[Cite as *Cleveland v. Schumann*, 2011-Ohio-741.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95530

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

MARK W. SCHUMANN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 10 TRD 039556

BEFORE: Boyle, J., Rocco, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: February 17, 2011

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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} On June 13, 2010, defendant-appellant, Mark Schumann, received a traffic citation in violation of Cleveland Codified Ordinances ("C.C.O.") 431.19, for not coming

to a complete stop at a stop sign. He pleaded not guilty to the citation, and the case proceeded to a bench trial. The trial court found him guilty of the stop sign violation and sentenced him to pay $150 plus costs.[1]

{¶ 3} Schumann appeals, raising five assignments of error for our review. Because we find merit to his first and second assignments of error, we reverse the judgment of the trial court and remand for a new trial.

"Present Recollection Refreshed"

{¶ 4} In his first and second assignments of error,[2] Schumann argues that the trial court erred by allowing Officer Rodes to testify because he "lacked actual recollection of the facts." He argues that the state did not lay the proper foundation under Evid.R. 612 ("writing used to refresh memory"). We agree.

{¶ 5} An appellate court reviewing the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. "The trial court had broad discretion in the admission and the exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, the [appellate]

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[1]We note that Schumann paid his fine and costs and did not request a stay. But this appeal is not moot because pursuant to R.C. 4507.021(G), the Ohio Bureau of Motor Vehicles assessed points against his driver's license. As such, Schumann has suffered a collateral disability. See *Westlake v. Connole* (Sept. 12, 1999), 8th Dist. Nos. 74727 and 74910; *Cleveland v. Jennings* (Feb. 17, 2000), 8th Dist. No. 76810.

[2]"[1.] The trial court erred in treating Officer Rodes as a competent witness.
"[2.] The trial court erred in allowing Officer Rodes to refresh his memory."

court should be slow to interfere." Id. at 109, citing *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 302, 224 N.E.2d 126, certiorari denied (1968), 390 U.S. 1024, 88 S.Ct. 1409, 20 L.Ed.2d 281.

{¶ 6} Near the beginning of the trial, Officer Gregory Rodes testified that on June 13, 2010, he was in "a marked police car, conducting traffic enforcement." Significant to this appeal, Schumann objected at this point. Schumann told the trial court his reason for the objection: "[t]he officer should be testifying from his independent recollection, not by reading the ticket." The trial court responded, "[h]e can refresh his memory if he needs to." It then overruled Schumann's objection, and permitted the state to continue its direct examination of Officer Rodes.

{¶ 7} Evid.R. 612, "writing used to refresh memory," provides that "if a witness uses a writing to refresh memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. The adverse party is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. ***."

{¶ 8} In *State v. Scott* (1972), 31 Ohio St.2d 1, 5-6, 285 N.E.2d 344, the Ohio Supreme Court explained: "In the 'present recollection refreshed' situation, the witness looks at the memorandum to refresh his memory of the events, but then proceeds to testify

upon the basis of his present independent knowledge." Thus, "when a party seeks to refresh a witness's recollection under Evid.R. 612, the evidence consists solely of the witness's present testimony." *State v. Woods* (1988), 48 Ohio App.3d 1, 5, 548 N.E.2d 954, citing *State v. Diehl* (1981), 67 Ohio St.2d 389, 391-392, 423 N.E.2d 1112.

{¶ 9} Prior to employing a writing to refresh the recollection of a witness, it must be established that the witness lacks a present recollection of the information or events described in the writing. Once the trial court is satisfied that the witness has no present recollection of the relevant information or events, the witness is permitted to read the writing silently or have relevant portions thereof read to him. If his recollection has been revived, he may then continue with his testimony. See *Woods*, supra.

{¶ 10} Here, there was no foundation of any kind presented. We know that Officer Rodes was reading from the citation when he was testifying because of Schumann's objection and the court's response. But the city did not lay the proper foundation. It failed to establish that Officer Rodes did not recall the events that led to him writing the citation. Nor did the city establish that once Officer Rodes reviewed the citation, he then could recollect what had actually occurred. Thus, we find that the trial court erred in permitting Officer Rodes's testimony under Evid.R. 612.

{¶ 11} Schumann further maintains that the state could have, but did not, use Evid.R. 803(5), which is the "recorded recollection" exception to the hearsay rule. But we disagree that the state could have used this rule. It provides that "[a] memorandum or

record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

{¶ 12} Under Evid.R. 803(5), the writing itself, whether read into the record or introduced into evidence by an adverse party, constitutes *substantive* evidence, versus Evid.R. 612, where the evidence consists solely of the witness's present testimony. *Woods*, 48 Ohio App.3d at 5, citing *Diehl*, 67 Ohio St.2d at 391-392. But as the Second Appellate District explained, "[a] traffic ticket is merely a charging instrument. Whatever comments or allegations may appear on a charging instrument may not be deemed to constitute admissible and admitted evidence to prove an element or elements of an offense." *State v. Kilgore*, 175 Ohio App.3d 665, 2008-Ohio-1162, 888 N.E.2d 1126.

{¶ 13} Accordingly, we find the trial court erred in allowing Officer Rodes to testify while reading from the citation, without the proper foundation laid under Evid.R. 612.

{¶ 14} Nonetheless, we must determine if the error was harmless. "Where evidence has been improperly admitted *** the admission is harmless 'beyond a

reasonable doubt' if the remaining evidence compromises 'overwhelming' proof of the defendant's guilt." *State v. Sage* (1987), 31 Ohio St.3d 173, 181, 510 N.E.2d 343. We find that the evidentiary error here was not harmless. Schumann was clearly prejudiced by such admission as there was no other evidence submitted to establish his guilt besides Officer Rodes's testimony. See *Scott*, 31 Ohio St.2d at 10.

{¶ 15} Accordingly, Schumann's first and second assignments of error are sustained. Schumann's conviction is vacated. As a result, Schumann's remaining assignments of error are moot.[3] This case is remanded for a new trial.

Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[3]"[3.] The trial court erred in disallowing defense's cross-examination and direct testimony on a collateral matter.

"[4.] The trial court plainly erred in partially nullifying defense's right to testify and to cross-examine witnesses.

"[5.] The trial court plainly erred in imposing the maximum possible sentence in the absence of aggravating factors."

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR