

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff-Appellee,

vs.

SCOTT L. MARSHALL,

Defendant-Appellant.

Case No. CR00-18

JUDGMENT ON APPEAL

DATE OF HEARING: July 30, 2001.
DATE OF RENDITION: July 30, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: Oral arguments on appeal from county court after remand from Court of Appeals.
APPEARANCES:
For appellant: David W. Jorgensen without defendant.
For appellee: Thomas P. Herzog, Holt County Attorney.
SUBJECT OF JUDGMENT: Further proceedings on appeal from county court (case number CR99-305) after remand from Nebraska Court of Appeals.
PROCEEDINGS: See journal entry rendered July 30, 2001.
OPINION:

1. The appellant appeals from the judgment and sentence of the county court upon a jury verdict for driving under the influence of alcohol, second offense.
2. This court had previously affirmed the county court judgment in all respects. On further appeal to the Nebraska Court of Appeals, that court affirmed in part as to the assignments of error relating to the conviction for driving under the influence in the county court, but reversed this court's denial of the defendant-appellant's motion to file a supplemental bill of exceptions and remanded for further proceedings. In conformity therewith, this court ordered the county court to file a supplemental bill of exceptions and for further oral arguments thereafter. The supplemental bill of exceptions has been filed pursuant to the

mandate.

3. The only assignments of error arising from the supplemental bill of exceptions concern the county court sentencing proceeding. Paragraphs Nos. 6 and 7 of the statement of errors filed May 25, 2000, relate to that sentencing proceeding. This court's disposition of the other assignments in the statement of errors were affirmed by the Court of Appeals.

4. Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Patterson*, 7 Neb. App. 816, 585 N.W.2d 125 (1998).

5. Appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Id.* Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

6. Paragraph 7 of the statement of errors concerns the admission of Exhibit 27. The objection at sentencing attacked the form of the certification of Exhibit 27. Exhibit 27 is a multi-page document. A certification stamp appears only on the first page, stating "I do hereby certify that *this* is a true copy of *the original* on file with this court[.]" Exhibit 27 (emphasis supplied) (capitalization omitted). A proper signature and title of the deputy clerk, under seal of the county court for Hall County, Nebraska, appears with the stamp. The defendant asserts that only the first page is certified because each page does not bear a similar stamp. But the county court record makes it clear that it was submitted as a nine page document at the sentencing hearing, with all pages stapled together.

7. NEB. REV. STAT. § 25-1285 (Reissue 1995) specifies a procedure for proving judicial records of Nebraska courts. See *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984). That procedure does not mandate a specific form of certification. In addition, Nebraska Evidence Rule 902 dispenses with the necessity for extrinsic evidence of authenticity in certain circumstances, placing

considerable importance upon the certifying officer's seal and signature. NEB. REV. STAT. § 27-902(1) and (4) (Reissue 1995). The seal, signature, and official capacity of the officer clearly appear on the document. The only substantive question is whether the certification sufficiently includes the remaining pages of the stapled document.

8. This court concludes that the form of the certification is sufficient to show prima facie compliance with §§ 25-1285 and 27-902. Nothing in the certification language expressly limits the certification to a single page. Nothing in the record affirmatively shows that the subsequent pages were not part of the document certified by the deputy clerk under seal. Nothing precluded the defendant-appellant from offering contradicting testimony by the defendant or anyone else having personal knowledge to show that this document did not accurately reflect the judicial record of the county court case file.

9. The theory behind liberal admissibility has been stated as:

In the case of innumerable writings which almost invariably correctly show their origins on their face, the slight obstacle to fraud presented by authentication requirements is far outweighed by the time and expense of proving authenticity. The danger of injustice and delay is greater than the danger of forgery. Rule 902 covers such documents which experience has proved generally reliable in showing their own authenticity.

Fortifying circumstances – difficulty, ease of detection and criminal sanctions – generally make the danger of forgery very slight in connection with this limited class of self-authenticating documents. In view of the slight danger of forgery, it is unnecessary to require the proponent to furnish further evidence of authenticity, especially in the situations where there “is great inconvenience amounting sometimes to practical impossibility.” In some cases, the facts that would provide further evidence of authenticity are within the knowledge of the opponent of the evidence, making it even more unfair to require the proponent to present this evidence.

The trial judge should, therefore, not use his [or her] discretion to exclude documents coming within Rule 902's classifications. The opponents of the evidence are in no way precluded from contesting authenticity and evidence may be presented to the jury to be considered in deciding how much weight to give the document; they are only precluded from disputing admissibility on the ground of authentication.

5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 902[01] (1982).

10. This court concludes that the county court did not err in admitting Exhibit 27.

11. The defendant-appellant's other assignment claims that insufficient evidence existed to enhance the defendant's sentence. Exhibit 27 was the only evidence offered on enhancement. Because

this court concludes that the county court properly received that entire document, the court concludes the record is sufficient to show a prior conviction. The county court correctly determined that sufficient evidence existed to establish the prior conviction.

12. Because the assigned errors lack merit and no plain error appears in the record, the judgment should be affirmed.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The judgment of the county court is **AFFIRMED**.
2. Costs on appeal, except the appeal to the Court of Appeals in that court's case No. A-00-000907, are taxed to the defendant-appellant.
3. Pursuant to the mandate of the Court of Appeals, costs on appeal in that court's case No. A-00-000907 are taxed to the party incurring such costs, costs of defendant-appellant taxed at \$52.00, costs of plaintiff-appellee taxed at \$-0-.
4. The mandate shall issue as provided by law.

Signed at O'Neill, Nebraska, on July 30, 2001.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties, **and deliver a certified copy to county court.**
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days, **stating "Judgment of county court AFFIRMED"**.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed
"Judgment on Appeal" entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge

**THE FOLLOWING DOES NOT CONSTITUTE ANY PORTION OF THE ABOVE
JUDGMENT OR ORDER AND IS INCLUDED SOLELY FOR THE CONVE-
NIENCE OF THE CLERK OF THE DISTRICT COURT:**

1. Assuming that the clerk of the district court places the file stamp and date upon this order (the “entry” defined by § 25-1301) on Monday, July 30, 2001, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Court of Appeal would be **Wednesday, August 29, 2001**.
2. If further appeal **is** timely perfected, issuance of the mandate of this court would await the mandate of the higher appellate court.
3. If **no** further appeal is timely perfected, within 2 judicial days after expiration of time for appeal, § 25-2733(1) requires the clerk of the district court to issue the mandate and to transmit the mandate to the clerk of the county court together with a copy of the decision.
4. The clerk of the district court should be prepared to transmit the mandate on **Thursday, August 30, 2001**.
5. In anticipation, at the clerk’s earliest convenience, the clerk should prepare a draft mandate for review to assure that it is properly completed as to form. The form is provided in the form book. The space for the district court decision would be filled in as “**AFFIRMED**”.
6. The mandate should be prepared in **two** duplicate originals. Both copies would be properly dated as to date of issuance, signed by the clerk, and the district court seal affixed.
7. **One** of the duplicate originals would be filed in the district court file. It would, of course, be file-stamped and docketed.
8. The **other** would be transmitted to county court on the **same day** that it is **issued**. The clerk of the district court would physically hand carry it to the county court clerk for filing in that court. **Attached** to the county court copy should be a **copy of the above judgment or order**. That attached copy does not have to be specially certified. The judge realizes that, pursuant to the court’s instructions, the district court clerk will have already transmitted a certified copy of the judgment or order to the county court at the time of entry. But the statute (§ 25-2733(1)) specifically requires that a copy of the decision be attached to the mandate.