

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

STATE OF OHIO	:	
	:	Appellate Case No. 2015-CA-27
Plaintiff-Appellee	:	
	:	Trial Court Case No. 14-CR-135
v.	:	
	:	(Criminal Appeal from
ROBERT E. McDARGH	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 11th day of March, 2016.

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FAIN, J.

{¶ 1} Defendant-appellant Robert E. McDargh appeals from his sentence imposed
after he violated the terms of his community control. McDargh contends that the trial

court erred in admitting hearsay testimony at the revocation hearing. The State argues that the Rules of Evidence do not apply to revocation hearings. We conclude that minimum due process requirements are required for revocation hearings, but that McDargh has not established that an error was made admitting the evidence. Accordingly, the sentence imposed by the trial court is Affirmed.

I. The Course of Proceedings

{¶ 2} McDargh was indicted on three counts of Endangering Children, in violation of R.C. 2919.22(A)(1). The indictment included specifications on each count based on McDargh's previous convictions for Endangering Children, which elevated the charges to fourth-degree felonies. Pursuant to a plea agreement, McDargh pled guilty to Count I of the indictment, and the State agreed to dismiss the other two counts. Based on the plea, the trial court found McDargh guilty of one count of Endangering Children, in violation of R.C. 2919.22(A)(1), a felony of the fourth degree. The trial court sentenced McDargh to five years of community control, subject to intensive supervision and control by the Adult Probation Department. The entry of conviction also included an order that "[v]iolation of any part of this sentence shall lead to a more restrictive sanction, or a prison term of 18 months." Dkt. #18. At the sentencing hearing, the trial court informed McDargh that his failure to comply with any rule or any sanction could result in longer, more restrictive sanctions, and "if this happens, you will be sentenced to 18 months in prison." June 17, 2014 Transcript at 9.

{¶ 3} The entry of conviction incorporated the Adult Probation Department's Regulations of Probation, which included twelve specific conditions of community control. McDargh signed the statement listing the conditions, acknowledging that he fully

understood the conditions and agreed to comply. One of the conditions prohibited McDargh from possessing, purchasing or using any narcotic drug or other controlled substance. Another condition required McDargh to complete a program at West Central Community Correctional Facility, and all recommendations for treatment and aftercare. The statement also informed McDargh that, "if the defendant violates any rule of his community control, he could be sentenced to the Ohio State Penitentiary for a period of eighteen (18) months."

{¶ 4} About four months later, McDargh was discharged from West Central Community Correctional Facility after unsuccessfully completing the program. A Clark County probation officer filed an affidavit, Dkt. #22, averring that McDargh had violated the terms of his community control by: 1) testing positive for cocaine, opiates and marijuana on August 29, 2014; and 2) failing to complete the program at West Central Community Correctional Facility. An amended affidavit was later filed adding three more violations of the conditions for community control, including testing positive for opiates on January 13, 2015, having contact with K.S., and violating the terms of GPS monitoring. Dkt. #28. A second amendment to the probation officer's affidavit added two more violations; testing positive for opiates on January 27, 2015 and attempting to tamper with a urine test on February 3, 2015 by concealing a bottle of urine under his clothing. Dkt. #33.

{¶ 5} At the first revocation hearing set to establish McDargh's violations of community control, McDargh admitted to the first alleged violation, testing positive for cocaine, opiates and marijuana on August 29, 2014. The probation officer, Joshua Hunt, testified that McDargh was admitted to the program at West Central Community

Correctional Facility on August 2, 2014, and was discharged, as unsuccessful, on Sept. 2, 2014. Officer Hunt's testimony did not specify any reason for the unsuccessful discharge. Officer Hunt's testimony was based on reports he received from West Central Community Correctional Facility, kept as business records in the regular course of business for the Probation Department. McDargh objected to Officer Hunt's testimony, arguing that it was inadmissible hearsay and violated McDargh's Sixth Amendment right to confrontation. The trial court overruled McDargh's objection. The hearing was continued to allow McDargh to present witnesses to support his position that he was not discharged from the program at West Central Community Correctional Facility for unsuccessfully completing the program. At the second day of the revocation hearing, McDargh called two witnesses; a resident monitor and a counselor, both employed at West Central Community Correctional Facility. Both confirmed that McDargh was harassed by other residents in the program, and that McDargh was discharged because of an altercation. McDargh admitted that when another resident pushed him from behind, as a natural reaction he turned around and shoved the other resident.

{¶ 6} After additional violations were presented in the amended affidavits from the Probation Officer, another revocation hearing was conducted. At the hearing, McDargh admitted to the two additional violations regarding drug abuse. The trial court entered a judgment finding that McDargh violated the terms of his community control by failing to successfully complete the program at West Central Community Correctional Facility, and by McDargh's admission of three drug offenses. Based on these violations, the trial court revoked the order of community control and sentenced McDargh to serve a prison term of eighteen months.

{¶ 7} From the judgment revoking his community control, and sentencing him to prison, McDargh appeals.

II. Standard of Review

{¶ 8} In *State v. Cofer*, we addressed the standard of review for judgments revoking community control, as follows:

A community control revocation hearing is not a criminal trial. *State v. Hylton* (1991), 75 Ohio App.3d 778, 781, 600 N.E.2d 821. Thus, the State does not have to demonstrate a violation with proof beyond a reasonable doubt. *Id.* at 782, 600 N.E.2d 821. The State need only present substantial evidence of a violation of the terms of a defendant's community control. "The right to continue on community control depends on compliance with community control conditions and is a matter resting within the sound discretion of the court." *State v. Brown*, Montgomery App. No. 22467, 2008-Ohio-4920, ¶ 9, quoting *State v. Schlecht*, Champaign App. No.2003-CA-3, 2003-Ohio-5336, at ¶ 7. Thus, we review the trial court's decision revoking community control sanctions on an abuse-of-discretion standard. *Id.* An abuse of discretion occurs when the trial court's decision is unreasonable, arbitrary, or unconscionable. *Id.*

State v. Cofer, 2d Dist. Montgomery No. 22798, 2009-Ohio-890, ¶¶ 12-13.

{¶ 9} Therefore, a trial court's finding that the defendant violated the terms of community control will not be disturbed on appeal absent an abuse of discretion. "Generally, abuse of discretion occurs when a decision is grossly unsound, unreasonable, illegal, or unsupported by the evidence." *State v. Nichols*, 195 Ohio App.3d 323, 2011-

Ohio-671, 959 N.E.2d 1082, ¶ 16 (2d Dist.).

III. The Trial Court Did Not Err by Admitting Testimony of the Probation Officer

{¶ 10} For his sole assignment of error, McDargh asserts:

THE TRIAL COURT ERRED BY PERMITTING A PROBATION
OFFICER TO TESTIFY REGARDING MR. MCDARGH'S PARTICIPATION
IN THE WEST CENTRAL COMMUNITY CORRECTIONAL FACILITY IN
VIOLATION OF THE CONFRONTATION CLAUSE

{¶ 11} McDargh argues that the trial court erred by relying on hearsay evidence to conclude that he violated the terms of his community control. McDargh's argument fails to acknowledge that McDargh admitted to multiple violations of the terms of his community control, and that pursuant to the terms of the conviction entry, even a single violation permitted the trial court to revoke community control and impose a prison term of eighteen months. McDargh was informed of this condition of his community control at the sentencing hearing, in the judgment entry of conviction, and in the document he signed acknowledging the terms of his community control. McDargh cannot establish any error in the trial court's revocation of his community control based on possible evidentiary errors unrelated to the violations that were established by his admissions.

{¶ 12} Even if McDargh's revocation had been based on a single violation regarding his unsuccessful completion of the program at West Central Community Correctional Facility Revocation, we would still conclude that he has failed to present an error with arguable merit. "Revocation hearings are not subject to the rules of evidence, thus allowing for the admission of hearsay evidence." *State v. Westrick*, 3d Dist. Putnam No. 12-10-12, 196 Ohio App. 3d 141, 2011-Ohio-1169, 962 N.E. 2d 818, ¶ 24, citing *State*

v. Patierno, 3d Dist. Defiance No. 4-08-08, 2009-Ohio-410, ¶ 16; Evid.R. 101(C)(3). “The rationale for the exception is that, since a * * * revocation hearing is an informal proceeding, not a criminal trial, the trier of fact should be able to consider any reliable and relevant evidence to determine whether the [defendant] has violated the conditions of his [supervision].” *Columbus v. Bickel* 77, Ohio App.3d 26, 36, 601 N.E.2d 61 (10th 1991), citing *State v. Miller*, 42 Ohio St.2d at 102, 106, 326 N.E.2d 259 (1975).

{¶ 13} We acknowledge that minimum due process requirements for revocation hearings provide the offender the right to confront and cross-examine adverse witnesses. *State v. Miller*, 42 Ohio St.2d 102, 104, 326 N.E.2d 259 (1975). “The introduction of hearsay evidence into a revocation hearing is reversible error when that evidence is the only evidence presented and is crucial to a determination of a probation violation.” *State v. Ryan*, 3d Dist. Union No. 14-06-55, 2007-Ohio-4743, ¶ 9, citing *State v. Ohly*, 166 Ohio App.3d 808, 2006-Ohio-2353, 853 N.E.2d 675 (6th Dist.). A probation officer may introduce a business record maintained in the regular course of business by the Probation Department, by laying a proper foundation in accordance with Evid. R. 803(6).

{¶ 14} In the case before us, the testimony of the probation officer was not the only testimony presented to determine McDargh’s multiple violations of the terms of his community control. The probation officer’s testimony, in which he identified a business record that was regularly maintained in the course of the probation department’s business, was not inadmissible hearsay. McDargh had the opportunity to cross-examine the witness. Furthermore, in his testimony, McDargh admitted that he had been unsuccessfully discharged from the program, contending only that he should not have been. His unsuccessful discharge from the program violated the conditions of his

community control sanctions; the fact that he should not have been so discharged, if accepted as true, would only have served as mitigation of the sanction to be imposed by the trial court for McDargh's multiple violations.

{¶ 15} McDargh's sole assignment of error is overruled.

IV. Conclusion

{¶ 16} McDargh's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and WELBAUM, J., concur.

Copies mailed to:

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