

[Cite as *State v. Cunningham*, 2015-Ohio-2554.]

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

STATE OF OHIO

Plaintiff-Appellee

 V_1

JAMES LESTER CUNNINGHAM

Defendant-Appellant

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C.A. CASE NOS. 2014-CA-99
2014-CA-100

T.C. NOS. 13CR392
13CR694A

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 26th day of June, 2015.

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Defendant-Appellant

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FROELICH, P.J.

{¶ 1} James Cunningham appeals from the revocation of his community control

sanctions in two cases. For the following reasons, the trial court's judgments will be affirmed.

{¶ 2} Cunningham's counsel has filed a brief under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that after thoroughly examining the record and the law, he found no potentially meritorious issues for appeal. Counsel identified one potential assignment of error, namely that Cunningham's admissions to the community control violations were not made knowingly, intelligently, and voluntarily. By entry, we informed Cunningham 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).

{¶ 3} On June 3, 2013, Cunningham was indicted on one count of possession of cocaine in an amount less than five grams. *State v. Cunningham*, Clark C.P. No. 13 CR 392. On October 7, 2013, while that case was pending, Cunningham was indicted on two counts of having weapons while under disability and one count of improper handling of a firearm in a motor vehicle. *State v. Cunningham*, Clark C.P. No. 13 CR 694A. Cunningham subsequently pled guilty to the possession charge in Case No. 13 CR 392 and to improper handling of a firearm in Case No. 13 CR 694A; the two additional charges were dismissed.

{¶ 4} On January 27, 2014, the trial court held a combined sentencing hearing on both cases, during which the court ordered three years of community control with intensive supervision in both cases. As part of his community control in Case No. 13 CR 694A, Cunningham was required to successfully complete the West Central Community

Correctional Facility program. The court notified Cunningham that a violation of his community control sanctions could result in a more restrictive sanction, a longer sanction, or a prison term. In Case No. 13 CR 392, the potential prison term was 12 months, and in Case No. 13 CR 694A, the potential prison term was 18 months, to be served consecutively to the sentence in 13 CR 392. Cunningham was ordered to pay a \$1,000 fine in Case No. 13 CR 392 and a \$2,500 fine in Case No. 13 CR 694A. On February 14, 2014, the trial court issued written judgment entries reflecting its oral sentences.

{¶ 5} On April 24, 2014, Cunningham's probation officer notified the trial court that Cunningham was unsuccessfully discharged from the West Central Community Correctional Facility program on April 20. Cunningham appeared before the trial court on April 29 and was released on a personal recognizance bond. A probation violation hearing for both cases was set for June 16, 2014.

{¶ 6} On June 16, Cunningham admitted the violation in both cases and waived a hearing on the merits. The court found that Cunningham's admission was made knowingly, intelligently, and voluntarily, and the matter was set for disposition on July 10, 2014. At that hearing, the trial court gave Cunningham 30 days to demonstrate that he was employed and complying with a drug program. The court ordered that Cunningham be placed on electronic monitoring during this time and that he take weekly drug tests. Disposition on the violation was rescheduled for August 12, 2014.

{¶ 7} On July 21, 2014, Cunningham's probation officer filed an amended affidavit, stating that Cunningham violated his community control sanctions in three additional respects: (1) he failed to report police contact on May 27 and July 17, (2) he violated the terms of his electronic monitoring schedule on July 18, and (3) he associated

on May 27 with Brittany Watkins, with whom he was to have no contact. Cunningham denied the allegations. The court revoked his bond pending a hearing.

{¶ 8} On August 12, 2014, Cunningham admitted the violations alleged in the amended affidavit, and the trial court found that Cunningham made those admissions knowingly, intelligently, and voluntarily. The trial court revoked Cunningham's community control in both cases and imposed the previously-stated prison terms. The court ordered the prison term in Case No. 13 CR 694A to be served consecutively to the sentence imposed in Case No. 13 CR 392, for a total of 30 months in prison. The court orally ordered Cunningham to pay the balance of his fines, which were \$975 and \$2,475, and court costs. The court also orally notified Cunningham of his post-release control obligation and the consequences if he failed to comply with post-release control.

{¶ 9} Cunningham appeals from the revocation of his community control.

{¶ 10} "The right to continue on community control depends upon compliance with community control conditions and is a matter resting within the sound discretion of the court. Accordingly, we review the trial court's decision to revoke a defendant's community control for an abuse of discretion. Abuse of discretion has been defined as an attitude that is unreasonable, arbitrary, or unconscionable." (Internal citations omitted.) *State v. Lewis*, 2d Dist. Montgomery No. 23505, 2010-Ohio-3652, ¶ 11.

{¶ 11} A defendant is entitled to due process when his community control is revoked as the result of a violation of a condition imposed on that control. *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). The due process rights which must be observed in a community control revocation hearing are: (1) written notice of the claimed violations of community control; (2) disclosure of evidence against

him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached hearing body; and (6) a written statement by the fact finder as to the evidence relied upon and the reasons for revoking community control. *Gagnon* at 786, quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *State v. Nallen*, 2d Dist. Miami No. 2012 CA 24, 2013-Ohio-3284, ¶ 18.

{¶ 12} “[C]ommunity control revocation proceedings are not the same as a criminal trial, and a revocation of community control punishes the failure to comply with the terms and conditions of community control, not the specific conduct that led to the revocation.” *State v. Black*, 2d Dist. Montgomery No. 24005, 2011-Ohio-1273, ¶ 17. Upon revoking community control, the trial court may (1) lengthen the term of the community control sanction; (2) impose a more restrictive community control sanction; or (3) impose a prison term on the offender, provided that the prison term is within the range of prison terms available for the offense for which community control had been imposed and the term does not exceed the prison term specified in the notice provided to the offender at the original sentencing hearing. R.C. 2929.15(B).

{¶ 13} Prior to asking Cunningham if he admitted the community control violations, the trial court asked Cunningham a series of questions akin to a Crim.R. 11 plea hearing. Appellate counsel raises as a potential assignment of error that Cunningham’s admissions to the community control violations were not knowing, intelligent, and voluntary, because the trial court did not place Cunningham under oath before asking him questions and the trial court did not ask Cunningham if he was satisfied with his attorney.

{¶ 14} A trial court need not comply with the requirements of Crim.R. 11, which governs pleas, in accepting an offender's admission to community control violations. See, e.g., *State v. Brown*, 3d Dist. Logan No. 8-14-04, 2015-Ohio-468, ¶ 15; *State v. Lucas*, 6th Dist. Ottawa Nos. OT-13-025, OT-13-026, 2014-Ohio-3857, ¶ 7. Instead, Crim.R. 32.3 applies to revocation of community control. That Rule provides that the trial 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."

{¶ 15} Here, the trial court conducted thorough hearings prior to accepting Cunningham's admissions. The court asked Cunningham about his level of education, whether he was under the influence of alcohol, drugs, or medications that affected his ability to understand the procedures, whether he was offered any promises or threatened to induce the admissions, and whether he understood that he could be sentenced to consecutive sentences of 12 months and 18 months in prison if he were found to have violated his community control. The court notified Cunningham that the State had the burden to prove by the preponderance of the evidence that he had violated his community control, that Cunningham had the right to confront witnesses and to subpoena witnesses on his behalf, and that he had the right to testify on his own behalf, but was not required to. Cunningham stated that he wanted to waive those rights and admit to the violations. At the August 12 hearing, Cunningham was asked if he was happy with his attorney's representation. Based on Cunningham's answers, the court found that Cunningham's admissions were knowingly, intelligently, and voluntarily made. We find no arguably meritorious claim that the trial court's hearing was inadequate or that Cunningham's

admissions were not knowing, intelligent, and voluntary.

{¶ 16} After revoking Cunningham's community control, the trial court imposed consecutive sentences. Cunningham had been notified that, if he violated the conditions of his community control, his prison sentences in his two cases could be run consecutively. We need not address whether R.C. 2929.14(C)(4), which deals with the imposition of consecutive sentences for multiple offenses, is applicable here; even assuming, for sake of argument, that it does apply, the trial court made the findings that R.C. 2929.14(C) would have required. The court properly notified Cunningham that the Adult Parole Authority would have the option to place him on post-release control for up to three years, R.C. 2967.28(C), and of the consequences if he violated post-release control.

{¶ 17} Upon review of the entire record, we find no non-frivolous arguments regarding the trial court's revocation of Cunningham's community control in Case Nos. 13 CR 392 and 13 CR 694A. Accordingly, the trial court's judgments will be affirmed.

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FAIN, J. and DONOVAN, J., concur.

Copies mailed to:

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