IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

BRUCE LYNN CRUM,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. CVA1 07-83
County Court Case No. 07-TR-154449-O

Appeal from the County Court,
For Orange County,
Christine Groves, Hearing Officer.

Clifford J. Geismar, Esquire,
for Appellant.

No appearance,
for Appellee.

Before POWELL, TURNER, THORPE, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING LOWER COURT

Appellant Crum appeals from the hearing officer's order judging him guilty of the civil traffic infraction of improper change of lanes, withholding adjudication of guilt, and ordering him to pay a fine and to attend an aggressive driving class. Both the law enforcement officer and Appellant testified, giving different versions of what occurred. A transcript of the hearing testimony was made a part of the record. For the reasons stated below, we affirm.

The sole issue on this appeal is one of credibility, that is, who did the hearing officer believe, the law enforcement officer or Appellant.

Many pro se litigants and a few attorneys, do not fully understand the appellate process.[1] In this opinion, we will go to great lengths to explain the reasons for our decision and will quote directly from opinions of the Florida Supreme Court and District Courts of appeal, which we are mandated by law to follow.

We start with the long-standing fundamental rule of law that "[i]n appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979).

Credibility of Witnesses

Next, we point out that where the sole issue on appeal is credibility of the witnesses, an appellate court cannot substitute its judgment for that of the trial judge, hearing officer or jury. As was repeated recently in Hillier v. City of Plantation, 935 So.2d 105,107 (Fla. 3d DCA 2006)(citing Adkins v. State, 650 So. 2d 61, 62 (Fla. 2d DCA 1994):

> Faced with conflicting evidence, the trial court chose to believe the City's witnesses. This is merely a credibility determination, and 'it is for the trial court who heard the testimony below, not this court, to evaluate and weigh the credibility of witness testimony and other evidence adduced at trial.'

This is only logical, since it is the trial judges, hearing officers and jurors, not the appellate judges, which have the opportunity to see and hear the witnesses testify, observe their bearing and demeanor while testifying, and resolve any conflicts in the evidence. Another circuit court appeal has addressed this issue on similar facts and reached the same conclusion we do. See Mansfield v. State, 4 Fla. L. Weekly Supp. 7a (Fla. 10th Cir. Ct. May 2, 1996).

[1] For example, some believe that an appeal is a new trial by the appellate court on the record and briefs, or that filing an appeal will automatically get the litigant a new trial or hearing before the county court or hearing officer. However, that is not so. The function of the appellate court is to review certain acts or omissions by the judge or hearing officer which have been specifically identified and argued in appellant's brief in order to determine if error occurred, and if so, what should be done.

Transcript of Proceedings Below Furnished As Part of Record On Appeal

Where a transcript of the proceedings below has been furnished, an appellate court can review the record to determine if the decision of the trial judge or hearing officer is supported by substantial competent evidence and is not against the manifest weight of the evidence. A trial judge's decision following a non-jury trial comes to the appellate court with a presumption of correctness and will not be disturbed unless totally unsupported by competent substantial evidence or manifestly against the weight of the evidence. Desvigne v. Downtown Towing Co., 865 So.2d 541, 542 (Fla. 3d DCA 2003).[2] For a case decided by this Court in its appellate capacity applying this legal principle, see Pegues v. Midland Credit Mgmt., Inc., 14 Fla. L. Weekly Supp. 427a (Fla. 9th Cir. Ct. Feb. 7, 2007).

Transcript Not Furnished

It is the responsibility of the appellant to furnish the appellate court with a record that is prepared and transmitted in accordance with the rules. Fla. R. App. P. 9.200(e). The record on appeal shall consist of the original documents, exhibits, and transcript(s) of proceedings or a stipulated statement of the proceedings. Fla. R. App. P. 9.200(a). Such transcripts would include the testimony of the witnesses and would be made by a stenographic court reporter or by a qualified transcriber transcribing an official audio disk made by the trial clerk. Where an appellant has not furnished a transcript, the appellate court "must give utmost credence to his [the trial judge's or hearing officer's] fact findings, and assume there was the best imaginable evidence adduced to support them." Hudson Pest Control, Inc. v. Westford Asset Mgmt., Inc., 622 So.2d 546, 547 (Fla. 5th DCA 1993). Thus, where no transcript has been provided, the

[2] "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). "Competent substantial evidence is tantamount to legally sufficient evidence." In re M.F., 770 So. 2d 1189, 1192 (Fla. 2000). The word "manifest" is "synonymous with evident, visible or plain." 2 Bouvier's Law Dictionary 2083.

appellate court has no authority to set aside the trial judge's or hearing officer's decision, and it is required to affirm. See Applegate, 377 So. 2d 1150.[3]

In conclusion, we have carefully reviewed the record, the transcript of the testimony, and Appellant's initial brief. Because we find that the sole issue is one of credibility of the witnesses and we further find that the hearing officer's decision is based upon substantial competent evidence and not against the manifest weight of the evidence, the order appealed from must be affirmed. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

AFFIRMED.

DONE and **ORDERED** at Orlando, Florida this __11___day of ___August_____, 2009.

_____/s/_____
ROM W. POWELL
Senior Judge

_____/s/_____
THOMAS W. TURNER
Circuit Judge

_____/s/_____
JANET C. THORPE
Circuit Judge

[3] It is always wise for a litigant to retain a court reporter or determine in advance if the clerk in attendance will make an audio recording of the proceedings. One can never know when a transcript might be necessary for an appeal or other post-proceedings purposes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 11 day of August, 2009, to the following: **Clifford J. Geismar, Esquire**, 2431 Aloma Avenue, Suite 150, Winter Park, Florida 32792 and **Office of the State Attorney, Appeals Unit,** 415 N. Orange Avenue, Orlando, Florida 32801.

/s/
Judicial Assistant