

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 14AP-740
Plaintiff-Appellant,	:	(C.P.C. No. 10CR-4365)
v.	:	
	:	(REGULAR CALENDAR)
Jessica Tully,	:	
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on June 9, 2015

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*Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*,  
for appellant.

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APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas terminating defendant-appellee, Jessica Tully, unsuccessfully from intervention in lieu of conviction. For the following reasons, we reverse.

**I. Facts and Procedural History**

{¶ 2} In July 2010, the state indicted Tully on 11 counts of theft, all felonies of the fourth degree. On December 9, 2010, Tully filed a motion for intervention in lieu of conviction, pursuant to R.C. 2951.041. In support of the motion, Tully asserted that she was a drug dependent person or in danger of becoming a drug dependent person within the meaning of R.C. 2951.041(A), that her drug dependence was a factor leading to the charged activity, and that treatment would substantially reduce the likelihood of additional criminal activity. The state opposed the motion for intervention in lieu of conviction, arguing the granting of the motion would demean the seriousness of the offense.

{¶ 3} On June 6, 2011, the trial court held a hearing regarding Tully's request for intervention in lieu of conviction, pursuant to R.C. 2951.041. At that hearing, Tully pled guilty to the 11 counts of theft, and the trial court indicated that the guilty pleas would be held in abeyance pending her participation in the intervention in lieu of conviction program. Two days after the hearing, the trial court filed an entry granting Tully's request for intervention in lieu of conviction. The entry stayed all criminal proceedings in this matter and ordered that Tully be placed under the control and supervision of the Franklin County Court of Common Pleas Probation Department as provided in R.C. 2951.041(D). The trial court's intervention plan for Tully required, among other things, that she abstain from the use of illegal drugs, submit to regular random drug and alcohol screenings, and that she obtain and maintain gainful employment or pursue further educational endeavors.

{¶ 4} On June 26, 2014, Tully's probation officer filed a request for revocation of intervention in lieu of conviction and a statement of Tully's violations of the conditions of her intervention plan. Tully's violations included testing "positive dilute for opiates" on April 25, 2012, failing to provide a urine screen on numerous occasions, providing diluted urine screens on numerous occasions, failing to report on numerous occasions, and failing to obtain and maintain gainful employment or pursue further educational endeavors.

{¶ 5} On August 14, 2014, the trial court held a hearing on the request of the probation department to revoke Tully's intervention in lieu of conviction as a result of Tully's alleged violations of the intervention plan. At the hearing, Tully's counsel did not directly challenge Tully's alleged violations of the intervention plan, but did request the trial court to terminate the intervention as "unsuccessfully completed and allow her to be released." (Tr. 6.) The trial court provided Tully an opportunity to speak regarding the alleged violations. Tully explained that her drug dependency troubles began after the loss of her 12-week-old daughter to sudden infant death syndrome in 2008. Tully further explained that, as the primary caregiver for her other two children, ages 4 and 11, her failures to report often resulted from childcare issues. After hearing statements from Tully and counsel for both sides, the trial court stated, "What all of us are struggling with is procedurally how to end this without accepting 11 felony 4 convictions, which I don't think would be appropriate. So I'm proposing that we put a disposition sheet on the case that says the defendant's intervention in lieu is terminated unsuccessfully. She's

discharged from further responsibilities to the probation department and to the court." (Tr. 18.) The state noted its objection for the record.

{¶ 6} On August 22, 2014, the trial court filed an entry titled "Intervention in Lieu of Conviction Termination Through Revocation Hearing." The entry states the trial court found Tully "to be in violation of Intervention in Lieu of Conviction." But the entry further states "the Defendant having satisfied the Court that Intervention in Lieu of Conviction need not be revoked at this time, said Defendant is hereby terminated from Intervention in Lieu of Conviction as unsuccessful." Additionally, on August 14, 2014, the trial court filed a criminal disposition sheet providing the following instructions to the probation department: "Defendant's participation in the Intervention in Lieu program is terminated as unsuccessful. Probation shall terminate all further supervision."

{¶ 7} On September 19, 2014, the state filed a notice of appeal, claiming an appeal as a matter of right, and a motion for leave to appeal, pursuant to App.R. 5(C), if this court disagreed that the state could appeal as of right. On December 16, 2014, this court issued a memorandum decision finding the state could not appeal as of right. However, upon determining the state sufficiently demonstrated a probability that its claimed error did in fact occur, this court granted the state's motion for leave to appeal, pursuant to App.R. 5(C). *State v. Tully*, 10th Dist. No. 14AP-740 (Dec. 16, 2014) (memorandum decision). Accordingly, the state filed an appellate brief on February 13, 2015. Tully did not file a response. This case was submitted to the court for disposition on April 28, 2015. On May 6, 2015, the state filed a motion to supplement the record on appeal with a transcript of the June 6, 2011 hearing, which this court granted.

## **II. Assignment of Error**

{¶ 8} The state assigns the following error for our review:

The trial court erred by failing to enter a finding of guilty as to all charged counts and impose sentence as required by R.C. 2951.041(F).

## **III. Discussion**

{¶ 9} In its sole assignment of error, the state argues the trial court erred by terminating Tully from intervention in lieu of conviction without accepting Tully's guilty

pleas to the 11 counts of theft charged in the indictment and imposing sentences on each conviction.

{¶ 10} Intervention in lieu of conviction is a statutory creation that allows a trial court to stay a criminal proceeding and order an offender to a period of rehabilitation if the court has reason to believe that drug or alcohol usage was a factor leading to the offense. *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, ¶ 9, citing R.C. 2951.041(A)(1). "In enacting R.C. 2951.041, the legislature made a determination that when chemical abuse is the cause or at least a precipitating factor in the commission of a crime, it may be more beneficial to the individual and the community as a whole to treat the cause rather than punish the crime." *State v. Shoaf*, 140 Ohio App.3d 75, 77 (10th Dist.2000).

{¶ 11} To grant a motion for intervention in lieu of conviction, a trial court must find that the defendant has met all the requirements of R.C. 2951.041(B) and is therefore eligible for intervention in lieu of conviction. *State v. Wiley*, 10th Dist. No. 03AP-362, 2003-Ohio-6835, ¶ 3. But even if a defendant satisfies all the statutory requirements, the trial court has discretion to determine whether a particular defendant is a good candidate for intervention in lieu of conviction. *Id.*, citing *State v. Schmidt*, 149 Ohio App.3d 89, 2002-Ohio-3923 (2d. Dist.).

{¶ 12} If a trial court grants a defendant's request for intervention in lieu of conviction, the court "may stay all criminal proceedings" and must "establish an intervention plan for the offender." R.C. 2951.041(C) and (D). "The terms and conditions of the intervention plan shall require the offender, for at least one year from the date on which the court grants the order of intervention in lieu of conviction, to abstain from the use of illegal drugs and alcohol, \* \* \* and to submit to regular random testing for drug and alcohol use." R.C. 2951.041(D).

{¶ 13} "If the court grants an offender's request for intervention in lieu of conviction and the court finds that the offender has successfully completed the intervention plan for the offender, \* \* \* the court shall dismiss the proceedings against the offender." R.C. 2951.041(E). "Successful completion of the intervention plan and period of abstinence \* \* \* shall be without adjudication of guilt and is not a criminal conviction." R.C. 2951.041(E). But if the offender "fails to comply with any term or condition imposed as part of the intervention plan for the offender, the supervising authority for the offender

promptly shall advise the court of this failure," and the court must "hold a hearing to determine whether the offender failed to comply with any term or condition imposed as part of the plan." R.C. 2951.041(F). "If the court determines that the offender has failed to comply with any of those terms and conditions, it *shall enter a finding of guilty and shall impose an appropriate sanction* under Chapter 2929. of the Revised Code." (Emphasis added.) R.C. 2951.041(F).

{¶ 14} "It is now well-established that R.C. 2951.041(F) clearly and unambiguously conveys the legislative intent that the trial court must sentence a defendant who is found to have failed his or her program of treatment in lieu of conviction to an appropriate sanction under R.C. Chapter 2929." *State v. Davis*, 12th Dist. No. CA2013-12-129, 2014-Ohio-2122, ¶ 10, citing *State v. Taylor*, 10th Dist. No. 99AP-533 (Mar. 14, 2000). *See also Massien* at ¶ 9 (noting that pursuant to R.C. 2951.041(F), "[i]f the offender fails to comply with any term or condition imposed as part of the intervention plan, the court shall enter a finding of guilt and impose the appropriate sanction").

{¶ 15} In its entry terminating defendant from intervention in lieu of conviction as unsuccessful, the trial court found Tully "to be in violation of Intervention in Lieu of Conviction." (Aug. 22, 2014 Entry.) Upon finding that Tully failed to comply with the terms and conditions of intervention in lieu of conviction, R.C. 2951.041(F) required the court to find Tully guilty of each offense to which she pled guilty, and to impose an appropriate sanction for each conviction. Therefore, the trial court erred by not finding Tully guilty of 11 counts of theft and imposing an appropriate sanction for each conviction. Accordingly, the state's sole assignment of error is sustained.

#### **IV. Conclusion**

{¶ 16} Having sustained the state's sole assignment of error, we reverse and remand for further proceedings. Pursuant to R.C. 2951.041(F), the trial court must enter a finding of guilty as to the 11 counts of theft, and impose an appropriate sanction under R.C. Chapter 2929 for each conviction.

*Judgment reversed;  
cause remanded with instructions.*

TYACK and DORRIAN, JJ., concur.

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