

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
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Plaintiff-Appellee	:	C.A. CASE NO. 23505
v.	:	T.C. NO. 08 CR 929
	:	
ROBERT BRYAN LEWIS	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 6th day of August, 2010.

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FROELICH, J.

{¶ 1} This case is before the court on Defendant-Appellant Robert Lewis’s appeal from a trial court’s decision to revoke his community control and sentencing him to 14 months in prison. Because the trial court did not abuse its discretion in revoking Appellant’s community control, the judgment of the trial court will be affirmed.

I

{¶ 2} On April 8, 2008, Appellant was indicted on one count of Burglary, a felony of the fourth degree. Appellant pled no contest to the charge and on August 7, was sentenced to five years of community control. The conditions of his community control sanction required the following: pay court costs and attorney fees; attend the SWOP program to obtain and maintain verifiable employment; have no contact with victim; pay child support; obtain drug and alcohol assessments and follow through with any recommended treatment; provide verification of prescribed medications; complete 200 hours of community service; attend anger management counseling; and continue treatment in the Absat program. The termination entry also noted that Appellant was on “no breaks” status. The court informed Appellant that the possible sanctions for violating his community control included a longer term of community control, a more restrictive sanction, or a prison term of 18 months.

{¶ 3} On November 6, 2008, a capias was issued for the Appellant as an absconder. He was arrested on March 27, 2009.

{¶ 4} On April 22, 2009, a notice of violation of community control was filed. Numerous violations were alleged: Appellant failed to provide verification of his employment or child support payments; he failed to report for meeting with his probation officer as instructed; he failed to make regular payments toward his financial obligations; he failed to provide verification of medications; he failed to complete 200 hours of community service; he failed to attend anger management counseling; and he failed to provide verification of continued treatment at the Absat Program.

{¶ 5} At the evidentiary hearing on the notice of violation, Appellant's probation officer, Brandon Hayes, testified in support of the allegations. He explained that, although Appellant was in compliance with the terms of his community control for the first several months, he missed a couple of days at the Personal Planning Project (PPP), and stopped reporting to Hayes. Appellant was declared an absconder in November, 2008, and there was no contact with him until his arrest more than four months later.

{¶ 6} Once arrested, Appellant posted bond and again was in compliance with the terms of his community control for the two months between his arrest and the revocation hearing. Based on Appellant's performance while on community control and his criminal history, which consisted of three non-support charges in the 1990's and several misdemeanors mostly in the 1980's and 90's, and his "no-breaks" status, Hayes concluded that he could not work with Appellant and recommended that Appellant's community control be revoked.

{¶ 7} Appellant also testified at the hearing. He explained that he told Hayes's supervisor, Jill Johnson, who was also the supervisor of PPP, about medical problems with his back and heart, and he provided documentation from his surgeon. Johnson told Appellant that he could no longer participate in PPP because he could not sit through the classes. As a result of his medical problems, Appellant was not able to continue doing the work that he had been doing, but he was able to get a job delivering pizzas. However, his driver's license was revoked, and he lost the job. Appellant's cell phone was shut off in November, 2008. Appellant testified that he advised Hayes of a new telephone number, and he received one call from Hayes at that number. He claims that he tried to call Hayes on a few other occasions, but kept getting Hayes's answering machine. Appellant explained that after his medical problems caused him to miss a

couple of appointments and prevented him from completing PPP, he was afraid he would go to prison, so he panicked and did not report to Hayes.

{¶ 8} The trial court found that Appellant had violated the terms of his community control and sentenced him to 14 months in prison. Appellant filed a timely notice of appeal.

II

{¶ 9} Appellant's Assignment of Error:

{¶ 10} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REVOKED THE PROBATION OF APPELLANT."

{¶ 11} "The right to continue on community control depends upon compliance with community control conditions and is a matter resting within the sound discretion of the court. Accordingly, we review the trial court's decision to revoke a defendant's community control for an abuse of discretion." *State v. Jackson*, Montgomery App. No. 23458, 2010-Ohio-2836, ¶56, internal citations omitted. "Abuse of discretion has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." *Id.*, internal citations omitted.

{¶ 12} "Because a community control violation hearing is not a criminal trial, the State need not prove a violation beyond a reasonable doubt. *State v. Cofer*, Montgomery App. No. 22798, 2009-Ohio-890, ¶12. 'The State need only present substantial evidence of a violation of the terms of a defendant's community control.' *Id.*" *State v. Brandon*, Montgomery App. No. 23336, 2010-Ohio-1902, ¶17.

{¶ 13} Even if the court accepted some of Appellant's explanations for part of his non-compliance (medical problems, driver's license, etc.), which it apparently did not, Appellant admitted substantial non-compliance and absconding for four months. There was certainly "substantial evidence" that Appellant was in violation of the terms of his community control sanctions.

{¶ 14} We understand Appellant's argument to be further that even if he were in violation of the conditions of his community control, the court should have imposed a less restrictive sanction and continued him on community control. "Community control is not a contract for good behavior. The community control sanction is deemed the appropriate sentence to both punish the offender and protect the public. Community control is not 'a break'; it is the punishment that fits the crime." *State v. Beverly*, Ross App. No. 01CA2603, 2002-Ohio-118 (emphasis in original).

{¶ 15} "R.C. 2929.15(B) provides a trial court with three options if an offender violates a condition or conditions of community control. *State v. Belcher*, Lawrence App. No. 06CA32, 2007-Ohio-4256, ¶ 20. These are: (1) extend the terms of the community control sanction, (2) impose a prison term that does not exceed that prison term specified by the court at the offender's sentencing hearing; or (3) impose a stricter community control sanction. R.C. 2929.15(B)." *State v. Palacio*, Ottawa App. No. OT-07-015, 2008-Ohio-2374, ¶ 8. A trial court's choice of sanction under R.C. 2929.15(B), where the defendant has violated the conditions of community control, is subject to review on appeal under an abuse of discretion standard. *Id.*; *State v. Wolfson*, Lawrence App. No. 03CA25, 2004-Ohio-2750, ¶ 8.

{¶ 16} Pursuant to R.C. 2929.19(B)(5), Appellant was notified at the time of

original sentencing to community control that, in the event he violated the conditions of community control, he could face the specific prison term of 18 months. Accordingly, the trial court's sentencing options for Appellant's violations of community control included imposition of a sentence of imprisonment for up to 18 months, and the defendant was sentenced to 14 months.

{¶ 17} As the court said in *State v. Gilliam* (June 10, 1999), Lawrence App. No. 98-CA-30:

{¶ 18} "The pertinent statutes appear to direct the focus of a court's inquiry on violation of a community control sanction to the violation of the sanction itself, and not the original offense(s) which led to its imposition. It logically follows then that the court must focus on determining a punishment that is commensurate with the seriousness of the sanction violation and which adequately protects the public from any future crime by the offender. See R.C. 2929.11(A). Because, the community control sanction chosen constitutes adequate punishment, the primary issues posed by a violation of that sanction would be whether the violation evidences a need for stronger protection of the public and how much punishment is deserved for failing to respect the court's authority or breaching the court's trust. Griffin & Katz, [Ohio Felony Sentencing (1998 Ed.)] at 295, § T1.15. Moreover, as Judge Griffin and Professor Katz explain in the following excerpt from their treatise, imprisonment is not always warranted for violations of community control sanctions:

{¶ 19} "Many violations of community control sanctions will not indicate that the offender poses a likelihood of committing future crime so much as that the offender is resistant to control. Failures to report to the supervising officer, failures to participate

faithfully in an educational or treatment program, failures to seek or hold employment, failures to perform community service, failures to make regular payments of restitution, and even failures to abide faithfully by an electronic monitoring sanction may not necessarily indicate a likelihood of criminal behavior so much as a resistance to supervision. Absent evidence that the offender is likely to be engaging in conduct harmful to the public, the purpose of any sanction for such violation is to compel compliance with the original sanction and to prevent continued disobedience of the court's order. Thus, prison would usually not be appropriate.

{¶ 20} “ ‘Evidence may exist, however, that the offender's misconduct-albeit not criminal-shows that the offender is likely to be committing other crimes that are harmful to the public. In that event, a sanction sufficient to deter such conduct would be appropriate for a noncriminal violation of a community control sanction. That deterrent sanction might not, however, be a prison sanction. The critical question for the court would be “what is the sanction that imposes the least burden on state or local governmental resources that is necessary to protect the public from future crime”? The answer might be prison, but it might also be electronically monitored home detention, residence in a halfway house, or a sentence to jail or to a community-based corrections facility.’ Id. at 427, §§ T5.36-T5.37.” Id.

{¶ 21} The Supreme Court has recognized that R.C. 2929.15(B) affords a trial court “a great deal of latitude in sentencing the offender” for violations of the conditions of community control. *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, ¶ 20. “R.C. 2929.15(B) requires the court to consider both the seriousness of the original offense leading to the imposition of community control and the gravity of the community

control violation.” Id.

{¶ 22} Hayes testified that for nearly four months, despite having a “no breaks” condition on his community control, Appellant did not meet with Hayes, and he was declared an absconder. During that time, Appellant failed to provide verifications of his employment, child support payments, medications, and attendance at counseling programs. Appellant conceded that he did not report to Hayes, even though he knew that he was required to do so. The trial court would have acted within its discretion had it imposed a less restrictive sanction such as local jail time, house arrest, community sentence, or additional programs. However, the judge was able to observe the community control officer as well as the defendant and was familiar with the defendant from sentencing and revocation, and we do not conclude that the trial court abused its discretion in revoking his community control or in imposing a 14-month sentence.

{¶ 23} Appellant’s assignment of error is overruled.

III

{¶ 24} Appellant’s assignment of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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- C. Douglas Copley
- Hon. Mary L. Wiseman