[Cite as *State v. Pettry* , 2007-Ohio-6106.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ERIC PETTRY

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 2006CA0075

O P I N I O N

NUNC PRO TUNC

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Criminal Case No. 04-CR-00177
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	May 20, 2008 Nunc Pro Tunc (Original Date November 5, 2007)

APPEARANCES:

For Defendant-Appellant

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For Plaintiff-Appellee

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Hoffman, J.

Due to a clerical error, the language in ¶15, p. 5 has been changed from overruled to sustained, therefore, this Opinion corrects and replaces the previous Opinion filed November 5, 2007.

{¶1} Defendant-appellant Eric Pettry appeals the judgment of the Licking County Court of Common Pleas which found he violated the terms and conditions of his community control sanction and, as a result of that violation, imposed 16 months imprisonment. The State of Ohio is plaintiff-appellee.

{¶2} At issue in this case is whether the use of hearsay evidence at Appellant's violation hearing denied him due process of law. For the reasons that follow, we find Appellant was denied due process under the facts of this case.

STATEMENT OF THE CASE AND FACTS

{¶3} Appellant pled guilty to the charge of burglary on October 21, 2004. Appellant was sentenced to community control sanctions beginning December 12, 2004.

{¶4} On May 26, 2006, Appellee filed a motion to revoke Appellant's community control status. After a probable cause hearing, the matter proceeded to the second stage violation hearing on June 26, 2006. After hearing, the trial court found Appellant violated his community control sanction for only one of the claimed violations; i.e., Appellant had committed a criminal trespass.

{¶5} Ms. Susie Eisel was the probation officer assigned to supervise Appellant. Ms. Eisel received information Appellant had trespassed on private property. Ms. Eisel based her request for revocation upon her conversation with Mr. Shakey Harris,

apparently a governmental fire inspector. Mr. Harris did not testify at the hearing. Ms. Eisel did testify, but merely relayed the information provided to her by Mr. Harris who apparently conducted the investigation giving rise to the alleged violation.

{¶6} Following the hearing, the trial court found Appellant violated his community control sanction by committing a trespass and imposed a 16 month prison term. It is from that decision, Appellant prosecutes this appeal assigning as error:

{¶7} "I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN ALLOWING THE INTRODUCTION, OVER THE OBJECTIONS OF THE ACCUSED, OF HEARSAY EVIDENCE DURING THE HEARING ON THE DEFENDANT-APPELLANT'S ALLEGED VIOLATION OF COMMUNITY CONTROL.

{¶8} "II. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL THROUGH THE FAILURE TO RAISE OBJECTIONS AND NATURE OF OBJECTIONS RAISED DURING THE PROCEEDINGS BELOW."

I

{¶9} Despite the specific error asserted in his assignment, Appellant nevertheless concedes "[I]t is accepted that the Ohio Rules of Evidence do not have a direct application to the hearing related to the revocation of a criminal defendant's community control status. Evid. R. 101(C)(3) (citation omitted)."[1] Despite such concession, Appellant nevertheless argues he was denied the right to confront his accusers and the due process of law guaranteed to him by the Ohio and United States Constitutions.

[1] Appellant's brief at p. 8.

{¶10} In *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S .Ct. 1756, 36 L.Ed.2d 656, the United States Supreme Court held the following minimum due process requirements apply in a probation revocation proceeding: (a) written notice of the claimed violations of probation, (b) disclosure to the probationer of the evidence against him, (c) an 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 finder as to the evidence relied on and the reasons for revoking probation. *Id.,* at 786.

{¶11} In *State v. Miller* (1975), 42 Ohio St.2d 102, the Ohio Supreme Court considered whether the probationer's right to confront adverse witnesses against him was denied when the trial court permitted a probation officer who did not prepare the entries in the probation department record to testify about the contents of that record. The court held as follows:

{¶12} "Where at a probation revocation hearing the trial court permits a probation officer who did not prepare the entries in the probation department record to testify as to the contents of that record and the probation officer who prepared the entries does not appear, there is a denial of the probationer's right to confront the witnesses against him, and, where the record does not show that the probation officer who prepared the entries was unavailable or that a specific finding was made of good cause for not allowing confrontation, there is a denial of the minimum requirements of due process of law required for probation revocation proceedings." Syllabus.

{¶13} Although Appellant concedes the Rules of Evidence do not necessarily apply to the revocation hearing at issue, Appellant argues at a minimum due process

requires Appellant be afforded the right to confront and cross-examine witnesses; specifically, Mr. Harris.

{¶14} The State rebuts Appellant's argument citing this Court's opinion in *State v. Gullett* (November 13, 2006) Muskingum App. No. CT2006-0010 asserting the direct testimony of the probation officer who prepared the statement of probation violation meets the minimal requirements of due process. However, *Gullett* is distinguishable from the case sub judice as Ms. Eisel did not have direct contact with the witnesses concerning the incident leading to Appellant's probation revocation. Rather, her knowledge of the incident stemmed merely from Mr. Harris' out of court statements relating the results of his investigation of the incident to her. Cross-examination of Ms. Eisel is not a substitute for the ability to cross-examine Mr. Harris. Accordingly, we find, analogous to the *Miller* Court's holding, Appellant was denied the minimum requirements of due process as he was not afforded an opportunity to cross-examine the witness with direct knowledge of the incident.

{¶15} Appellant's first assignment of error is sustained.

II.

{¶16} Based upon our analysis and disposition of Appellant's first assignment of error, we find Appellant's second assignment of error moot.

{¶17} The judgment of the Licking County Court of Common Pleas is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and this opinion.

By: Hoffman, J. and

Delaney, J. concur,

Gwin, P.J. dissents

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

Gwin, P.J., dissenting

{¶18} I respectfully dissent from the majority's disposition of appellant's case.

{¶19} As this Court noted in *State v. Gullett*, 5th Dist. No. CT2006-0010, 2006-Ohio-6564, "[i]n a probation revocation proceeding, the prosecution need not produce evidence establishing a probation violation beyond a reasonable doubt. Rather, the prosecution must present substantial proof that a defendant violated the terms of his or her probation. *State v. Hylton* (1991), 75 Ohio App.3d 778, 600 N.E.2d 821; *State v. Mingua* (1974), 42 Ohio App.2d 35, 327 N .E.2d 791; *State v. Umphries* (June 30, 1998), Pickaway App. No. 97CA45, unreported. Accordingly, in order to determine whether a defendant's probation revocation is supported by the evidence, a reviewing court should apply the "some competent, credible evidence" standard set forth in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. See *State v. Umphries* (July 9, 1998), Pickaway App. No. 97CA45; *State v. Puckett* (Nov. 12, 1996), Athens App. No. 96CA1712. This highly deferential standard is akin to a preponderance of evidence burden of proof. See *State v. Kehoe* (May 18, 1994), Medina App. No. 2284-M. We see no difference in the standard of review between a probation violation and a violation of community control sanctions.

{¶20} "Once a court finds that a defendant violated the terms of probation, the decision whether to revoke probation lies within the court's sound discretion. See *State v. Scott* (1982), 6 Ohio App.3d 39, 452 N.E.2d 517; *Umphries,* supra; *State v. Conti* (1989), 57 Ohio App.3d 36, 565 N.E.2d 1286; *State v. Daque* (Aug. 11, 1997), Ross App. No. 96CA2256. Thus, a reviewing court will not reverse a trial court's decision

absent an abuse of discretion. *State v. Sheets* (1996), 112 Ohio App.3d 1, 677 N.E.2d 818". Id at ¶ 22-23.

{¶21} "A revocation hearing is not a criminal trial, the State only has to introduce evidence showing that it was more probable than not that the person on probation or community control violated the terms or conditions of the same. See *State v. Stockdale* (Sept. 26, 1997), Lake App. No. 96-L-172.

{¶22} "The rules of evidence, including hearsay rules, are expressly inapplicable to a revocation hearing. Evid.R. 101(C) (3). The rationale for this exception is that a trial court should be able to consider any reliable and relevant evidence indicating whether the probationer has violated the terms of probation, since a probation or community control revocation hearing is an informal proceeding, not a criminal trial. *Columbus v. Bickel* (1991), 77 Ohio App.3d 26, 36, 601 N.E.2d 61, citing *State v. Miller* (1975), 42 Ohio St.2d 102, 106, 326 N.E.2d 259. However, in *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656, the United States Supreme Court held that the due process requirements of *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, with regard to parole violation hearings, were applicable to probation revocation proceedings. The minimal due process requirements for final revocation hearings include:

{¶23} " '(a) [W]ritten notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing

body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole." 'Id*.,* citing *Morrissey,* supra, at 489.

{¶24} "The confrontation right at issue in revocation cases does not arise by virtue of the substantive provisions of the Sixth Amendment, but is rather a procedural protection guaranteed by the Fourteenth Amendment. *Columbus v. Lacy* (1988), 46 Ohio App.3d 161, 546 N.E.2d 161, citing *Morrissey,* supra, at 477-480". *State v. Gullett*, supra at ¶ 26-29. "The introduction of hearsay evidence into a probation-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. Jones* (May 9, 1991), 8th Dist. No. 58423, 1991 WL 76031, citing *State v. Mingua* (1974), 42 Ohio App.2d 35, 39-40, 71 O.O.2d 234, 327 N.E.2d 791. See, also, *State ex rel. Hines v. Ohio Parole Bd*. (Dec. 5, 1995), 10th Dist. No. 95APE05-623, 1995 WL 723679 ("in most cases hearsay cannot form the sole basis for revocation of parole")". *State v. Ohly*, 166 Ohio App.3d 808, 816-17, 2006-Ohio-2353 at ¶ 21, 853 N.E.2d 675, 681-682.

{¶25} In the case at bar, the appellant testified "I recently bought a car for $200 that had a fuel leak and we was [sic.] using it to go mushroom hunting on some 4-wheeler trails in the back of Broken Arrow Archery…" (T. at 33-34). The State further presented the trial court with a photograph of appellant's burned-out automobile on the property in question. In making his ruling the appellant had violated the terms of his probation the trial judge noted "…There is a picture of your burned out car, Mr. Pettry, and there's no mushrooms around. There's no 4-wheel drive trail or off-road trail…"

{¶26} Ohio courts have recognized that "harmless error" analysis applies to a claim of confrontation right violations. See, e.g., *State v. Davis,* Cuyahoga App. No. 85477, 2005-Ohio-5544, ¶ 29, citing *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L .Ed.2d 674. Thus, where a defendant's admissions are sufficient by themselves to prove a violation of conditions of probation, it is harmless error even if some of the evidence admitted by the trial court was impermissible. See *State v. Stephens* (May 28, 1999), Huron App.No. H-98-045. *State v. Gullett*, supra at ¶ 30.

{¶27} The fact that no charges were filed is of no consequence. “The failure to prosecute the appellee on these criminal charges would not bar the use of these offenses as the grounds for the revocation of his probation. *Kennedy v. Maxwell* (1964), 176 Ohio St. 215, 198 N.E.2d 658. Furthermore, although not presented in the instant cause, a majority of states which have addressed the issue have found that an acquittal in a criminal prosecution does not preclude revocation of parole or probation on the same charge. *In re Coughlin* (1976), 16 Cal.3d 52, 127 Cal.Rptr. 337, 545 P.2d 249; *Brimhall v. Turner* (1972), 28 Utah 2d 321, 502 P.2d 116; *Standlee v. Smith* (1974), 83 Wash.2d 405, 518 P.2d 721. See, also, *Rubera v. Commonwealth* (Mass., 1976), 355 N.E.2d 800, and *Stone v. Shea* (1973), 113 N.H. 174, 304 A.2d 647 (the courts respectively held therein that a conviction by an inferior court that is appealed to a higher court for a trial de novo may constitute the basis for the revocation of probation on an earlier conviction). *State v. Martin* (1978), 56 Ohio St.2d 207, 210-211, 383 N.E.2d 585, 587.

{¶28} I would find the question in the case at bar is one of credibility of the witnesses which is within the discretion of the trial court. The State introduced

competent, credible evidence showing that it was more probable than not that appellant violated the terms or conditions his probation.

{¶29} I would affirm the decision of the trial court.

s/ W. Scott Gwin

HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
	:	**NUNC PRO TUNC**
ERIC PETTRY	:	
Defendant-Appellant	:	Case No. 2006CA0075

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is reversed and the matter remanded to the trial court for further proceedings in accordance with the law and our Opinion. Costs assessed to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY