

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 9-14-28

v.

ANGELO D. BOYKINS,

OPINION

DEFENDANT-APPELLANT.

**Appeal from Marion County Common Pleas Court
Trial Court No. 13-CR-0578**

Judgment Affirmed

Date of Decision: April 6, 2015

APPEARANCES:

***Robert C. Nemo* for Appellant**

***Denise M. Martin* for Appellee**

PRESTON, J.

{¶1} Plaintiff-appellant, Angelo D. Boykins (“Boykins”), appeals the judgment of the Marion County Court of Common Pleas. For the reasons that follow, we affirm.

{¶2} On November 22, 2013, the Marion County Grand Jury indicted Boykins on two counts: Count One of trafficking in heroin in violation of R.C. 2925.03(A)(1), (C)(6), a fifth-degree felony; and Count Two of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a first-degree felony. (Doc. No. 3). On February 20, 2014, the Marion County Grand Jury indicted Boykins in a superseding joint indictment on three counts: Count Three of trafficking in heroin in violation of R.C. 2925.03(A)(1), (C)(6), a fourth-degree felony; Count Eight of trafficking in heroin in violation of R.C. 2925.03(A)(1), (C)(6), a fifth-degree felony; and Count Thirteen of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a second-degree felony. (Doc. No. 52).¹

{¶3} On March 6, 2014, Boykins pled guilty to Count Three, amended to a fifth-degree felony, and the State moved to dismiss Counts Eight and Thirteen. (Doc. No. 78). The trial court accepted his guilty plea, found him guilty on Count Three, as amended, and dismissed Counts Eight and Thirteen. (*Id.*). The trial

¹ The other counts in the superseding joint indictment relate to other defendants.

court sentenced Boykins to two years of community control, including 45 days in jail. (*Id.*).

{¶4} On June 9, 2014, the State filed a “Violation and Notice of Hearing” alleging that Boykins violated his community-control sanctions. (Doc. Nos. 93, 94). At the preliminary community-control-violation hearing on June 10, 2014, the trial court concluded that there was probable cause that Boykins violated his community-control sanctions. (Doc. No. 102). A community-control-revocation hearing was scheduled for June 23, 2014, but that hearing was continued until July 7, 2014. (*Id.*). At the July 7, 2014 hearing, the trial court concluded that Boykins violated “terms 1, 13, and 14 of his community control sanctions and that the community control sanctions should be revoked.” (*Id.*). That same day, the trial court sentenced Boykins to 11 months in prison. (*Id.*).

{¶5} Boykins filed his notice of appeal on July 21, 2014. (Doc. No. 107). He raises three assignments of error. For ease of our discussion, we will discuss Boykins’ second assignment of error first, followed by his first and third assignments of error.

Assignment of Error No. II

Appellant was denied his right to a fair and impartial hearing as a result of the trial court allowing a third hearing and assisting appellee in the presentation of it’s [sic] case.

{¶6} In his second assignment of error, Boykins argues that the trial court erred by “telling [the State] the specific evidence that [the trial court] wanted to hear at a second hearing” and by allowing the State another opportunity to “present the evidence that the trial court wished to hear.” (Appellant’s Brief at 13).

{¶7} As an initial matter, we note that Boykins’ second assignment of error alleges due-process violations to which he did not object at the hearing. Boykins’ failure to object to due-process violations at the community-control-revocation hearing waives all but plain error on appeal. *State v. Allsup*, 3d Dist. Hardin Nos. 6-10-06 and 6-10-07, 2011-Ohio-405, ¶ 30, citing *State v. Gilreath*, 2d Dist. Greene No. 2000-CA-1, 2000 WL 896319, *2 (July 7, 2000). “Crim.R. 52 pertinently provides that only plain errors or defects affecting substantial rights—and not harmless errors—may be noticed where those errors were not first brought to the attention of the trial court.” *State v. Pavlich*, 6th Dist. Erie No. E-10-011, 2011-Ohio-802, ¶ 26, citing Crim.R. 52(A) and (B). Accordingly, we will review Boykins’ second assignment of error for plain error.

{¶8} “‘A defendant under community control is entitled to both a preliminary and a final revocation hearing.’” *State v. Knerr*, 3d Dist. Auglaize Nos. 2-14-03 and 2-14-04, 2014-Ohio-3988, ¶ 14, quoting *State v. Kiser*, 5th Dist. Tuscarawas, No. 2008 AP 030014, 2009-Ohio-1337, ¶ 12, citing *Gagnon v.*

Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756 (1973). “The purpose of the preliminary hearing is to determine if probable cause exists that the defendant violated the terms of his probation or community control.” *Id.*, citing *State v. Delaney*, 11 Ohio St.3d 231, 233 (1984). “The purpose of the final revocation hearing is to give the defendant ‘an opportunity to be heard and to show’ that he either did not violate his conditions or that certain mitigating circumstances ‘suggest that the violation does not warrant revocation.’” *Id.*, quoting *Morrissey v. Brewer*, 408 U.S. 471, 488, 92 S.Ct. 2593 (1972).

{¶9} “This Court has held that although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding.” *State v. McKeithen*, 3d Dist. Marion No. 9-08-29, 2009-Ohio-84, ¶ 22, citing *State v. Ryan*, 3d Dist. Auglaize No. 14-06-55, 2007-Ohio-4743, ¶ 8, citing *Gagnon* at 782. “Therefore, the minimum due process requirements afforded a defendant in a probation revocation proceeding differ from those in a criminal trial.” *Id.* The minimum due-process requirements for revocation hearings are:

- (a) Written notice of the claimed violations;
- (b) disclosure of evidence against him or her;
- (c) the opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses;
- (e) a neutral

and detached hearing body; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revocation.

Id., quoting *State v. Miller*, 42 Ohio St.2d 102, 104 (1975), quoting *Morrissey* at 489.

{¶10} Since a community-control-revocation hearing is not a criminal proceeding, “the State is not required to prove a violation of the terms of community control beyond a reasonable doubt.” *Id.* at ¶ 6, citing *Ryan* at ¶ 7. “The State must, instead, show ‘substantial’ evidence that the offender violated the terms of his community control sanctions.” *Id.*

{¶11} Because Boykins argues in his second assignment of error that he was denied the right to a “fair and impartial” hearing, we assume that he is arguing that he was denied the right to a neutral and detached hearing body.

{¶12} In evaluating whether the hearing body was neutral and detached, courts look to the rules concerning judicial bias. *See Pavlich*, 2011-Ohio-802, at ¶ 31; *State v. Swayne*, 4th Dist. Adams Nos. 12CA952, 12CA953 and 12CA954, 2013-Ohio-3747, ¶ 16. “[A] judge is presumed to be unbiased and unprejudiced in the matters over which he presides.” *Id.*, quoting *In re Disqualification of Olivito*, 74 Ohio St.3d 1261, 1263 (1994). “Thus, the appearance of judicial bias or prejudice must be compelling to overcome the presumption of his integrity.” *Id.*

{¶13} Here, Boykins asserts that the trial court judge erred by instructing the State as to what the State is required to demonstrate at a community-control-revocation hearing and by suggesting what evidence the State should introduce for it to meet its burden of establishing that Boykins violated his community-control sanctions. Namely, the following exchange took place:

[Trial Court]: Now, what I've heard in terms of evidence on the Trafficking at this point is, you know, Brent Reed just provided testimony – very brief testimony based on his review of the – of the Police Report. Defendant testifying denied selling any drugs. You know, I kinda expect the State would bring some evidence in here more specific. I'm not real comfortable going to revocation when all I have is – I've got hearsay evidence that supports Trafficking based on just a review of a report from someone who wasn't involved at all. A direct [sic] evidence from the Defendant denying that he committed the Trafficking. So what I'm inclined to do is to come back here for a third hearing as much

as I hate to do that to – so we can have some real evidence on the Trafficking.

* * *

[The State]: I – I guess my question is this. If – if what your thought is – it almost sounds like you wanna mini Trial on this issue. If that's what you –

[Trial Court]: Well kinda. I mean, he has a due process.

* * *

[Trial Court]: He's then entitled to a second hearing after there's been further time to investigate the facts. Just because we find probable cause at the first hearing doesn't mean that we have to find that there's a violation. I mean, when there's more time to investigate and we hear additional evidence, you know, then we can make that determination. But, yeah, it is a mini Trial. * * * I'm hearing from someone with some direct information that was involved in the case not just a Probation Officer that spent ten minutes reviewing a report and has no – done no investigation on the – on the facts. I

mean, that's fine to get past the initial probable cause. And it's fine if there's not really denial. But in this case, Defendant actually took the stand and said, "I didn't do it". You know, so, you know, I think we need, you know, we need a little bit more evidence.

(June 23, 2014 Tr. at 9-11).

{¶14} While we do not condone the trial court's actions, we do not find that they rise to a level that negates the presumption that the trial court was unbiased and unprejudiced. *Swayne* at ¶ 19. Likewise, Boykins did not point us to any authority that the trial court's actions violated his substantial rights, and we found none.

{¶15} Next, Boykins argues that he was prejudiced by the trial court when the trial court continued the community-control-revocation hearing until July 7, 2014 because the State was not prepared to proceed with the community-control-revocation hearing at that time. "[T]rial courts have inherent power to manage their own dockets." *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 2007-Ohio-2882, ¶ 23. *See also State v. Atkins*, 6th Dist. Sandusky No. S-95-005, 1995 WL 704102, *2 (Dec. 1, 1995) (the reasons for continuances fall squarely within the discretion and authority of the trial court to manage and

control its own docket). Again, Boykins did not point us to any authority that the trial court's actions violated his substantial rights, and we found none.

{¶16} The trial court took no action against Boykins at the June 23, 2014 hearing and he was properly notified of the continued hearing on July 7, 2014. Accordingly, it was not plain error for the trial court to continue the June 23, 2014 hearing.

{¶17} Because Boykins did not point us to any authority that the trial court's actions violated his substantial rights and we found none, we conclude that there is nothing to overcome the presumption of judicial integrity. As such, we conclude the trial court was neutral and detached. Therefore, we find no error or defect in this aspect of the proceedings that would affect Boykins' substantial rights.

{¶18} Boykins' second assignment of error is overruled.

Assignment of Error No. I

The trial court erred in finding that appellant violated the terms of his probation as a result of selling heroin, resulting in the trial court violating appellant's community control sanctions and imposing a prison sentence of eleven months.

{¶19} In his first assignment of error, Boykins argues that the trial court erred by finding that there was substantial evidence that he violated the terms of his community control.

{¶20} As we stated above, the State must show substantial evidence that the offender violated the terms of his community-control sanctions at a community-control-revocation hearing. *McKeithen*, 2009-Ohio-84, at ¶ 6, citing *Ryan*, 2007-Ohio-4743, at ¶ 7. *See also State v. Miller*, 10th Dist. Franklin No. 03AP-1004, 2004-Ohio-1007, ¶ 10 (in making its substantial-evidence determination, the trial court is to consider the credibility of the witnesses).

{¶21} “Substantial evidence is akin to a preponderance-of-the-evidence burden of proof.” *State v. Burdette*, 5th Dist. Morrow No. 10-CA-9, 2011-Ohio-4425, *4, citing *State v. Ohly*, 166 Ohio App.3d 808, 2006-Ohio-2353, ¶ 18 (6th Dist.). “Substantial evidence is considered to consist of more than a mere scintilla of evidence, but somewhat less than a preponderance.” *Id.*, citing *State v. Gomez*, 11th Dist. Lake No. 93-L-080, 1994 WL 102230, *4 (Feb. 18, 1994), citing *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir.1966) and *Marker v. Finch*, 322 F.Supp. 905, 910, fn. 7 (D.Del.1971).

{¶22} The decision of a trial court finding a community-control violation will not be disturbed absent an abuse of discretion. *McKeithen* at ¶ 7, citing *Ryan* at ¶ 7. An abuse of discretion is more than a mere error in judgment; it suggests that a decision is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157-158 (1980). When applying this standard, a reviewing court

may not simply substitute its judgment for that of the trial court. *State v. Adams*, 3d Dist. Defiance No. 4-09-16, 2009-Ohio-6863, ¶ 33.

{¶23} Boykins argues that the State did not present substantial evidence at the community-control-revocation hearing that he violated the terms of his community-control sanctions. Specifically, he argues that the video played at the hearing purporting to show Boykins selling heroin does not show any transaction between him and a confidential informant. Boykins also argues that the confidential informant was not searched prior to her interaction with him and that the substance that she provided law enforcement was not tested. Therefore, Boykins argues that it is unclear if the substance was heroin and it is unclear who gave the confidential informant the substance.

{¶24} At the community-control-revocation hearing, the State presented the testimony of Lieutenant Chris Adkins (“Lieutenant Adkins”) of the MARMET drug task force of the Marion City Police Department. Lieutenant Adkins testified that he was informed by a confidential informant, who was working with the MARMET drug task force, that she could purchase narcotics from Boykins. (July 7, 2014 Tr. at 3-5). Lieutenant Adkins testified that on May 21, 2014 the confidential informant was to “attempt to purchase \$20.00 in heroin off Mr. Boykins.” (*Id.* at 5). He testified that the confidential informant shared that she owed Boykins “a drug debt of \$60.00.” (*Id.*). Because of the debt she owed to

Boykins, Lieutenant Adkins testified that he “instructed the [confidential] [i]nformant to see if [Boykins] would sell \$20.00 worth of heroin to the [confidential informant] and then [the MARMET drug task force would] pay \$40.00 towards the \$60.00 in back fee.” (*Id.*). The State then played a recording of a phone call between the confidential informant and Boykins, which arranged the transaction. (*Id.* at 5-6). (*See also* State’s Ex. 1). During the phone conversation, Lieutenant Adkins testified that the confidential informant asked Boykins to purchase “boy,” “a common term used to describe heroin,” from him. (*Id.* at 6). Lieutenant Adkins further testified that Boykins agreed to sell the confidential informant \$20.00 worth of heroin during the phone conversation. (*Id.* at 8).

{¶25} After the transaction was arranged, Lieutenant Adkins testified that a video camera was placed on the confidential informant and she was searched. (*Id.* at 9, 19). Lieutenant Adkins identified State’s Exhibits 2 and 3 as the video recording and photographs of the transaction, which were shown to the trial court. (*Id.* at 10). He averred that the video recording depicts Boykins and the confidential informant “swapping hands” and that “you can see cash in [Boykins’] hand.” (*Id.*). However, he testified that because the bag of heroin was so small, one cannot see “the physical transaction of the bag” in the video or in the photographs. (*Id.* at 11). At the conclusion of the transaction, the confidential

informant gave Lieutenant Adkins the heroin she purchased from Boykins. (*Id.* at 12). Lieutenant Adkins testified that “[i]t appeared to [sic] heroin, brown heroin.” (*Id.*).

{¶26} Boykins testified on his own behalf. He stated that the confidential informant owed him \$60.00 for “the chicken and the beer,” not for a drug debt. (*Id.* at 35). He testified that the confidential informant asked to purchase heroin from him during the taped phone call, but that he “was just sayin’ anything to get – to make sure that she had the \$60.00 that she owed [him].” (*Id.* at 37). He testified that he met the confidential informant and that she paid him the \$60.00, but that he did not give her any drugs. (*Id.* at 38). Boykins testified that he did not sell the confidential informant the heroin because “nobody that I know even put Heroin in a – in a plastic bag. They use lotto tickets.” (*Id.* at 39). The heroin the confidential informant provided to Lieutenant Adkins was in a plastic bag. (*Id.*).

{¶27} At a community-control-revocation hearing the trial court, being in the better position to observe the witnesses and hear their testimony, is entitled to deference on issues of witness credibility and weight of the evidence. *McKeithen*, 2009-Ohio-84, at ¶ 15, citing *State v. Scheck*, 3d Dist. Marion No. 9-08-20, 2008-Ohio-5314, ¶ 21 and *State v. DeHass*, 10 Ohio St.2d 230, 232 (1967).

{¶28} Here, the trial court was in a better position to assess the credibility of the witnesses and the trial court chose to believe Lieutenant Adkins instead of

Boykins. Based on the evidence presented, we conclude that there was substantial evidence presented that Boykins violated his community-control sanctions. Therefore, the trial court did not abuse its discretion in finding that Boykins violated his community-control sanctions.

{¶29} Boykins' first assignment of error is overruled.

Assignment of Error No. III

The trial court erred in not allowing appellant his right to allocution pursuant to Ohio Criminal Rule 32(A).

{¶30} In his third assignment of error, Boykins argues that the trial court failed to afford him the right to allocution before imposing the 11-month prison sentence at his community-control-revocation hearing.

{¶31} The right of allocution is provided in Crim.R. 32(A)(1), which states that "[a]t the time of imposing sentence, the court shall * * * [a]fford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." "The remedy for a violation of a criminal defendant's right to allocution is a remand for resentencing." *State v. Michael*, 3d Dist. Henry No. 7-13-05, 2014-Ohio-754, ¶ 29, citing *State v. Campbell*, 90 Ohio St.3d 320, 326 (2000).

{¶32} However, Boykins' argument is without merit because there is no requirement for the right of allocution at a community-control-revocation hearing.

Id. at ¶ 30, 31, citing *State v. Krouskoupf*, 5th Dist. Muskingum No. CT2005-0024, 2006-Ohio-783, ¶ 15. Therefore, the trial court did not err by not offering Boykins the opportunity to speak at his community-control-revocation hearing.

{¶33} Boykins' third assignment of error is overruled.

{¶34} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

SHAW and WILLAMOWSKI, J.J., concur.

/jlr