[Cite as *State v. Mahon*, 2018-Ohio-295.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106043

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRIAN MAHON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED;
SENTENCE VACATED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-612054-A

BEFORE: McCormack, J., E.A. Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: January 25, 2018

ATTORNEY FOR APPELLANT

Steven L. Bradley
Marein and Bradley
526 Superior Ave.
222 Leader Building
Cleveland, OH 44114

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Matthew E. Meyer
Assistant County Prosecutor
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

TIM McCORMACK, J.:

{¶1} Defendant-appellant Brian Mahon appeals his sentence for one count of unlawful use of telecommunications device in violation of R.C. 2913.06(B)(1), a felony of the fifth degree. On appeal, Mahon contends that the trial court abused its discretion when it imposed a sentence of five years of community control that included the following conditions: (1) house arrest with GPS monitoring device for one year, and (2) prohibition from consuming alcohol or using drugs and attending any place or function where drugs or alcohol are sold, used, or served. The state of Ohio concedes the error. After an independent review of the record, we reverse.

{¶2} Brian Mahon was previously convicted of a traffic offense and was assessed $175 in court costs associated with the offense. After trial, Mahon, who was an employee of the city of Cleveland Clerk of Courts' office, logged into the clerk of courts' office system and removed the court costs from the file. Mahon was terminated from employment, indicted for his actions, and eventually pleaded guilty to unlawful use of telecommunications device in violation of R.C. 2913.06(B)(1).

{¶3} During his sentencing, the trial court noted that it reviewed the sentencing memorandum and it heard statements from defense counsel, the defendant, and the prosecutor. Defense counsel provided that the action that precipitated this sentencing was an isolated event that is not typical of Mahon, who is an otherwise law-abiding family man with no prior criminal record. The defendant expressed remorse for his conduct. And the prosecutor noted that because Mahon has accepted responsibility for

his actions, and the prosecutor does not believe Mahon is likely to reoffend, he believed that community control sanctions was appropriate punishment.

{¶4} Thereafter, the court noted that it is troubled by Mahon's actions, finding that Mahon "disgraced not only the law profession, but also the clerk of courts and the municipal court system." The court inquired whether Mahon practiced law, to which Mahon replied that he had a law license but did not practice law. Before imposing sentence, the court stated its preference for prison:

> Well, you know what? I know that if I sent you to prison today, which I would very much like to do, I know that Governor Kasich will have his minions letting you out in three weeks, you know, so I'm not sure that that's the right course for me to follow.

{¶5} The court then imposed community control sanctions and noted its conditions:

> So instead I am going to place you on community control sanctions for five years on the following conditions, which of course, many are standard, you will follow all those that the probation department tells you, including no drugs or alcohol and no attending any place or function where drugs or alcohol are sold, served, or used. That includes restaurants, night clubs, casinos, family barbeques, graduations, weddings, etc. But you're also going to be on house arrest for one year. You are gonna have a GPS monitor which will be placed on you today.
>
> * * *
>
> And you will have to verify every time that you are leaving the house, your GPS monitor will tell us where you're going, and you will have to verify the purpose for leaving the house. So you can't just say it's a medical appointment or just say it's church. You will have to be able to have it verified.
>
> * * *

> I'm sure if you went to a cocktail party and told all these people, yeah, I'm going to go in tomorrow and erase all my costs and fines, I don't think they would have written these letters [on your behalf], but people write letters when they don't know the whole facts of the story, but I do believe that, you know, people wouldn't write the letters if they knew what clandestine deceit you were attempting to pull.

{¶6} We review the trial court's imposition of community control sanctions for an abuse of discretion. *State v. Cooper*, 2016-Ohio-8048, 75 N.E.3d 805, ¶ 31 (8th Dist.), citing *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 10. And "[a]lthough a trial court is granted broad discretion in imposing community control sanctions, its discretion is not limitless." *State v. White*, 10th Dist. Franklin No. 14AP-1027, 2015-Ohio-3844, ¶ 5, citing *Talty* at ¶ 11.

{¶7} R.C. 2929.15(A) authorizes a court to impose financial sanctions, "as well as any other conditions of release under a community control sanction that the court considers appropriate." *Cooper* at ¶ 32. Community control conditions, however, must not be overbroad and must reasonably relate to the goals of community control: "rehabilitation, administering justice, and ensuring good behavior." *Talty* at ¶ 11.

{¶8} In determining whether community control sanctions are reasonably related to such goals, courts must consider "'whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to the conduct which is criminal or reasonably related to

future criminality and serves the statutory ends of probation.'" *Talty* at ¶ 12, quoting *State v. Jones*, 49 Ohio St.3d 51, 53, 550 N.E.2d 469 (1990); *Cooper*; *White* at ¶ 8. All three prongs of the *Jones* test must be satisfied for the reviewing court to find that the trial court did not abuse its discretion. *White* at ¶ 10. Additionally, the conditions "'cannot be overly broad so as to unnecessarily impinge upon the [offender's] liberty.'" *Talty* at ¶ 13, quoting *Jones* at 52.

{¶9} Several Ohio courts have previously required some nexus between an offender's crime and drug or alcohol use or abuse in order to uphold an alcohol-related community control condition. *See Strongsville v. Feliciano*, 8th Dist. Cuyahoga No. 96294, 2011-Ohio-5394 (finding the trial court abused its discretion in ordering defendant to have a drug and alcohol assessment and random drug and alcohol testing where the record is devoid of any mention of drugs or alcohol involvement); *State v. Chavers*, 9th Dist. Wayne No. 04CA0022, 2005-Ohio-714 (finding an abuse of discretion in ordering defendant not to consume alcohol or visit a bar that serves alcohol where nothing in the record indicated that alcohol was involved in the crime or the offender's past criminal history); *State v. Wooten*, 10th Dist. Franklin No. 03AP-546, 2003-Ohio-7159 (finding an abuse of discretion in requiring defendant to undergo drug assessment, possess no alcohol, and submit to random urinalysis where record lacked evidence linking offender's connection to drugs or alcohol); *see also State v. Weimer*, 11th Dist. Trumbull No. 2004-T-0040, 2005-Ohio-2361 (upholding probation conditions requiring offender

convicted of driving under the influence from consuming or possessing drugs or alcohol or being found in any establishment where alcohol is sold or consumed by the drink).

{¶10} Also, courts have affirmed alcohol-related community control conditions where the conditions bear some relationship to the court's interest in rehabilitating an offender. S*ee Lakewood v. Hartman*, 86 Ohio St.3d 275, 714 N.E.2d 902 (1999) (upholding trial court's probation condition that offender's vehicle be equipped with an ignition device designed to detect alcohol despite the fact that offender's conviction did not involve alcohol where record shows offender's extensive history of alcohol-related convictions sufficient to support rehabilitation); *State v. Madey*, 8th Dist. Cuyahoga No. 81166, 2002-Ohio-5976 (affirming the trial court's barring offender from consuming alcohol where offender was convicted of misdemeanor assault involving alcohol usage, but reversing further condition that the offender not work in bars, get alcohol counseling, and attend weekly AA meetings because the record lacked sufficient evidence to support a conclusion that the offender had a drinking problem necessitating such conditions); *State v. Curry*, 10th Dist. Franklin No. 90AP-838, 1991 Ohio App. LEXIS 780 (Feb. 21, 1991) (upholding alcohol abstinence condition, in part, because of offender's history of alcohol-related convictions).

{¶11} Here, we cannot say that the trial court's community control condition requiring Mahon to refrain from consuming alcohol (or drugs) and attending any place or function where alcohol (or drugs) are sold, used, or served bears any relationship to the crime for which he was convicted. The record contains no mention whatsoever of drugs

or alcohol having been involved in the incident for which Mahon was convicted. Additionally, there is no indication that Mahon had a history of drug or alcohol abuse that could possibly support the trial court's desire to rehabilitate Mahon.

{¶12} Likewise, we cannot find that house arrest with GPS monitoring is reasonably related to rehabilitating this offender or relates to conduct regarding future criminality. Mahon's conviction is for an isolated, nonviolent offense, and he has no prior criminal history. Further, Mahon has been terminated from employment with the clerk's office. He is therefore unlikely to reoffend or engage in similar offenses in the future. As such, the record does not support the conclusion that confining Mahon to his home for one year under electronic surveillance that continually monitors his location was necessary to rehabilitate Mahon or protect those individuals who may be injured by his conduct.

{¶13} For the foregoing reasons, we find the community control conditions of house arrest and alcohol prohibition do not satisfy the requirements outlined in *Jones*, 49 Ohio St.3d at 53, 550 N.E.2d 469, and we must find the trial court abused its discretion in imposing the two community control conditions. We therefore vacate that portion of the trial court's sentencing order imposing the above conditions. *See Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, at ¶ 25.

{¶14} Mahon's sole assignment of error is sustained.

{¶15} Judgment reversed in part, vacated in part, and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

TIM McCORMACK, JUDGE

EILEEN A. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR