

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-09-123
- vs -	:	<u>OPINION</u>
	:	5/10/2010
CUAUHTEMOC SILVA HERNANDEZ,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MASON MUNICIPAL COURT
Case No. 09TRD02258

Bethany S. Bennett, Mason City Prosecutor, 5950 Mason-Montgomery Road, Mason, Ohio 45040, for plaintiff-appellee

Louis Edward Valencia II, 10979 Reed Hartman Highway, Suite 110, Cincinnati, Ohio 45242, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Cuauhtemoc Silva Hernandez, appeals from a decision of the Mason Municipal Court denying his motion to withdraw his no contest plea and to vacate his conviction for physical control.

{¶2} On May 5, 2009, at approximately 5:00 a.m., Warren County Sheriff's Deputy

Scott Williams responded to a 911 call regarding an incident occurring at the intersection of Pembroke Street and Larchwood Court in Deerfield Township in Warren County, Ohio. Upon arrival, Deputy Williams saw Hernandez standing outside a vehicle, talking with one of his neighbors who was complaining to Hernandez about the noise being caused by his car radio.

Upon noticing that a strong odor of alcoholic beverage was coming from Hernandez and that Hernandez was swaying and unable to keep his balance, Deputy Williams performed several standard field sobriety tests on Hernandez, all of which indicated that Hernandez was intoxicated. Deputy Williams placed Hernandez under arrest for physical control, a first-degree misdemeanor, in violation of R.C. 4511.194.¹ Hernandez then submitted to a breath test which showed he had a blood alcohol content of .186.

{¶3} Hernandez was ordered to appear on the physical control charge in the Mason Municipal Court. Hernandez entered a not guilty plea to the charge, filed a motion to suppress any evidence gathered by police against him, and requested a Spanish interpreter. However, on the day his suppression motion was scheduled to be heard, Hernandez withdrew the motion and changed his not guilty plea to a no contest plea. The trial court convicted Hernandez as charged and sentenced him to 180 days in jail, with all but six days of the jail sentence suspended, and gave Hernandez the option to serve the six days in jail or three days in jail and three days in the Driver Intervention Program.

{¶4} Less than a week later, Hernandez, represented by new counsel, moved to withdraw his no contest plea and to vacate his conviction for physical control and requested an evidentiary hearing on the motion. After holding a hearing on the motion, the trial court overruled it. Hernandez then filed a motion to reconsider, which the trial court also overruled.

{¶5} Hernandez now appeals, assigning the following as error:

1. R.C. 4511.194(B) prohibits a person from being in physical control of a vehicle while under the influence of alcohol or a drug of abuse.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW HIS GUILTY [sic] PLEA AND VACATE CONVICTION PURSUANT [sic] TO OHIO CRIMINAL RULE 32.1."

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT ERRED BY FAILING TO HOLD AN EVIDENTIARY HEARING [sic] ON APPELLANT'S MOTION TO WITHDRAW HIS GUILTY [sic] PLEA AND VACATE HIS CONVICTION PURSUANT TO OHIO CRIMINAL RULE 32.1 DESPITE APPELLANT'S CLEAR AND UNEQUIVOCAL REQUEST."

{¶10} We shall discuss Hernandez' assignments of error together since they are closely related.

{¶11} Hernandez argues the trial court abused its discretion by denying his post-sentence motion to withdraw his no contest plea and to vacate his conviction for physical control because he did not make the plea knowingly, intelligently and voluntarily since, at the time he entered the plea, he did not speak English and neither the trial court, the prosecutor, nor his original counsel inquired as to whether his court-appointed interpreter was competent to translate for him.

{¶12} However, Hernandez failed to ensure that a transcript of the proceedings held in this case was made part of the record. The Ohio Supreme Court has stated, "Upon appeal of an adverse judgment, it 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 a transcript of the proceedings held in this case, we must presume the regularity of the proceedings and accept the trial court's factual determinations as correct. See *State v. Fields*, Brown App. No. CA2009-05-018, 2009-Ohio-6921, ¶8, citing *Knapp v. Edwards*

Laboratories (1980), 61 Ohio St.2d 197, 199.

{¶13} Furthermore, Hernandez failed to raise the issue regarding the competency of his court-appointed interpreter until he filed a motion asking the trial court to reconsider its denial of his motion to withdraw his plea and vacate his conviction for physical control. A party's failure to raise an alleged error in the trial court in a timely manner generally precludes the party from raising the issue on appeal. See *State v. O'Connor*, Fayette App. No. CA2007-01-005, 2008-Ohio-2415, ¶10.

{¶14} Hernandez acknowledged during oral argument that a transcript of the proceedings held in this case was never filed in the record and that he failed to preserve for appellate review the issue regarding the competency of his court-appointed interpreter. Nevertheless, he argues the trial court committed reversible error by failing to hold an evidentiary hearing on his motion to withdraw his no contest plea, as he had requested. He contends that, in the memorandum in support of his motion to withdraw his plea, "he set forth sufficient prima facie evidence of a violation of his constitutional rights as well as ineffective assistance of counsel to warrant a hearing."

{¶15} However, the record shows the trial court was fully aware of Hernandez' request for an evidentiary hearing regarding his motion to withdraw his no contest plea, as the trial court temporarily stayed imposition of Hernandez' jail sentence pending an evidentiary hearing. Moreover, in its entry denying Hernandez' motion to withdraw his plea, the trial court set forth the procedural history of the case, noting that Hernandez, through his newly-retained counsel, filed a motion to withdraw his no contest plea and requested an evidentiary hearing, and that "[t]he case was set for hearing and heard on July 28, 2009." Since a transcript of the July 28, 2009 hearing was never filed in the record, we are unable to determine what transpired at that hearing, and therefore we must presume the regularity of those proceedings, as well as the correctness of the trial court's factual determinations. See

Fields, 2009-Ohio-6921 at ¶8, citing *Knapp*, 61 Ohio St.2d at 199.

{¶16} Furthermore, it is apparent from its decision denying Hernandez' motion to withdraw his plea that the trial court rejected the chief argument Hernandez made in support of the motion, namely, that his original counsel did not just predict, but represented, that he would not receive jail time if he pled no contest to the physical control charge. The trial court stated:

{¶17} "It appears that the sole reason for [Hernandez] seeking to withdraw his no contest plea is because he was sentenced to 6 days in jail. He has however failed to prove that a manifest injustice resulted from his no contest plea. There is 'not a manifest injustice when [a] Defendant holds [a] mistaken belief that [their] sentence would be significantly lighter, nor when [their] attorney says a particular sentence probably will result.' [*State v.*] *Neeley*[, Clinton App. No. CA2008-08-034, 2009-Ohio-2337,] ¶10, citing [*State v.*] *McComb*[, Montgomery App. Nos. 22570, 22571, 2009-Ohio-295,] ¶9."

{¶18} The foregoing suggests that Hernandez was permitted to give testimony at the hearing held on his motion to withdraw his plea regarding what his original counsel had told him about the consequences of his no contest plea. It also strongly indicates the trial court found that Hernandez' original counsel *predicted*, but did not *represent*, that Hernandez would not receive jail time if he pled no contest to the charge. Because no transcript of the hearing was provided, we must presume the regularity of the proceedings and that the trial court's factual finding on this issue was correct. See *Fields*, 2009-Ohio-6921 at ¶8, citing *Knapp*, 61 Ohio St.2d at 199.

{¶19} Accordingly, Hernandez' first and second assignments of error are overruled.

{¶20} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.

[Cite as *State v. Hernandez*, 2010-Ohio-2056.]