

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

STANLEY COX

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 2008CA00264

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 2007CR1753

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 31, 2009

APPEARANCES:

For Plaintiff-Appellee

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Stark County, Ohio

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Farmer, P.J.

{¶1} On November 20, 2007, the Stark County Grand Jury indicted appellant, Stanley Cox, on two counts of breaking and entering in violation of R.C. 2911.13 and two counts of vandalism in violation of R.C. 2909.05, all felonies of the fifth degree. On February 19, 2008, appellant pled guilty as charged. By nunc pro tunc judgment entry filed March 4, 2008, the trial court sentenced appellant to two years of community control. The trial court advised appellant that if he violated his community control, he would be subject to a prison term of ten months on each of the four counts, to be served consecutively.

{¶2} On August 1, 2008, appellant's probation officer, Dawn Porter, filed a motion to revoke community control or modify former order for the reason that appellant violated the terms and conditions of his community control. A hearing was held on October 20, 2008. By judgment entry filed October 23, 2008, the trial court revoked appellant's community control and sentenced appellant to forty months in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE FINDING OF THE TRIAL COURT THAT APPELLANT VIOLATED THE TERMS OF HIS COMMUNITY CONTROL SANCTIONS WAS AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE."

II

{¶5} "THE IMPOSITION OF A FORTY (40) MONTH PRISON TERM UPON APPELLANT FOR VIOLATING THE TERMS OF HIS COMMUNITY CONTROL SANCTIONS WAS CONTRARY TO LAW."

I

{¶6} Appellant claims the trial court's determination that he had violated the terms of his community control was against the substantial weight of the evidence. We disagree.

{¶7} "The privilege of probation rests upon the probationer's compliance with the probation conditions and any violation of those conditions may properly be used to revoke the privilege." *State v. Bell* (1990), 66 Ohio App.3d 52. "Because a community control revocation hearing is not a criminal trial, the State does not have to establish a violation with proof beyond a reasonable doubt." *State v. Wolfson*, Lawrence App. No. 03CA25, 2004-Ohio-2750, ¶7. Instead, the state need only present "substantial proof" that a defendant willfully violated the community control conditions. *State v. Hylton* (1991), 75 Ohio App.3d 778, 782. "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." *State v. Alderson* (August 31, 1999), Meigs App. No. 98CA12. Once a trial court finds that a defendant violated the terms of his/her probation, the decision whether to revoke probation lies within the trial court's sound discretion. *State v. Scott* (1982), 6 Ohio App.3d 39. In order to find an abuse of discretion, we must determine the trial court's decision was

unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶8} The motion to revoke appellant's community control was predicated upon appellant being charged with domestic violence and resisting arrest (a violation of Condition No. 1), having contact with Diana Stinson contrary to his probation officer's direct order (a violation of Condition No. 5), and having contact with Diana Stinson who had a criminal record (a violation of Condition No. 11). T. at 8. Appellant's probation officer, Dawn Porter, had specifically ordered appellant not to have contact with Diana Stinson. T. at 9. Appellant was also missing Melymbrosia appointments and falling asleep in class, and was found to have beer cans at his residence. Id.

{¶9} Stark County Sheriff's Deputy Dustin Hallock reported that Ms. Stinson made a "911" call. T. at 13. Deputy Hallock arrived on the scene and found Ms. Stinson to be "very distraught" with scrapes on her arm. T. at 14-15. Following his investigation, Deputy Hallock located appellant whereupon appellant denied hitting Ms. Stinson, but admitted to having contact with her ("we just had a verbal argument"). T. at 16. Appellant and Ms. Stinson live in the same trailer park, some forty feet apart. T. at 18.

{¶10} Appellant's own admission establishes that he violated Condition No. 5 of his community control by having contact, albeit verbal, with Ms. Stinson. We find this undisputed fact alone is sufficient to substantiate the finding that appellant violated his community control.

{¶11} Assignment of Error I is denied.

II

{¶12} Appellant claims the trial court erred in imposing a forty month prison sentence. We disagree.

{¶13} In the original March 4, 2008 nunc pro tunc sentencing entry, the trial court specifically stated the following:

{¶14} "Violation of any condition of this sentence shall lead to a more restrictive sanction, a longer sanction, or a prison term of ten (10) months on Counts One, Two, Three and Four to run consecutive. After prison release, if post release control is imposed, for violation of post release control conditions the Adult Parole Authority or Parole Board could impose a more restrictive or longer control sanction, or return defendant to prison for up to nine months for each violation, up to a maximum of ½ of the stated prison term. If the violation is a new felony, defendant may receive a prison term of the greater of one year or the time remaining on post release control."

{¶15} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶14, the Supreme Court of Ohio discussed the role of the appellate court in reviewing sentencing as follows:

{¶16} "Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial-fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant's sentence. Instead, the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)."

{¶17} If a trial court's sentence is not contrary to law, then the trial court's sentence is reviewed under an abuse of discretion standard. *Kalish* at ¶17 ("Therefore, assuming the trial court has complied with the applicable rules and statutes, the exercise of its discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion pursuant to *Foster*.").

{¶18} Appellant argues that as a result of *Kalish*, the trial court must conduct a second sentencing hearing and comply with *Foster* [*State v.*, 109 Ohio St.3d 1, 2006-Ohio-856]. Appellant argues a forty month sentence is extreme in light of the nature and seriousness of the violation.

{¶19} From our review of the record, we find the trial court did in fact engage in a *Foster*-type analysis:

{¶20} "I have a different interpretation, Ms. Bible, with all due respect as to why this case didn't go forward in Municipal Court. Ms. Stinson didn't show up and then post not showing up she seemed to have a wonderful relationship with Mr. Cox. And what you are asking this Court to do is to just turn a blind eye and believe that this was a casual chance meeting between the two. They exchanged pleasantries and went on.

{¶21} "When, in fact, it is obvious that this was a confrontation. The evidence shows that Ms. Stinson was -- received physical injuries, that she -- excited utterance testimony was that Mr. Cox was the perpetrator, statement to the deputy upon being arrested without even being asked a question I didn't hit her, we just had an argument and then miraculously this woman doesn't show up for any of the hearings and Mr. Cox and her are speaking intimately soon thereafter.

{¶22} "This is just such a violation of conditions of probation that I find that they are significant enough to revoke community control." T. at 23-24.

{¶23} The trial court imposed sentences within the statutory range for each offense. R.C. 2929.14(A)(5).

{¶24} Upon review, we find the trial court did not err in sentencing appellant to forty months in prison.

{¶25} Assignment of Error II is denied.

{¶26} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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Plaintiff-Appellee

-VS-

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JUDGMENT ENTRY

CASE NO. 2008CA00264

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES