

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-816
	:	(C.P.C. No. 07CR-12-8717)
v.	:	
	:	(REGULAR CALENDAR)
Michael L. Roberts,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Michael L. Roberts, from a judgment of the Franklin County Court of Common Pleas, revoking appellant's community control sanctions and sentencing him to a term of imprisonment.

{¶2} On December 6, 2007, appellant was indicted on two counts of robbery, in violation of R.C. 2911.02. On January 31, 2008, appellant entered a guilty plea to one count of robbery, and the court entered a nolle prosequi as to the remaining robbery count. By entry filed February 1, 2008, the trial court imposed five years of community

control sanctions, with the provision that "if the community control is revoked defendant will be sentenced to a prison term of five years." The court also ordered appellant to pay court costs.

{¶3} On November 18, 2008, a probation officer filed a request for revocation of appellant's probation, alleging that appellant had been found guilty of driving under suspension, and had tested positive for cocaine; the request for revocation further alleged that appellant had failed to appear for appointments with the probation department, failed to report for urine screens, failed to verify his employment, and had not paid court costs. On December 2, 2008, the trial court conducted a hearing on the request for revocation. By entry filed December 4, 2008, the trial court declined to revoke appellant's probation, but the court imposed additional conditions, including requiring appellant to enter and successfully complete a community based correction facility ("CBCF") program.

{¶4} On February 27, 2009, a probation officer filed a request for revocation of appellant's probation on the basis that he had been terminated from the CBCF program on February 6, 2009 (i.e., without having successfully completing the program). On March 24, 2009, the trial court conducted a hearing on the revocation request, which included testimony regarding an altercation at the CBCF involving appellant and several other CBCF residents. Following the presentation of evidence, the trial court concluded there was probable cause to show that appellant violated his probation, but the court again declined to revoke probation; rather, the court reduced appellant's probation to a total of two years on the condition that if he "violates the terms and conditions of probation over the period of the next year, then he is going to go to jail and do five years plus 12

months consecutive." The trial court's decision to continue appellant's probation was journalized by entry filed April 6, 2009.

{¶5} On July 6, 2009, a probation officer filed a request for revocation of appellant's probation, alleging the following violations by appellant: (1) an arrest for petty theft on June 15, 2009; (2) testing positive for cocaine on May 7, 2009, and for alcohol on May 29, 2009; (3) failing to report for a urine screen on May 18, 2009; (4) failing to verify employment; (5) failing to pay court costs; and (6) failing to pay off his supervision fee.

{¶6} The trial court conducted a hearing on July 31, 2009, during which appellant's counsel stipulated to probable cause for the violations. At the conclusion of the hearing, the trial court revoked appellant's probation. The trial court filed a revocation entry on July 31, 2009, imposing a five-year sentence of imprisonment.

{¶7} On appeal, appellant sets forth the following assignment of error for this court's review: "The trial court erred by revoking Appellant's probation."

{¶8} Under his single assignment of error, appellant asserts the trial court erred in revoking his probation on both legal and factual grounds. Specifically, appellant contends: (1) the theft charge was subsequently dismissed (and therefore should not have been deemed a basis for revocation); (2) the trial court should have conducted a hearing to determine whether he had the ability to pay financial sanctions; and (3) following an initial positive urine screen, appellant's probation officer made certain representations affording him a chance for a follow-up screen.

{¶9} Under Ohio law, "[t]he privilege of probation rests upon the probationer's compliance with the probation conditions and any violation of those conditions may properly be used to revoke the privilege." *State v. Bell* (1990), 66 Ohio App.3d 52, 57.

Further, "probation revocation proceedings are not considered stages of criminal prosecution." *State v. Mason*, 10th Dist. No. 01AP-847, 2002-Ohio-2803, ¶24. Thus, in a probation revocation proceeding, the state "need not prove the violation beyond a reasonable doubt." *Id.* at ¶27. Instead, "substantial evidence that a probationer willfully violated the terms of his or her probation is sufficient to support the revocation of probation." *Id.* See also *State v. Miller*, 10th Dist. No. 03AP-1004, 2004-Ohio-1007, ¶10 (during a community control revocation hearing, a trial court is to "consider the credibility of the witnesses and to make a determination based on substantial evidence"). Further, "a trial court's decision to revoke probation will not be disturbed on appeal absent an abuse of discretion." *Id.*

{¶10} Appellant's primary contention is that the trial court erred in revoking his probation based upon his inability to pay his financial obligations. Appellant maintains the trial court should have conducted a hearing to consider his ability to pay, and to determine whether such non-payment was willful or intentional. In support, appellant cites *State v. Scott* (1982), 6 Ohio App.3d 39, for the proposition that it is unconstitutionally discriminatory to revoke probation and imprison an indigent probationer for failure to make restitution where the evidence shows the only reason for non-payment is the inability to pay, and there is no evidence the probationer willfully or intentionally failed to make such restitution payments, or willfully or intentionally failed to obtain employment in order to make restitution payments.

{¶11} The facts of the instant case, however, are distinguishable from those in *Scott*, in which the court found no evidence that a probationer, whose age and health precluded her from obtaining employment, was capable of making restitution payments.

In the present case, as noted by the state, appellant's failure to pay financial sanctions was not the sole basis of the trial court's decision. Specifically, during the hearing, the trial court noted the probation department had requested revocation for "various violations," including appellant's arrest for petty theft, testing positive for cocaine and alcohol, failing to report for a urine screen, and failing to verify employment. Appellant acknowledged testing positive for cocaine and alcohol, admitting he has "problems with drugs and alcohol." Appellant sought to minimize the failed drug test on the basis that his probation officer offered him the opportunity to take a follow-up test, which appellant claimed to have passed "except for the alcohol." Appellant further acknowledged during the hearing that he had pursued volunteer activities "in lieu of looking for work."

{¶12} Upon review, the record in this case does not present "a situation where a purely economic sanction is being enforced by revocation of community control against one who cannot pay it." *State v. Toler*, 154 Ohio App.3d 590, 2003-Ohio-5129, ¶9. Rather, similar to the facts in *Toler* (in which the trial court found the defendant violated community control by: (1) failing to keep his supervising officer informed of his residence, (2) failing to report to his supervising attorney, and (3) failing to pay required financial obligations), the instant case involves "the violation of multiple community control conditions, several of which were not related to the offender's financial status." *Id.*

{¶13} As part of the conditions of his community control, appellant was required to obtain and maintain full-time, verifiable employment, submit to drug screens, and to refrain from the use of drugs and alcohol. Here, the record contains substantial evidence to support the trial court's finding that appellant violated the terms of his probation, and we

conclude the trial court did not abuse its discretion in revoking appellant's community control sanctions.

{¶14} Finally, appellant's pro se "motion of judicial notice," filed subsequent to the filing of appellant's counsel's brief, is denied.

{¶15} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Motion denied; judgment affirmed.

TYACK, P.J., and FRENCH, J., concur.
