

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NUMBER 14-2000-13

v.

TY INSKEEP

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: August 15, 2000

ATTORNEYS:

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For Appellee.**

BRYANT, J. Defendant-appellant Ty M. Inskeep brings this appeal from the judgment of the Court of Common Pleas of Union County revoking his probation and reinstating his prior sentence for burglary.

On January 12, 1996, Appellant was indicted for burglary, petty theft and criminal mischief. Appellant plead guilty on March 27, 1996, and was sentenced to five to fifteen years. On October 17, 1996, Appellant was placed on shock probation. The terms of his probation required Appellant to abide by the law and to complete a WCCCF program. Since his release, Appellant has been convicted of various offenses such as domestic violence, disorderly conduct, criminal mischief, menacing, driving under suspension, and driving without an operator's license. In addition, Appellant has been terminated from the WCCCF program due to his medical condition.

On March 22, 2000, Appellant appeared before the trial court for probation violations. Appellant admitted to having violated his probation by violating various statutes. After the hearing the trial court found that Appellant had been terminated from the WCCCF program and was in violation of his probation. The trial court then reinstated the original sentence.

Appellant claims the following assignments of error.

The ruling by the lower court that [Appellant] voluntarily did not complete the WCCCF program was against the manifest weight of the evidence.

The lower court's sentence violated the U.S. Constitution as applied to the states through the Fourteenth Amendment as it amounts to cruel and unusual punishment.

The [Appellant's] due process rights were violated when the court acted as an arm of the prosecution.

In the first assignment of error, Appellant claims that the trial court erred by finding he voluntarily did not complete the WCCCF program, thus violating the terms of his probation. The testimony of all of the State's witnesses is that Appellant was terminated from the program because the facility and staff were not equipped to deal with Appellant's medical condition. Thus, the evidence does not support the finding that Appellant did not voluntarily complete the program.

However, the evidence supports the trial court's finding that Appellant violated the terms of his probation. Appellant admitted that he was convicted of two criminal offenses while on probation. Additionally, the probation officer testified that Appellant frequently failed the drug test required by the terms of his probation. Based upon this evidence, the trial court did not err in finding that Appellant violated the terms of his probation and ordering him to complete the original sentence. The first assignment of error is overruled.

The second assignment of error is that the sentence is cruel and unusual. Appellant claims that five to fifteen years is disproportionate to the violation of probation. However, the sentence is not for the probation violations but for the original offense of burglary. The time for appealing

the original sentence has passed, which means any question of the appropriateness of the sentence is barred by the doctrine of *res judicata*. Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceedings except on direct appeal, any defense or any claimed lack of due process that was raised or could have been raised at the trial which resulted in that conviction or on appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. The question of whether this sentence violates the Eighth Amendment could have been raised on direct appeal, thus it cannot be considered in this appeal. The second assignment of error is overruled.

In the third assignment of error, Appellant claims that the trial court acted as a prosecutor by questioning witnesses.

Evid.R. 614(B) permits a trial judge to interrogate a witness as long as the questions are relevant and do not suggest a bias for one side or the other. . . . Absent a showing of bias, prejudice, or prodding of the witness to elicit partisan testimony, it is presumed that the trial court interrogated the witness in an impartial manner in an attempt to ascertain a material fact or develop the truth. . . . A trial court's interrogation of a witness is not deemed partial for purposes of Evid. R. 614(B) merely because the evidence elicited during the questioning is potentially damaging to the defendant.

State v. Blankenship (1995), 102 Ohio App.3d 534, 548, 657 N.E.2d 559, 568 (citations omitted).

Here, the trial court asked the witnesses questions about Appellant's behavior while in the center. The State made allegations that Appellant had refused medications and had refused to follow the instructions of the staff. The trial court questioned the witnesses about this. These facts were relevant to determine whether Appellant had voluntarily caused his termination from the program. In addition, the record does not reveal a bias by the judge against Appellant. Thus, we must presume that the trial court acted impartially. The third assignment of error is overruled.

The judgment of the Court of Common Pleas of Union County is affirmed.

Judgment affirmed.

HADLEY, P.J., and SHAW, J., concur.

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