

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00271
BRANDON SHUMAN	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2008CR1971

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: August 9, 2010

APPEARANCES:

For Defendant-Appellant:

RODNEY A. BACA
610 Market Ave. N.
Canton, OH 44702

For Plaintiff-Appellee:

JOHN D. FERRERO
STARK COUNTY PROSECUTOR

RENEE M. WATSON
110 Central Plaza South, Suite 510
Canton, OH 44702-1413

Delaney, J.

{¶1} Defendant-Appellant Brandon Shuman appeals the decision of the Stark County Court of Common Pleas to revoke his community control sanction.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 12, 2009, Appellant pled guilty to one count of Domestic Violence, in violation of R.C. 2919.25(A), a felony of the fourth degree. The trial court sentenced Appellant to three years of community control. The sentencing entry stated that a violation of any condition of the terms and conditions of community control could lead to a prison term of 17 months. Specific to this case, the sentencing entry stated in paragraph 14 that, “Defendant shall follow all rules and regulations of treatment facilities or programs of any type in which he or he [sic] is placed or ordered to attend while under the jurisdiction of the Court, and/or the Department of Rehabilitation and Correction.”

{¶3} Appellant was placed in the Stark Regional Community Corrections Center (“SRCCC”).

{¶4} Appellant was terminated from SRCCC on August 31, 2009. On September 1, 2009, Appellant’s probation officer, Dennis William, filed a motion to revoke or modify Appellant’s probation. The motion alleged that Appellant failed to comply with the rules and regulations of SRCCC and was terminated from the program as a result.

{¶5} Appellant waived his probable cause hearing. The trial court conducted the full evidentiary hearing on September 14, 2009.

{¶6} At the hearing, the trial court heard testimony from Diane Wilson, the SRCCC Operations Director. Wilson stated that her duties as Operations Director were to maintain the day-to-day operations and supervise the probation department, the resident supervisors, the food service department, and the maintenance department. (T. 6).

{¶7} Wilson testified that when Appellant came to the SRCCC facility, the admissions officer went over the rules and regulations of the program listed in the resident handbook and Appellant attended an orientation class. (T. 9). Appellant signed the resident handbook on April 22, 2009. Id.

{¶8} Wilson stated that Appellant was terminated from the program due to 12 rule violations since his admission into the program. Id. Appellant made eight class-two minor rule violations including failure to follow staff directives two times, abuse of a sick day two times, manipulation of staff, failure to attend education class, sleeping at an unauthorized time, and failing to attend chemical dependency class. (T. 10). Appellant made three class-one violations. Id. These violations were lying to staff two times and having a positive urine screen for cocaine. (T. 9, 10). Appellant had one major violation of gambling. (T. 10).

{¶9} Wilson testified that Appellant's major rule violation was sufficient for Appellant to be terminated from the program. (T. 11). Ongoing rule violations could also result in termination per the resident handbook. Id.

{¶10} Wilson did not personally witness Appellant committing the rule violations nor did she write the reports regarding the rule violations. (T. 14). As to the major rule violation of gambling, Wilson testified that Dennis Hickman, the resident supervisor

reported the violation. (T. 15). The resident supervisor observed Appellant and Appellant's roommate in a room with dice and money on the floor. (T. 15-16).

{¶11} Dennis Williams, Appellant's probation officer, also testified. Williams testified that he had not spoken to Appellant until he was notified on August 31, 2009 that Appellant had been terminated from the SRCCC program and Williams came to arrest Appellant. (T. 20).

{¶12} The trial court determined at the conclusion of the hearing that the State proved by a preponderance of the evidence that Appellant violated the terms and conditions of his community control. (T. 25). The trial court found the appropriate remedy was to sentence Appellant to a 17-month prison term. *Id.*

{¶13} On September 18, 2009, Appellant filed a Request for Discovery pursuant to Crim.R. 16(A), four days after the evidentiary hearing.

{¶14} The trial court journalized its decision to revoke Appellant's community control on October 13, 2009.

{¶15} It is from this decision Appellant now appeals.

ASSIGNMENT OF ERROR

{¶16} Appellant raises one Assignment of Error:

{¶17} "THE COURT VIOLATED THE MINIMUM DUE PROCESS REQUIREMENTS FOR REVOCATION OF COMMUNITY CONTROL SANCTIONS."

{¶18} In his sole Assignment of Error, Appellant contends he was deprived of due process in the proceedings to revoke his community control. Specifically, Appellant complains that (1) he did not receive information from the State regarding Appellant's violations; (2) no one from SRCCC with personal knowledge of Appellant's violations

testified at the evidentiary hearing; and (3) the resident supervisor who reported Appellant's major violation may have had a bias against Appellant.

{¶19} In *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656, the United States Supreme Court held that the due process requirements of *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, with regard to parole violation hearings, were applicable to probation revocation proceedings. The minimal due process requirements for final revocation hearings include:

{¶20} “(a) [W]ritten notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.” *Id.*, citing *Morrissey*, *supra*, at 489.

{¶21} Appellant first argues that he was not given any information from the State regarding Appellant's alleged violations. Appellant states that his counsel sent the State a letter on September 2, 2009 requesting information.¹ Appellant also filed a Request for Discovery pursuant to Crim.R. 16(A) on September 18, 2009.

{¶22} It is well settled that community control revocation hearings are not criminal proceedings. *State v. Stafford* (Aug. 16, 2001), Tuscarawas App. No. 2000 AP

¹ This letter was not filed with the Clerk of Courts and is not part of the trial court record. As such, we cannot consider the letter in this appeal.

12 0095. Because a community control revocation proceeding is not a criminal proceeding, it has been held that the discovery procedures outlined in Crim.R. 16 are inapplicable to the revocation process. *State v. Stafford*, supra, citing *State v. Parsons* (Nov. 15, 1996), Greene App. No. 96 CA 20. However, even though Crim.R. 16 is inapplicable to the community control revocation proceedings, Appellant is entitled to some minimum due process rights as stated in *Gagnon*, supra: disclosure to the (probationer or) parolee of evidence against him.

{¶23} In the present case, we find that Appellant's due process rights were not violated in regards to the disclosure of the evidence against Appellant. First, Appellant received a discharge letter from the SRCCC outlining the 12 infractions committed by Appellant that resulted in his discharge from SRCCC. (T. 10, Exhibit 3). Second, Appellant was provided the opportunity to have a probable cause hearing, which Appellant waived. At this hearing, Appellant would have had the opportunity to discover evidence that he sought in his Request for Discovery filed on September 18, 2009. Third, at the full evidentiary hearing, Appellant had the opportunity to confront and cross-examine witnesses and to present his own witnesses and documentary evidence.

{¶24} Accordingly, we find no due process violation as to the disclosure of evidence against Appellant.

{¶25} Appellant next argues that his minimum due process rights were violated because no one from SRCCC with personal knowledge of Appellant's violations testified at the evidentiary hearing. "Generally, probation revocation hearings are not subject to the rules of evidence. The admission of hearsay evidence into a probation revocation hearing can only be construed as reversible error when it constituted the sole, crucial

evidence in support of the probation violation determination. *State v. Thompson*, Wood App. No. WD-06-034, 2007-Ohio-2665, ¶ 44, citing *State v. Ohly*, 166 Ohio App.3d 808, 853 N.E.2d 675, 2006-Ohio-2353. Additionally, in regard to any issues concerning the right to confront witnesses as set forth in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, we have held that said case does not apply to community control revocation hearings. See *State v. Crace*, Fairfield App. No. 05CA93, 2006-Ohio-3027, ¶ 18.” *State v. Redick*, Fairfield App. No. 08 CA 73, 2009-Ohio-3850, ¶11.

{¶26} Because a community control revocation hearing is not a criminal trial, the State does not have to establish a violation with proof beyond a reasonable doubt. *State v. Payne*, Warren App. No. CA2001-09-081, 2002-Ohio-1916, citing *State v. Hylton* (1991), 75 Ohio App.3d 778, 782, 600 N.E.2d 821. Instead, the prosecution must present “substantial” proof that a defendant violated the terms of his community control sanctions. *Id.*, citing *Hylton* at 782, 600 N.E.2d 821. Accordingly, we apply the “some competent, credible evidence” standard set forth in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, to determine whether a court's finding that a defendant violated the terms of his community control sanction is supported by the evidence. See *State v. Umphries* (July 9, 1998), Pickaway App. No. 97CA45; *State v. Puckett* (Nov. 12, 1996), Athens App. No. 96CA1712. This highly deferential standard is akin to a preponderance of the evidence burden of proof. See *State v. Kehoe* (May 18, 1994), Medina App. No. 2284-M.

{¶27} Once a court finds that a defendant violated the terms of his community control sanction, the court's decision to revoke community control may be reversed on

appeal only if the court abused its discretion. *Columbus v. Bickel* (1991), 77 Ohio App.3d 26, 38, 601 N.E.2d 61. An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Maurer* (1984), 15 Ohio St.3d 239, 253, 473 N.E.2d 768.

{¶28} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881, 111 S.Ct. 228, 112 L.Ed.2d 183. Reviewing courts should accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections, which cannot be conveyed to us through the written record. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 523 N.E.2d 846.

{¶29} In the case sub judice, Diane Wilson testified as to the violations that resulted in Appellant's termination from the SRCCC program. She stated that she did not personally witness Appellant's infractions but as Operations Director, she was responsible for all appeals in the facility and she reviewed Appellant's sanction history. (T. 14). Appellant committed 12 rule violations, including drug usage and gambling.

{¶30} Appellant admitted that he tested positive for cocaine while at SRCCC. (T. 24). Wilson stated that while Appellant was terminated from the program after the major rule violation of gambling, Appellant could have been terminated earlier for his ongoing violations. (T. 11). In this case, SRCCC continued to attempt to work with Appellant after the drug violation to decrease the amount of his rule violations. (T. 12).

{¶31} We find the hearsay evidence presented in this case to be permissible and it was not the sole, crucial evidence in support of Appellant's community control

revocation. Appellant's rule violations were properly documented and testified to, demonstrating by a preponderance of the evidence Appellant's violation of his community control sanctions.

{¶32} Appellant finally argues the major rule violation of gambling, which resulted in Appellant's ultimate termination from SRCCC, was documented by a resident supervisor that may have had a bias against Appellant. In relation to Appellant's above hearsay argument, Appellant states because the resident supervisor did not testify at the hearing, his due process rights were violated.

{¶33} Wilson testified that Dennis Hickman, a SRCCC resident supervisor, witnessed Appellant gambling and wrote the rule violation report. (T. 16). Counsel for Appellant asked Wilson if she had any knowledge that Hickman could have been biased against Appellant. Id. Wilson replied that she did not. Id.

{¶34} Counsel went on to ask if Appellant had made a report against another resident supervisor, Mike Smith, for inappropriate conduct towards Appellant. Id. Wilson stated that she was aware of the report and Smith was disciplined for the conduct. (T. 17). Smith and Hickman worked on the same shift and were probably working together when the gambling incident was discovered. Id. Wilson was asked if Smith was biased against Appellant. Id. Wilson replied that Smith did not write the gambling report. Id.

{¶35} We agree that the preponderance of the evidence fails to establish that Smith had any connection to the major rule violation report of gambling.

{¶36} Accordingly, our review of the record shows the trial court's decision to revoke Appellant's community control sanctions to be within its discretion and Appellant was afforded due process during the revocation proceedings.

{¶37} Appellant's sole Assignment of Error is overruled.

By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

PAD:kgb

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRANDON SHUMAN	:	
	:	
	:	Case No. 2009CA00271
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN