

[Cite as *State v. Turner*, 2017-Ohio-4101.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 27350
	:	
v.	:	T.C. NO. 16-CR-56/2
	:	
RALPH TURNER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 2nd day of June, 2017.

.....
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Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

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FROELICH, J.

{¶ 1} Ralph Turner appeals from a judgment revoking his community control and sentencing him to 12 months in prison. For the following reasons, the trial court's

judgment will be affirmed.

{¶ 2} Turner's counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that after examining the record and the law, he found no potentially meritorious issues for appeal. By entry, we informed Turner that his attorney had filed an *Anders* brief on his behalf and granted him 60 days from that date to file a pro se brief. No pro se brief was filed. The case is now before us for our independent review of the record. *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988).

Procedural History

{¶ 3} On July 21, 2016, Turner pled guilty to one count of possession of heroin, in violation of R.C. 2925.11(A), a felony of the fifth degree. On August 5, 2016, the trial court sentenced Turner to community control for up to five years. The conditions of community control included that Turner attend and complete a drug intervention program and pay court costs and certain other "financial obligations," including \$130 "to the assigned counsel budget."

{¶ 4} On November 1, 2016, the probation department filed a notice of community control violation, which asserted that Turner had violated the requirement that he attend and complete a drug intervention program and further stated that Turner was not complying with any of the terms of his community control. At a hearing on November 10, 2016, Turner admitted to violating "one or more of the terms and conditions" of his community control. In a termination entry filed on November 15, 2016, the trial court found that Turner had violated the terms of his community control. The court sentenced him to prison for 12 months, notified him of the possibility of a three-year term of post-

release control and of the consequences of violating post-release control sanctions, and ordered him to pay court costs. The court disapproved Turner's placement in a program of shock incarceration because of his "inability to be successful on community control"; pursuant to the presentence investigation, Turner had been "non-compliant" in two previous cases while on community control, by failing to complete treatment and by testing positive for drugs.

Violation of Community Control

{¶ 5} Crim.R. 32.3(A) provides: "The court shall not impose a prison term for violation of the conditions of a community control sanction or revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which action is proposed." As this Court has previously stated:

A community control revocation hearing is not a criminal trial. *State v. Hylton* (1991), 75 Ohio App.3d 778, 781, 600 N.E.2d 821. Thus, the State does not have to demonstrate a violation with proof beyond a reasonable doubt. *Id.* at 782, 600 N.E.2d 821. The State need only present substantial evidence of a violation of the terms of a defendant's community control. *Id.*

"The right to continue on community control depends on compliance with community control conditions and is a matter resting within the sound discretion of the court." *State v. Brown*, Montgomery App. No. 22467, 2008-Ohio-4920, ¶ 9, quoting *State v. Schlecht*, Champaign App. No. 2003-CA-3, 2003-Ohio-5336, at ¶ 7. Thus, we review the trial court's decision revoking community control sanctions on an abuse-of-discretion standard.

Id. An abuse of discretion occurs when the trial court's decision is unreasonable, arbitrary, or unconscionable. *Id.*

State v. Jenkins, 2d Dist. Montgomery No. 27173, 2017-Ohio-1073, ¶ 10, quoting *State v. Cofer*, 2d Dist. Montgomery No. 22798, 2009-Ohio-890, ¶ 12-13.

{¶ 6} Turner admitted to violating his community control sanctions; thus, the record does not demonstrate an abuse of discretion by the trial court in revoking community control.

{¶ 7} Appellate counsel raises the issue of court costs as a “potential issue hav[ing] no merit.” Specifically, counsel refers to the order at Turner’s original sentencing that he pay “\$130 to the assigned counsel budget,” and he notes that the court must consider the defendant’s ability to pay in imposing such costs. Counsel also recognizes, however, that Turner did not appeal from the judgment in which those costs were imposed.

{¶ 8} We agree with counsel’s implicit conclusion that res judicata bars Turner from raising an issue on appeal from the revocation of his community control sanctions which could have and should have been raised on direct appeal from the judgment of conviction in which community control was first imposed. See *State v. Fields*, 5th Dist. Richland No. 2012-CA-0011, 2012-Ohio-4808; *State v. Greenberg*, 10th Dist. Franklin No. 12AP-11, 2012-Ohio-3975; *State v. Townsend*, 8th Dist. Cuyahoga No. 97214, 2012-Ohio-496; *State v. Dodson*, 12th Dist. Butler No. CA 2011-02-034, 2011-Ohio-6347. Since Turner failed to raise this issue on direct appeal and the argument is now barred under the doctrine of res judicata, this is not a potentially meritorious argument on appeal from the revocation of community control sanctions. Moreover, Turner is not precluded

from seeking relief from the court costs in the trial court; R.C. 2947.23(C) provides that a court retains jurisdiction to waive, suspend, or modify payment of court costs “at the time of sentencing or at any time thereafter.”

Conclusion

{¶ 9} In addition to the potential error raised by appellate counsel, we have conducted an independent review of the trial court’s proceedings and have found no error having arguable merit. The judgment of the trial court will be affirmed.

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DONOVAN, J. and TUCKER, J., concur.

Copies mailed to:

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Hon. Mary L. Wiseman