

[Cite as *State v. Kubina*, 2017-Ohio-8031.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO, TOWNSHIP OF	)	
BOARDMAN,	)	
	)	
PLAINTIFF-APPELLEE,	)	CASE NO. 17 MA 0005
	)	
V.	)	OPINION
	)	
ALEXANDRIA KUBINA,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Mahoning County Area Court No. 2 of Mahoning County, Ohio Case No. 2015 TRC 02787 BDM
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JUDGMENT:	Affirmed
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APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph Rivera Assistant Prosecutor 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503-1426
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For Defendant-Appellant	Attorney Mark Lavelle 1045 Tiffany South Suite 3 Youngstown, Ohio 44514
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: September 20, 2017

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DONOFRIO, J.

{¶1} Defendant-appellant, Alexandria Kubina, appeals from a Mahoning County Area Court No. 2 judgment sentencing her to five days in jail following her no-contest plea to one count of operating a vehicle while under the influence (OVI).

{¶2} Appellant was arrested for one count of OVI, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1) and one count of speeding, a minor misdemeanor, in violation of R.C. 4511.21(C). Pursuant to plea negotiations, appellant's speeding violation was dismissed and appellant entered a no-contest plea to the one count of OVI.

{¶3} On July 21, 2015, the trial court issued the following orders regarding appellant's OVI conviction: appellant was to pay \$400.00 plus court costs, appellant was sentenced to 180 days of incarceration with 177 days suspended but in lieu of the three days of incarceration, appellant was given the option to complete a driver's intervention program (DIP) within 60 days, appellant's operator's license was suspended for 180 days, and appellant was placed on reporting community control for six months.

{¶4} On December 7, 2015, the Mahoning County Probation Department filed a probation violation charge against appellant. The basis of the probation violation charge was that appellant failed to complete her DIP and she acquired a new OVI charge. Appellant was notified of this probation violation charge on December 17, 2015. The subsequent probation violation hearing was scheduled to take place on January 19, 2016.

{¶5} At the January 19, 2016 hearing, appellant entered a not guilty plea to the probation violation charge and a subsequent hearing was scheduled for March 24, 2016. Six more subsequent hearings were scheduled for various reasons with the final hearing to take place on December 8, 2016.

{¶6} On December 29, 2016, appellant filed a motion to terminate probation. In her motion, appellant argued that her probationary period was terminated on January 17, 2016 which relieved the trial court of jurisdiction to sentence appellant for the OVI conviction for which she was put on probation. Appellant concedes that she

was notified of a potential violation of her probation on December 17, 2015 but argues that because the trial court did not extend appellant's probationary period, it relinquished jurisdiction after the probationary period ended on January 17, 2016. In support of this argument, appellant cited former R.C. 2951.09 which stated "At the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases, and the defendant shall be discharged."

{¶7} On January 3, 2017, the trial court denied appellant's motion stating it retained jurisdiction to sentence appellant because the probation violation charge was filed during the period of community control. The trial court sentenced appellant to five days of incarceration for failure to comply with the July 21, 2015 sentencing order. Appellant subsequently filed a motion to suspend the execution of the sentence which the trial court denied. After filing her notice of appeal, appellant filed a motion to stay her sentence with this Court which was granted. Appellant timely filed this appeal on January 10, 2017. Appellant now raises one assignment of error.

{¶8} Appellant's sole assignment of error states:

THE TRIAL COURT ERRED WHEN IT REVOKED
APPELLANT'S COMMUNITY CONTROL AFTER THE APPELLANT'S
TERM OF COMMUNITY CONTROL HAD EXPIRED.

{¶9} Appellant asserts that the trial court failed to follow former R.C. 2951.09 and subsequent case law interpreting this section by sentencing appellant after the period of community control expired on January 17, 2016. Specifically, appellant argues that because her community control period ended on January 17, 2016 and the trial court did not extend her community control period, the trial court lacked any jurisdiction to sentence her after that date.

{¶10} Plaintiff-appellee, the State of Ohio, argues that former R.C. 2951.09 was repealed in 2004, which makes it and any case law based on that code section inapplicable. Furthermore, the state argues that the trial court acted properly because the initial probation violation charge was filed before appellant's term of community

control had expired.

{¶11} The decision whether to revoke probation is within the trial court's discretion. *State v. Johnson*, 7th Dist. No. 09-MA-94, 2010-Ohio-2533, ¶ 10. Thus, a reviewing court will not reverse a trial court's decision absent an abuse of discretion. *Id.* An abuse of discretion means more than a mere error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980).

{¶12} R.C. 2951.09 was repealed on January 1, 2004. Due to the repeal of R.C. 2951.09, the trial court does not lose jurisdiction to sentence a defendant for a violation of community control just because the period of community control expires. See *State ex rel. Hemsley v. Unruh*, 128 Ohio St. 3d 307, 943 N.E.2d 1014, 2011-Ohio-226, ¶ 12-13. Because R.C. 2951.09 was repealed approximately eleven years before appellant was placed on community control in the case at bar, it is inapplicable.

{¶13} Pursuant to R.C. 2929.25(B), the sentencing court retains jurisdiction over any offender whom it sentences for the duration of the sanction or sanctions imposed. While R.C. 2929.25 was amended on September 13, 2016, the prior version of R.C. 2929.25(B) is identical to the current version. Furthermore, a court has jurisdiction to impose a sentence once the original period of community control expires as long as action is taken to institute a violation hearing during the community control period. *State v. Johnson*, 7th Dist. No. 09-MA-94, 2010-Ohio-2533, ¶ 30 citing *State v. Shorter*, 2d Dist. No. 22188, 2008-Ohio-1986 ¶ 10.

{¶14} In this case, appellant was sentenced to six months of reporting community control beginning on July 21, 2015 and ending on January 17, 2016. The probation violation charge for appellant failing to complete the DIP and for acquiring another OVI charge was filed on December 7, 2015, approximately one month before appellant's community control period expired. Because the probation violation proceeding was instituted prior to the expiration of appellant's community control period, the trial court retained jurisdiction over sentencing appellant.

{¶15} Analyzing appellant's arguments reveals several flaws. First, appellant relies on the Ohio Supreme Court's decision in *Davis v. Wolfe*, 92 Ohio St. 3d 549, 2001-Ohio-1281, 751 N.E.2d 1051. In *Davis*, the defendant-appellee Davis was convicted of six counts of vandalism and three counts of criminal damaging. In addition to other sentences, Davis was placed on probation for five years beginning on March 26, 1993. On October 26, 1997, Davis received a new charge of domestic violence that was not resolved until September 18, 1998, several months after Davis' original probationary period expired. The Ohio Supreme Court ruled that the trial court lacked jurisdiction over Davis for sentencing on the original vandalism and criminal damaging convictions because the probationary period for those convictions had ended. However, the Ohio Supreme Court relied on former R.C. 2951.09 in making this decision which, for reasons previously stated, makes this case inapplicable.

{¶16} Second, appellant relies on the Ohio Supreme Court's ruling in *Kaine v. Marion Prison Warden*, 88 Ohio St. 3d 454, 2000-Ohio-381, 727 N.E.2d 907. Appellant's reliance on *Kaine* is meritless for two reasons. First, *Kaine* also relies on R.C. 2951.09 which is inapplicable for reasons previously stated. Second, the main issue in *Kaine* concerned the date the appellant was initially placed on probation, which is distinguishable from the case at bar. Specifically, appellant Kaine argued unsuccessfully that his probationary period began before the date he was sentenced which would have made his probationary period expire before a probation violation charge was initiated against him. In the case at bar, there is no dispute as to when appellant was placed on probation and there is no dispute that a probation violation charge was instituted prior to her community control period expiring.

{¶17} Third, appellant relies on the Fifth District's ruling in *State v. McKinney*, 5th Dist. No. 03CA083, 2004-Ohio-4035. The *McKinney* case is not persuasive because it relies heavily on the *Davis v. Wolfe* decision which is inapplicable for reasons previously stated.

{¶18} Accordingly, appellant's sole assignment of error is without merit and is

overruled.

{¶19} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, P.J., concurs.