[Cite as *State v. Valko*, 2010-Ohio-1833.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
PAUL E. VALKO	:	Case No. 09-CA-27
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Cambridge Municipal Court, Guernsey County, Case No. 09TRC00900
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 22, 2010

APPEARANCES:

For Petitioner-Appellee	For Respondent-Appellant
WILLIAM F. FERGUSON 134 Southgate Parkway Cambridge, OH 43725-2324	RONALD C. COUCH 121 West Eighty Street Cambridge, OH 43725

Farmer, J.

{¶1} Appellant, Paul Valko, was charged with Operating a Vehicle under the Influence ("OVI") in violation of R.C. 4511.19(A)(1)(a) and (h) as well as with a Marked Lanes Violation and a Seat Belt Violation. Appellant was convicted and sentenced on the OVI and the marked lanes charges. He was acquitted of the seat belt charge.

{¶2} Counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, rehearing den. (1967), 388 U.S. 924, indicating that the within appeal was wholly frivolous and setting forth three proposed Assignments of Error. Appellant did not file a pro se brief alleging any additional Assignments of Error. Rather, he filed what appears to be the same potential Assignments of Error as raised by counsel. Appellee filed a brief on behalf of the State of Ohio. Appellant's three potential assignments of error are:

I.

{¶3} "THE TRIAL COURT ERRED BY FINDING THE APPELLANT PAUL VALKO GUILTY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II.

{¶4} "THE TRIAL COURT ERRED BY RELYING ON THE BREATHALYZER TEST AFTER TESTIMONY OF THE DEFENDANT, PAUL VALKO, THAT HE HAD AN ALCOHOL GAUZE IN HIS MOUTH AT THE TIME OF THE TEST."

III.

{¶5} "THE TRIAL COURT ERRED BY RELYING ON THE "VIDEO" OF THE STOP BY THE TROOPER AS THE DEFENDANT, PAUL VALKO ARGUES THAT THE

"VIDEO" DOES NOT ACCURATELY PORTRAY WHAT ACTUALLY HAPPENED DURING THE STOP."

{¶6} At trial, Trooper Valerie Perkins of the Ohio State Patrol testified she maintained the breathalyzer in accordance with the Ohio Revised Code and Ohio Administrative Code. Her testimony was followed by Trooper Scott Buxton also of the Ohio State Patrol. Trooper Buxton testified on February 11, 2009, he observed Appellant's vehicle travelling over the center line at which point he activated his in car camera. Appellant was observed weaving within his lane and was slow to respond once the trooper activated his overhead lights. When Appellant opened his car door, Trooper Buxton immediately detected a strong odor of alcohol. Appellant was asked for his driver's license, however, he had difficulty locating it in his wallet. The trooper observed Appellant pass the license up three times. Other indicators of intoxication were also present: glassy, bloodshot eyes, slurred speech and poor performance on the field sobriety tests. Appellant admitted consuming three, twenty four ounce beers as well as marijuana throughout the day. After being transported to the highway patrol station, Appellant submitted to a breathalyzer test with a BAC result of .180. Trooper Buxton testified he was able to determine Appellant did not have anything in his mouth at the time the breath test was administered.[1]

{¶7} Trooper Buxton patted Appellant down and discovered a substance confirmed by lab reports to be marijuana.

{¶8} Appellant testified on his own behalf. He advised the jury he had beers scattered throughout the day and admitted to taking a "couple of hits" of marijuana.

[1] Appellant suggests in his pro se filing that the transcript is inaccurate on this point, however, Appellant did not raise this issue as required under App.R. 9(E).

Appellant further explained his poor driving was due to wind gusts. Finally, Appellant explained the result on the breath test was inaccurate because he had cotton swabs in his mouth soaked with an alcohol solution used to treat his gum disease. On cross-examination, Appellant maintained his verbal admissions on the video and the inaccuracies between the video and his testimony are actually due to the video having been altered.

{¶9} In *Anders,* the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he should so advise the court and request permission to withdraw. Id*.* at 744. Counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal*.* Id*.* Counsel also must: (1) furnish his client with a copy of the brief and request to withdraw; and, (2) allow his client sufficient time to raise any matters that the client chooses. Id*.* Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines that the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. Id.

{¶10} Counsel in this matter has followed the procedure in *Anders v. California* (1967), 386 U.S. 738. We now will address the merits of Appellant's Potential Assignments of Error.

I., II. and III.

{¶11} We will address the potential Assignments of Error together because they all essentially suggest the verdict was against the manifest weight of the evidence.

{¶12} In determining whether a verdict is against the manifest weight of the evidence, the appellate court reviews the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the [trier of fact] 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶13} Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶14} Appellant was convicted of OVI in violation of R.C. 4511.19(A)(1)(a):

{¶15} "(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶16} "(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them"

* * *

{¶17} "(h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath."

{¶18} Appellant admitted consuming alcohol and marijuana prior to driving. He further admitted he had a moderate "buzz" at the time of the stop. Appellant's poor performance on the field tests together with his poor driving and admissions support the verdict of the jury. The jury chose to believe the trooper's testimony and the video over Appellant's explanation for his poor driving and poor performance on the field tests. We cannot say based on the evidence the jury clearly lost its way in concluding the trooper's testimony and the video were credible. Further, Appellant submitted to a breath test with a result of .180. The trooper testified he was able to observe the Appellant and did not find Appellant to have anything in his mouth. Even had the breath test been excluded, the evidence supports Appellant's conviction for OVI.

{¶19} Appellant's potential assignments of error are overruled.

{¶20} For these reasons, after independently reviewing the record, we agree with counsel's conclusion that no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders,* grant counsel's request to withdraw, and affirm the judgment of the Cambridge Municipal Court.

By Farmer, J.

Edwards, P. J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ Patricia A. Delaney_____

JUDGES

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IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
PAUL E. VALKO	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-27

For the reasons stated in our accompanying Memorandum-Opinion, we affirm the judgment of the Cambridge Municipal Court.

Costs to Appellant.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES