[Cite as *State v. Stern*, 2008-Ohio-5979.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
ROSS H. STERN	:	Case No. 07CAC-06-0029
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	On Appeal from Delaware Municipal Court, Case No. 07TRC02002
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	November 19, 2008

APPEARANCES:

For Plaintiff-Appellee

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Delaney, J.

{¶1} Defendant-Appellant, Ross H. Stern appeals his conviction and sentence entered by the Delaware Municipal Court on one count of operating a motor vehicle under the influence of alcohol, reckless operation and failure to wear a seatbelt. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On February 11, 2007, at approximately 1:35 a.m., Sergeant Mark Leatherman of the Delaware Police Department was traveling northbound on Liberty Street at the intersection of Liberty and William Street. While stopped at a red light, Sgt. Leatherman witnessed a vehicle fail to stop at the intersection of Spring and Liberty Streets. The vehicle crossed the intersection and as it turned left, it hit a curb. The vehicle slid across the southbound lane of traffic going left of center and hit a safety barrier for pedestrians on Liberty Street.

{¶3} The driver of the vehicle then continued southbound on Liberty Street and turned right onto Park Avenue. Sgt. Leatherman followed the vehicle and initiated a traffic stop. Sgt. Leatherman identified Appellant as the driver of the vehicle. Appellant had two passengers sitting in the backseat. Upon approaching the vehicle, Sgt. Leatherman detected a moderate to strong odor of alcohol coming from the vehicle. He noted that Appellant's eyes appeared to be glassy and bloodshot.

{¶4} Sgt. Leatherman asked Appellant if he had been drinking and Appellant stated that he had consumed one beer approximately three hours earlier. Appellant got out of the car and Sgt. Leatherman administered several field sobriety tests. He administered the horizontal gaze nystagmus test and observed six of six clues.

Appellant recited the alphabet properly, but failed the one-leg stand test and performed poorly on the walk and turn test.

{¶5} After the completion of the field sobriety tests, Sgt. Leatherman arrested Appellant for operating a vehicle while under the influence of alcohol. Appellant was transported to the Delaware Police Department and field sobriety tests were repeated at the police station while being recorded on videotape for OVI processing. Sgt. Leatherman read the BMV 2255 to Appellant. Sgt. Leatherman then asked if Appellant was willing to take the breath test, but Appellant first asked to phone his father, who is an attorney. Sgt. Leatherman stood a few feet from Appellant during the telephone conversation. The conversation was also videotaped not for the specific purpose of recording the conversation, but because the conversation occurred while the OVI processing tape was still running. After the completion of the conversation, Sgt. Leatherman asked Appellant again if he would take the breath test. Appellant refused to take the breath test and at that point, Sgt. Leatherman administered *Miranda* warnings. Appellant stated he would answer no further questions without his attorney.

{¶6} Appellant was cited for OVI, in violation of R.C. 4511.19(A)(1)(a); reckless operation, in violation of R.C. 4511.20; and failure to wear a seatbelt, in violation of Delaware Codified Ordinances 337.27(B)(1). On February 15, 2007, Appellant was arraigned, entered a plea of not guilty, appealed his administrative license suspension and demanded a jury trial. Appellant filed a motion suppress evidence and ALS appeal which were both heard at an evidentiary hearing held on May 4, 2007. The trial court denied the motion to suppress and overruled the ALS appeal by judgment entry issued on May 17, 2007.

{¶7} A jury trial was held on June 14, 2007. The jury returned a verdict of guilty on the OVI charge. The trial court entered a finding of guilt on the reckless operation charge and failure to wear a seat belt charge. The trial court sentenced Appellant to nine days in jail, $350 fine plus costs, suspension of his operator's license for a period of two years and placed Appellant on community control for two years.

{¶8} The trial court granted Appellant's request for stay of execution pending appeal. Appellant filed a timely appeal of his conviction and sentence and raises three Assignments of Error:

{¶9} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS STATEMENTS BASED UPON A MIRANDA VIOLATION AND THUS DEPRIVED APPELLANT OF HIS PRIVILEGES AND RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 1, ARTICLE 10 OF THE OHIO CONSTITUTION.

{¶10} "II. THE COURT ERRED AND COMMITTED AN ABUSE OF DISCRETION IN SENTENCING APPELLANT SIGNIFICANTLY MORE HARSHLY THAN IT CONSISTENTLY SENTENCED SIMILARLY SITUATED FIRST-TIME OVI OFFENDERS SOLELY BECAUSE APPELLANT EXERCISED HIS RIGHT TO A JURY TRIAL; THEREBY, VIOLATING APPELLANT'S RIGHTS TO DUE PROCESS, FUNDAMENTAL FAIRNESS AND EQUAL PROTECTION UNDER THE LAW AND THE FOURTEENTH AMENDMENT TO THE UNITED STATE (SIC) CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶11} "III. THE COURT ERRED BY RULING IN ITS JOURNAL ENTRY THAT APPELLANT FAILED TO SHOW ERROR IN HIS APPEAL OF THE ADMINISTRATIVE LICENSE SUSPENSION "ALS" AFTER FINDING ON THE RECORD THAT APPELLANT HAD SHOWN ERROR AND THE ALS WAS GRANTED AND THEREBY VIOLATED APPELLANT'S SUBSTANTIAL RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATE (SIC) CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION."

I.

{¶12} Appellant argues in his first Assignment of Error the trial court erred when it denied Appellant's motion to suppress statements made by Appellant before he was administered his *Miranda* rights. Appellant argues his Fifth Amendment rights were violated in two instances; first, when Appellant made statements in response to Sgt. Leatherman's questioning before Appellant was placed under arrest and administered his *Miranda* rights and second, when Sgt. Leatherman was present for Appellant's telephone conversation with Appellant's father.

{¶13} There are three methods of challenging a motion to suppress. It appears from Appellant's brief that Appellant is not challenging the trial court's findings of facts, but that the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Appellant argues the trial court incorrectly relied upon *Berkemer v. McCarty* (1984), 468 U.S. 420, in finding the conversation between Sgt. Leatherman and Appellant prior to arrest was permissible

roadside questioning. Appellant argues the trial court's reliance on *Berkemer*, supra, was misplaced because the questioning of Appellant took place after Appellant was removed from his vehicle and detained behind the police cruiser for several minutes before being formally placed under arrest and handcuffed.

{¶14} A defendant has the constitutional right against self-incrimination under both the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. In interpreting this right, it has been held that the state may not use statements stemming from a custodial interrogation of the defendant unless it demonstrates the use of certain procedural safeguards to secure the privilege of against self-incrimination. *Miranda v. Arizona* (1966), 384 U.S. 436.

{¶15} The requirements of a *Miranda* rights warning is only triggered by a custodial interrogation. *State v. Mason* (1998), 82 Ohio St.3d 144, 153, citing *Berkemer*, supra. The mere exercise of police investigative duties does not equate with custody. *State v. Coleman*, 7th Dist. No. 06 MA 41, 2007-Ohio-1573, ¶ 16. To determine whether a custodial interrogation occurred, the court must ask how a reasonable person in Appellant's position would understand the situation. Id. at 154, citing *Berkemer*, supra. If there was not a formal arrest, then to establish custody there must be a restraint on the freedom of movement to a degree associated with a formal arrest. *Coleman*, supra, citing *California v. Beheler* (1983), 463 U.S. 1121, 1125 and *Oregon v. Mathiason* (1977), 429 U.S.

{¶16} In *Berkemer*, the U.S. Supreme Court held that roadside questioning of a motorist detained pursuant to a routine traffic stop did not constitute "custodial interrogation" for purposes of the *Miranda* rule, so that pre-arrest statements the

motorist made in answer to such questioning were admissible against the motorist. If that person "thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda.*" Id. at 440.

{¶17} The Supreme Court compared the usual traffic stop to a "so-called '*Terry* stop' than to a formal arrest." Id. A *Terry* stop is not an arrest requiring probable cause; rather it is an investigative seizure made with mere reasonable suspicion of criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1. The Court found the traffic stop exception to *Miranda* to be constitutionally valid because a traffic stop is temporary, brief, public and substantially less police-dominated than the type of interrogation at issue in *Miranda* itself. Id. at 437-439. The Court stated that although a traffic stop curtails freedom of movement by the detainee and imposes some pressure to answer questions, the pressure does not sufficiently impair the privilege against self-incrimination to warrant a *Miranda* warning. Id. at 436-437. Thus, the Court determined that an officer making a traffic stop can "ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." Id. at 439.

{¶18} Accordingly, *Miranda* is not triggered merely because an officer questions a stopped motorist in order to investigate suspicions of driving under the influence. *Coleman*, supra. In this present case, Appellant directs this Court's attention to only one pre-arrest statement made by Appellant, specifically in reference to what Appellant had to drink that night. Sgt. Leatherman testified that Appellant made no further statements regarding drinking and driving from the time in Appellant's car back to the

station. (Partial Trans. of Motion to Suppress Hrg., p. 2). Further, while Appellant states in his brief that he was made to stand behind the police cruiser during the traffic stop, we can find no such evidence in the partial transcript of the motion to suppress hearing provided to this Court.[1] We find the trial court did not err in applying *Berkemer* to the present case. As such, we cannot find the officer's pre-arrest questioning of Appellant violated Appellant's Fifth Amendment rights.

{¶19} Appellant next argues the trial court erred in failing to suppress Appellant's post-arrest videotaped conversation with his father. Appellant's father is also an attorney. Appellant argues the conversation should be suppressed under two theories: violation of Appellant's Fifth Amendment rights and violation of the attorney-client privilege.

{¶20} Upon a review of the record in this matter, we cannot find the trial court erred in denying Appellant's motion to suppress in regards to the conversation. There was no evidence presented that Appellant was subject to interrogation by Sgt. Leatherman during the conversation. Sgt. Leatherman stood a few feet away from Appellant when he spoke to his father. (Partial Trans. of Motion to Suppress Hrg., p. 2-4). The record of the conversation shows that Appellant asked the officer questions during the conversation to relay information to his father and the officer was surprised that Appellant was speaking to him. (Trans. of Videotape of Appellant Talking with His Attorney, p. 3-4). Finally, the record provided to this Court fails to reflect that Appellee raised any information at trial contained in the conversation between Appellant and his father. We find this evidence further supports the trial court's decision that the recording

[1] We will focus on the ramifications of the lack of a written transcript when addressing Appellant's third Assignment of Error.

of the conversation did not violate Appellant's Fifth Amendment rights or his attorney client privilege.

{¶21} Appellant's first Assignment of Error is overruled.

II.

{¶22} Appellant argues in his second Assignment of Error that the trial court abused its discretion when it sentenced Appellant to nine days in jail and a two-year license suspension. Appellant states he was a first-time offender and the circumstances of the incident did not warrant such a sentence. We disagree.

{¶23} A sentence that is within the statutory limitations is not excessive. *State v. Elkins*, 5th Dist. No. 05 CA C 0008, 2006-Ohio-3997, at ¶ 37, citing *State v. Juliano* (1970), 24 Ohio St.2d 117, 120. Appellant was convicted under R.C. 4511.19(A)(1)(a). The sentencing requirements for a violation of R.C. 4511.19(A)(1)(a) are set forth in R.C. 4511.19(G). R.C. 4511.19(G)(1)(a)(i) states that if a sentence is being imposed for a violation of R.C. 4511.19(A)(1)(a), the trial court shall sentence the offender to a mandatory jail term of three consecutive days. The court may impose a jail term in addition to the three-day mandatory jail term but "in no case shall the cumulative jail term imposed for the offense exceed six months." R.C. 4511.19(G)(1)(a)(i). Further, R.C. 4511.19(G) states that, "[i]n all cases, a class five license suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of section 4510.02 of the Revised Code." A class five suspension is subject to a definite period of six months to three years. R.C. 4510.02(A)(5).

{¶24} We review the trial court's sentencing decision under an abuse of discretion standard. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. We find the trial court did not abuse its discretion in sentencing Appellant within the statutory limitations.

{¶25} Appellant's second Assignment of Error is overruled.

III.

{¶26} Appellant argues in his third Assignment of Error that the trial court erred when it issued its judgment entry overruling Appellant's appeal of the administrative license suspension because that entry conflicted with the trial court's oral decision made during the ALS appeal hearing (held during the suppression hearing).

{¶27} On May 17, 2007, the trial court issued a judgment entry in which the court overruled Appellant's ALS appeal. The trial court therein found that the evidence demonstrated: (1) Appellant was lawfully under arrest for OVI at the time the BMV 2255 was read; (2) Sgt. Leatherman informed Appellant of the consequences of taking the test and refusing to take the test; and (3) Appellant consulted with his father about the test. The trial court then held, in the written judgment entry, that Appellant knowingly, intelligently and voluntarily refused to submit to the breath test.

{¶28} In contradiction with the trial court's decision, Appellant refers this Court to a discussion between the judge and the prosecutor that occurred at the suppression hearing on May 4, 2007. Appellant quotes the following exchange between the prosecutor and the judge in his brief:

{¶29} "Judge: The ALS was appealed on February 15th when Mr. Owens entered a not guilty plea on behalf of the defendant, and then it was scheduled basically for a hearing along with this hearing today.

{¶30} "Pros: So is he going to remain under ALS until you make a ruling or how's that work?

{¶31} "Judge: No. Cause I'm gonna probably at least do that part of it sooner and I'm gonna grant the ALS appeal and the basis is that the BMV 2255 wasn't complete when it was served on the defendant and there's a provision that requires if it's not complete, it can be notarized, it can be subsequently sworn and then you know re-served on the defendant which is fine, in this case it wasn't, I understand what happened here, but the uh, specifically §4511.119(e)(sic) says complete copy supposed to be served it wasn't, subsequently things were completed but that completed form was never served on the defendant. Now I can't answer the other question which is did the BMV really put him under an ALS suspension between the date of the stop and now, I'm not really sure what they do and I'll probably have to run a leads to check that to see what period he was really subject to an ALS or not so I can't answer that question, alright. Anything else?"

{¶32} Appellant argues the trial court correctly determined in the aforementioned exchange that the BMV 2255 was incorrectly filled out and the later corrected copy was never served upon Appellant.

{¶33} It is well settled that courts speak through their journal entries and not by oral pronouncement. *Gaskins v. Shiplevy* (1996), 76 Ohio St.3d 380, 382, 667 N.E.2d 1194; *State v. King* (1994), 70 Ohio St.3d 158, 162, 637 N.E.2d 903; *Schenley v. Kauth*

(1953), 160 Ohio St. 109, 113 N.E.2d 625, at paragraph two of the syllabus. Appellant acknowledges that a court speaks through its journal entries, but argues the journal entry finding no error is contrary to law and also against the manifest weight of the evidence. This Court must therefore consider Appellant's argument in light of the trial court's decision to overrule Appellant's ALS appeal.

{¶34} Appellant has provided this Court with the trial court's discussion with the prosecutor in regards to the ALS appeal within the text of his brief. However, while Appellant argues there was an error in the administrative license suspension process, we can find no transcript concerning evidence presented at the ALS appeal hearing in regards those errors. App. R. 9 provides for the record on appeal, and states in pertinent part:

{¶35} "(A) Composition of the record on appeal the 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 shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. *When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify*

their accuracy, and append such copy of the portions of the transcripts to their briefs." (Emphasis added).

{¶36} Accordingly, if the transcript of proceedings is in the electronic medium, Appellant must type or print those portions of the transcript necessary for the appellate court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcript to his or her brief. *State v. Judy*, 5th Dist. No. 2007-CAC-120069, 2008-Ohio-4520, ¶ 5.

{¶37} Appellant provided this Court with a partial transcript of the suppression hearing. Upon review of that partial transcript, we find the portion provided by Appellant does not contain any reference to the ALS appeal hearing and any evidence presented in that regard. Absent a complete transcript, we are unable to review the facts underlying the propriety of the administrative license suspension based upon the proper completion of the BMV 2255 form. *Judy*, supra, citing *State v. Auld,* Delaware App. No.2006-CAC-120091, 2007-Ohio-3508 at ¶ 9. Factual assertions appearing in a party's brief, but not in any papers submitted for consideration to the trial court below, do not constitute part of the official record on appeal, and an appellate court may not consider these assertions when deciding the merits of the case. *Akro-Plastics v. Drake Industries* (1996), 115 Ohio App.3d 221, 226, 685 N.E.2d 246, 249. In *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, the Supreme Court of Ohio held the following: "[t]he duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162. This principle is recognized in App.R. 9(B), which provides, in part, that ' * * *the

appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.* * *. 'When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." (Footnote omitted.)

{¶38} Based upon the evidence before us, we cannot say the decision to overrule Appellant's administrative license suspension appeal was against the manifest weight of the evidence. Appellant's third Assignment of Error is overruled.

{¶39} Accordingly, the judgment of the Delaware Municipal Court is affirmed.

By Delaney, J.

Farmer, J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

PAD:kgb

[Cite as *State v. Stern*, 2008-Ohio-5979.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ROSS H. STERN	:	
Defendant-Appellant	:	Case No. 07CAC-06-0029

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware Municipal Court is affirmed. Costs to Appellant.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS