

[Cite as *State v. Morris*, 2016-Ohio-7417.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

D'ALCAPONE A. MORRIS

Defendant-Appellant

Appellate Case Nos. 26949, 26960

Trial Court Case No. 2009 CR 02159/1

(Criminal Appeal from
Common Pleas Court)

DECISION AND ENTRY

September 29, 2016

PER CURIAM:

{¶ 1} D'Alcapone A. Morris appealed the trial court's decisions overruling his public records request and his motion for leave to file a delayed motion for a new trial. After the consolidated matter was fully briefed, Morris filed a motion to remand it to the trial court to correct the record. Specifically, he "seeks to modify his Motion for Leave to File a Delayed Motion for New Trial" to include an affidavit that was purportedly submitted to, but not filed with or considered by, the trial court. Morris asserts that he submitted the affidavit a few days after his motion, but did not learn that it was not filed, considered, or included in the

record until the State of Ohio so argued in its brief. He argues that the “record in this case should include that affidavit, as it likely would have resulted in the trial court granting” his delayed motion for a new trial. The State of Ohio did not file a timely response to the motion to remand. App.R. 15(A).

{¶ 2} According to the Rules of Appellate Procedure, the record is defined as “[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court.” App.R. 9(A)(1). It is “a bedrock principle of appellate practice in Ohio * * * that an appeals court is limited to the record of the proceedings at trial.” *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 13. In this case, the record was certified as complete on March 14, 2016.

{¶ 3} Appellant correctly notes that the record may be supplemented pursuant to App.R. 9(E). This does not mean, however, that parties may add *new* material to the appellate record. “A reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.” *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978) at paragraph 1 of the syllabus. Rather, the Rule allows parties to correct the record to reflect what actually happened in the trial court:

Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the trial court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, or the trial court,

either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified, filed, and transmitted.

App.R. 9(E).

{¶ 4} This division of Rule 9 helps ensure that the record we review “truly discloses what occurred in the trial court.” It is not a vehicle for the parties to change the record to reflect what they wish occurred in the trial court, or to include materials that they did not present, or that the trial court did not have before it to consider. See *State v. Williams*, 73 Ohio St.3d 153, 160, 652 N.E.2d 721 (1995) (refusing to supplement with “matters that appellant now wishes to add [that] were never part of the trial court’s proceedings”).

{¶ 5} For example, if a document was considered by a trial court but inadvertently not filed, a motion to supplement the record would be appropriate, because the document was before the court. If a document was filed but not included in the record, App.R. 9(E) would also apply. If, however, a document was not filed, and was not considered by the trial court, it cannot be added to the record on appeal by App.R. 9(E). The determinative factor is whether the material was before the trial court; “even if both parties request the addition, it must be clearly established that the matter to be added was in fact before the trial court in the proceedings before that court” before it can be included in the appellate record. Painter & Pollis, *Ohio Appellate Practice*, Section 4.19 (2015).

{¶ 6} Here, Morris acknowledges that the affidavit at issue was not filed and was not considered by the trial court. Because it was not before the trial court, it cannot be added to the record via App.R. 9(E), because its inclusion would not truly and accurately disclose

what occurred in the trial court. Accordingly, we OVERRULE the motion to correct the record and to remand this matter to the trial court.

SO ORDERED.

MARY E. DONOVAN, Presiding Judge

JEFFREY M. WELBAUM, Judge

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