court reviewing a lower court's judgment indulges in a presumption of regularity of the proceedings below.” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 7; see, also, *Knapp*, *supra*.

{¶14} “[A]n appellant ‘bears the burden of affirmatively demonstrating error on appeal.’” *Village of S. Russell v. Upchurch*, 11th Dist. Nos. 2001-G-2395 and 2001-G-2396, 2003-Ohio-2099, ¶10, quoting *Concord Twp. Trustees v. Hazelwood Builders*

(Mar. 23, 2001), 11th Dist. No. 2000-L-040, 2001 Ohio App. LEXIS 1383. Mr. Molk has failed to file with the court a complete trial record; he has provided no transcript or statement of evidence; and his brief is devoid of any citations to any authority necessary to support his arguments. The nature of his appeal makes crucial the review of a transcript or a statement of evidence and, without it, we must afford the trial court substantial deference.

{¶15} The Sentencing Entry

{¶16} Through his first assignment of error, Mr. Molk argues that the appealed judgment entry failed to specify the section of the Ohio Revised Code under which he was charged and convicted. Mr. Molk points out that the trial court simply wrote the word “OVI” to indicate the charge to which he pleaded “no contest” and was found guilty. This court is not clear from Mr. Molk’s brief just what error he alleges has occurred. For the purposes of considering Mr. Molk’s appeal, we have construed his first assignment of error as asserting a procedural defect in the trial court’s judgment entry in that the specific code section number for that OVI offense was not indicated.

{¶17} “In entering a final appealable order in a criminal case, the trial court must comply with Crim.R. 32(C), which states: ‘A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.’” *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, ¶10.

{¶18} Mr. Molk appears to argue that the trial court failed to comply with Crim.R. 32(C) when it did not indicate on the judgment entry form the section of the Ohio

Revised Code under which he was found guilty and sentenced. A review of the judgment entry, however, shows that the trial court strictly complied with the requirements of Crim.R. 32(C). The judgment entry clearly stated that Mr. Molk was charged with “OVI/stop sign/turn signal,” and indicates that he pleaded no contest to and was found guilty of “OVI”. The judgment entry went on to clearly lay out Mr. Molk’s sentence. There is no requirement that the trial court indicate on a sentencing entry the exact section numbers of the revised code the defendant has been found guilty of violating.

{¶19} The assertion that Mr. Molk did not know the crime for which he was found guilty is not well taken. From the scant evidence we do have in the trial court file, we have no doubt that Mr. Molk was made aware of the charges against him and the corresponding Ohio Revised Code sections. The initial citation indicates the charges and code sections, as do all subsequent motions and notices contained within the court file. These documents were presumably delivered to Mr. Molk or shared with him by his court-appointed attorney.

{¶20} No evidence is before us to suggest that the trial court failed to comply with the requirements of Crim.R. 32(C), nor that Mr. Molk was unaware of the charge for which he was being charged, convicted, and sentenced. The first assignment of error is without merit.

{¶21} Sentence Based On Past Convictions

{¶22} In his second assignment of error, Mr. Molk argues that he was improperly sentenced as a repeat offender.

{¶23} Pursuant to *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to the existing statutes,

appellate courts must apply a two-step approach in reviewing a sentence. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard. *Id.* at ¶4.

{¶24} The first prong of the analysis instructs that “the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Id.* at ¶14.

{¶25} If the first prong is satisfied, that is, the sentence is not “clearly and convincingly contrary to law,” the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id.* at ¶17.

{¶26} Sentencing for a conviction of OVI is regulated by R.C. 4511.19. Mr. Molk was sentenced under R.C. 4511.19(G)(1)(c), one of multiple repeat offender provisions found in this code section. R. C. 4511.19(G)(1)(c) provides: “an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor.” The associated jail sentence for defendants determined to fall under R.C. 4511.19(G)(1)(c) shall be a mandatory jail term of 30 consecutive days or a 15 day jail term plus 55 days of house arrest with electronic monitoring. The court may impose a sentence greater than 30 days, but no more than one year. Additionally, a trial court

shall also impose: 1) a fine of between \$850 and \$2,750, 2) a Class 3 driver's license suspension – privileges are at the discretion of the trial court after 180 days hard time only, 3) criminal forfeiture of the offender's vehicle if it was involved in the offense, 4) participation in an alcohol and/or drug program, 5) restricted plates, and 6) an ignition interlock system.

{¶27} Sentencing an individual as a repeat offender under R.C. 4511.19(G)(1)(c) requires that the individual have accumulated two prior convictions for equivalent offenses in the past six years. When a defendant is only facing a misdemeanor, as in the case *sub judice*, prior convictions are for sentencing consideration only and do not constitute an element of the offense. See *State v. Allen* (1987), 29 Ohio St.3d 53. "Revised Code 2945.75 sets forth the requirement that a certified copy of the entry of judgment is necessary to prove a prior conviction but this applies, only when the prior conviction makes the offense one of more serious degree." *State v. Agee* (June 20, 1991), 3rd Dist. No. 3-90-29, 1991 Ohio App. LEXIS 3000, at *5.

{¶28} Because no statute specifically sets forth the procedural requirements for OVI sentencing, apart from the statutorily mandated sentences, a trial court has broad discretion to receive and consider evidence regarding sentencing. *Id.* In the absence of a challenge by the defendant as to the admission of prior convictions for sentencing purposes, a court may rely on such evidence as it deems sufficient. *City of Columbus v. Malinchak* (Mar. 29, 1988), 10th Dist. Nos. 87AP-1038, 87AP-1039 and 87AP-1040, 1988 Ohio App. LEXIS 1204. See also, *State v. Smith* (Sept. 24, 1990), 12th Dist. No. CA89-12-105, 1990 Ohio App. LEXIS 4150 (relying on a face sheet with judge's signature); *State v. Perkins* (June 22, 1998), 12th Dist. No. CA97-10-047, 1998 Ohio App. LEXIS 2785 (relying on certified copies of documents resembling docket sheets

and tickets/citations, in addition to trooper testimony); *State v. Chaney* (1998), 128 Ohio App.3d 100 (relying on a photocopy of the front of tickets and a certified copy of the docket sheets); *State v. Cyphers* (Apr. 10, 1998), 2nd Dist. No. 97-CA-19, 1998 Ohio App. LEXIS 1658 (relying on witness testimony).

{¶29} Mr. Molk has failed to provide us with a transcript of the plea and sentencing proceedings, or a statement of facts in lieu of transcript. The trial court made a specific finding in its sentencing entry that “[t]his is the defendant’s 3rd conviction of DUI in the last 6 years.” We therefore presume regularity of the proceedings, that the trial court complied with all rules and statutes, and that sufficient evidence of Mr. Molk’s prior convictions were presented to the trial court.

{¶30} We have no evidence before us to suggest that Mr. Molk’s sentence is clearly and convincingly contrary to law or that the prosecution failed to produce evidence of prior convictions. Therefore, we move to the second prong of the analysis and review Mr. Molk’s sentence under an abuse of discretion standard.

{¶31} The trial court’s sentence, discussed *supra.*, was well within the permissible range of sentences for offenders qualifying under R.C. 4511.19(G)(1)(c). Under the statute, the trial court could have imposed an even harsher penalty on Mr. Molk, including the denial of driving privileges or a greater jail sentence. Therefore, the trial court did not abuse its discretion in meting out Mr. Molk’s punishment and we decline to overturn a valid sentence. Mr. Molk’s second assignment of error is without merit.

{¶32} Ineffective Assistance of Counsel

{¶33} In his third assignment of error, Mr. Molk claims that he was denied the effective assistance of trial counsel. He asserts that he was advised by his counsel to

plead “no contest,” despite maintaining his innocence, and that his counsel convinced him the plea would ensure him a less severe sentence.

{¶34} “In the context of a guilty plea, the standard of review for ineffective assistance of counsel is whether: (1) counsel's performance was deficient; and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty.” *State v. Dudas*, 11th Dist. Nos. 2008-L-081 and 2008-L-082, 2008-Ohio-7043, ¶27, citing *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, *9. The defendant has the burden of proving ineffective assistance of counsel. *Madeline* at *10.

{¶35} This court has repeatedly emphasized that “[t]he mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is *not* sufficient to establish the requisite connection between the guilty plea and the ineffective assistance.’ (Emphasis sic.) *Id.*, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, *11, citing *State v. Haynes* (Mar. 3, 1995), 11th Dist. No. 93-T-4911, 1995 Ohio App. LEXIS 780, *4-*5. ‘Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily.’ *Madeline*, *supra.*” *Dudas* at ¶28.

{¶36} “A claim that a guilty plea was induced by ineffective assistance of counsel must be supported by evidence where the record of the guilty plea shows it was voluntarily made.” *Dudas* at ¶31, citing *State v. Malesky* (Aug. 27, 1992), 8th Dist. No. 61290, 1992 Ohio App. LEXIS 4378 and *State v. Kapper* (1983), 5 Ohio St.3d 36. In *Dudas*, we quoted with favor the holding in *Malesky*: “A naked allegation by a

defendant of a guilty plea inducement, is insufficient to support a claim of ineffective assistance of counsel, and would not be upheld on appeal unless it is supported by affidavits or other supporting materials, substantial enough to rebut the record which shows that his plea was voluntary." *Dudas* at ¶32, quoting *Malesky* at *5.

{¶37} Mr. Molk fails to support his claim of ineffective assistance of counsel either through the record or with affidavits or other supporting material. As previously noted, we were not provided an argument supported with citations to authority nor were we provided a complete trial record or transcript; therefore, we must presume regularity as to the trial proceedings, including Mr. Molk's attorney's conduct.

{¶38} Mr. Molk's allegation of ineffective assistance of counsel is a prime example of the naked allegation held to be insufficient to support an ineffective assistance of counsel claim in *Dudas* and *Malesky*. Without any evidence to the contrary, we presume that Mr. Molk's attorney rendered effective assistance to him at the trial court level. Mr. Molk's third and final assignment of error is without merit.

{¶39} The judgment of the Mentor Municipal Court is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.