

[Cite as *State v. Burkholder*, 2009-Ohio-5526.]

IN THE COURT OF APPEALS OF DARKE COUNTY, OHIO

STATE OF OHIO :
 :
 Plaintiff-Appellee : C.A. CASE NO. 1750
 :
 vs. : T.C. CASE NO. 07CR14135
 :
 BARRY BURKHOLDER : (Criminal Appeal from
 : Common Pleas Court)
 Defendant-Appellant :

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O P I N I O N

Rendered on the 16th day of October, 2009.

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Richard M. Howell, Atty. Reg. No.0002550, Pros. Attorney,
 Courthouse, Greenville, OH 45331
 Attorney for Plaintiff-Appellee

Barry Burkholder, #595452, P.O. Box 300, Orient, OH 43146
 Defendant-Appellant, Pro Se

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GRADY, J.:

{¶ 1} During the early morning hours of January 5, 2007,
 the Greenville Veterinary Clinic located at 305 N. Ohio Street
 in Greenville was forcibly entered by breaking a window.
 Several drawers and cabinets were opened but only three dollars
 in loose change was stolen. A glove left behind at the scene
 was subsequently matched to Defendant via DNA analysis.

{¶ 2} Defendant was indicted on one count of breaking and entering in violation of R.C. 2911.13 (A), a fifth degree felony.

Defendant waived his right to counsel and elected to represent himself at trial. Following a jury trial, Defendant was found guilty as charged. The trial court sentenced Defendant to a twelve month prison term.

{¶ 3} Defendant timely appealed to this court from his conviction and sentence, and once again he is proceeding pro se.

{¶ 4} In the letter Defendant sent to this court on January 7, 2009, which we construed as his pro se brief in support of his appeal, Defendant sets forth in mere conclusory statements fourteen allegations or assignments of error. This document fails in almost every respect to comply with the requirements governing the content of the brief of the appellant. App.R.16(A)(1)-(7). Briefs filed in this court, whether by counsel or pro se, must comply with App.R. 16. Furthermore, Defendant has failed to include in the record on appeal any transcript of the jury trial proceedings from which we can determine the errors Defendant now assigns on appeal.

{¶ 5} An appellant has the burden on appeal to show the existence and effect of the error he assigns, and to do so by specific reference to the trial record. *State v. Puckett*, 143

Ohio App.3d 132, 2001-Ohio-2463. Therefore, the duty to provide a record which exemplifies the error he assigns is the appellant's duty. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. When an appellant fails in that duty, an appellate court has no alternative but to overrule any error assigned that requires reference to the trial proceedings, because the presumption of regularity of those proceedings in which an appellate court indulges cannot then be rebutted. *Hartt v. Munobe*, 67 Ohio St.3d 3, 1993-Ohio-177.

{¶ 6} Because Defendant has failed to provide this court with a proper record of the jury trial proceedings which exemplify the errors he now complains about on appeal, and which is necessary for this court to determine the errors Defendant assigns, we have no alternative but to presume the regularity and validity of the trial court's proceedings and affirm its judgment.

{¶ 7} The assignments of error are overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J., concurs

FROELICH, J., concurring:

{¶ 8} The appellant requested appointed counsel and a transcript and was instructed on December 10, by magistrate's

order, to complete a financial disclosure/affidavit of indigency. On December 30, the defendant filed a notice that the affidavit of indigency was "forthcoming." On January 29, with no affidavit having been filed, this court ordered that defendant should proceed pro se.

{¶ 9} As such, he is bound by the same rules as if he were represented. While appellate courts often afford some leniency to pro se appeals, courts do not "conjure up questions never squarely asked or construct full-blown claims from convoluted reasoning." *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 206. "If a court cannot understand the arguments advanced by a party, relief cannot be granted." *State v. Dunlap*, Franklin App. No. 05AP-260, 2005-Ohio-6754, ¶10.

{¶ 10} Without "conjuring up" issues, it appears Burkholder assigns the following errors:

{¶ 11} ■ The judge tampered with the jury by talking with it during deliberations;

{¶ 12} ■ The judge refused to have the court reporter read back a witness's testimony;

{¶ 13} ■ The defendant was not timely supplied with discovery;

{¶ 14} ■ The defendant's subpoenas of witnesses were sent by mail;

{¶ 15} ■ Evidence was introduced that was from a search warrant issued by a judge that was not neutral and detached;

{¶ 16} ■ The defendant's requests for continuance were improperly denied;

{¶ 17} ■ A motion was denied to subpoena an alibi witness;

{¶ 18} "■ Evidence was improperly admitted despite the lack of a chain of custody;

{¶ 19} ■ Ex parte communications between the judge and prosecutor;

{¶ 20} ■ The Darke County prosecutor conspired with the Clinton County authorities.

{¶ 21} We can take judicial notice of filings and pleadings in the Darke County case where the defendant was convicted in November of 2008 and of the fact that the defendant was convicted in Clinton County in January of 2009, where he was represented by counsel and where there had been a competency hearing after which the court found the defendant to be competent.

{¶ 22} Beyond that, this court's hands are tied. We cannot represent or advocate for the defendant or construct an appellate record out of thin air. Nor can we conduct an independent *Anders* review when there is no record to review and the assignments - such as they are - are broad, conclusory allegations of judicial defalcations, not even slightly

supported by any record or facts before the court. The appellant has not met his burden of demonstrating error nor can the court independently find any error from the record before it, and I therefore concur in the decision to affirm the judgment of the trial court.

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Copies mailed to:

Darke County Prosecuting Attorney
Barry Burkholder
Hon. Jonathan P. Hein