[Cite as *State v. Evans*, 2009-Ohio-5802.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Sheila G. Farmer, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 00068
	:	
	:	
JOSEPH LEWIS EVANS	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Stark County Court of Common Pleas Case No. 2008 CR 0402
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 2, 2009

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO
Prosecuting Attorney,
Stark County, Ohio

BY: RONALD MARK CALDWELL
Assistant Prosecuting Attorney
Appellate Section
110 Central Plaza South - Suite 510
Canton, Ohio 44702-1413

For Defendant-Appellant

MATTHEW PETIT
111 Second Street, N.W.
Suite 302
Canton, Ohio 44702

Edwards, J.

{¶1} Appellant, Joseph Lewis Evans, appeals a judgment of the Stark County Common Pleas Court revoking his community control sanction and sentencing him to four years incarceration. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On May 7, 2008, appellant entered a plea of guilty to one count of domestic violence, a felony of the third degree, in violation of R.C. 2919.25(A). He was sentenced to four years incarceration.

{¶3} Appellant was granted judicial release on January 28, 2009. The balance of his sentence was suspended and he was placed on community control for three years. As a special condition of his community control sanction he was ordered to be evaluated by Stark Regional Community Correction Center (SRCCC) and, if accepted, to successfully complete any recommendations.

{¶4} Appellant was accepted into a residency program at SRCCC and terminated after fifteen days for making threats of violence against his wife, the victim of the offense of domestic violence of which he had been convicted.

{¶5} On Feburary 5, 2009, appellant asked Don Malterer, a transport officer for SRCCC, what would happen if he left the premises. Tr. 18. Appellant said that the only person he would want to see is his wife who lived nearby. Malterer responded that appellant would be terminated from the program if he left the premises. Appellant responded that Malterer did not need to worry about that because appellant was "not going to do 25 to life for murder." Tr. 18. Malterer was concerned about the comments and wrote a report concerning appellant's behavior.

{¶6} Theresa Marulli is a mental health therapist at SRCCC. She met with appellant for a counseling session on February 5, 2009. Appellant expressed agitation and frustration with having been incarcerated for a charge he did not commit and threatened harm against his wife. He indicated that he did not want to be charged with murder. While he did not specifically state to Marulli that he would kill his wife, he was specific that he wanted to harm his wife. Marulli completed a "duty to protect" form to notify appellant's wife of the threat.

{¶7} Appellant was terminated from the SRCCC program on February 6, 2009, for making threats of violence against the victim of his offense. Appellant's probation officer filed a motion to revoke his probation on February 6, 2009, for failing to complete the SRCCC program, in violation of Rule #17 of his probation.

{¶8} The case proceeded to an evidentiary hearing in the Stark County Common Pleas Court. At the hearing, appellant denied threatening to harm his wife. He admitted that he told Marulli that he heard voices telling him to harm his wife, although he did not want to harm her.

{¶9} The court revoked appellant's community control and his judicial release and sentenced him to the original sentence of four years incarceration. Appellant assigns two errors on appeal:

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

{¶11} "II. THE IMPOSITION OF A FOUR (4) YEAR PRISON TERM UPON APPELLANT FOR VIOLATING THE TERMS OF HIS COMMUNITY CONTROL SANCTIONS WAS CONTRARY TO LAW."

I

{¶12} Appellant first argues that the court's finding that he violated his community control conditions is against the weight of the evidence.

{¶13} This Court set forth the standard of review of a court's finding that a defendant violated his community control in *State v. Henry*, Richland App. No. 2007-CA-0047, 2008-Ohio-2474, at ¶14:

{¶14} "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. Payne*, Warren App. No. CA2001-09-081, 2002-Ohio-1916, citing *State v. Hylton* (1991), 75 Ohio App.3d 778, 782, 600 N.E.2d 821. Instead, the prosecution must present "substantial" proof that a defendant violated the terms of his community control sanctions. Id., citing *Hylton* at 782, 600 N.E.2d 821. Accordingly, we 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, to determine whether a court's finding that a defendant violated the terms of his community control sanction is supported by the evidence. 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 the evidence burden of proof. See *State v. Kehoe* (May 18, 1994), Medina App. No. 2284-M."

{¶15} Appellant does not dispute the finding that he failed to complete the SRCCC program. Rather, he argues that his termination from the program was improper.

{¶16} Don Malterer, a transport officer for SRCCC, testified that appellant asked him what would happen if he left the premises. Tr. 18. Appellant told Malterer that the only person he would want to see is his wife who lived nearby. Malterer responded that appellant would be terminated if he left the premises. Appellant responded that Malterer did not need to worry about that because appellant was "not going to do 25 to life for murder." Tr. 18. Malterer was concerned about the comments and wrote a report concerning appellant's behavior.

{¶17} Theresa Marulli, a mental health therapist at SRCCC, testified that she met appellant for a counseling session on February 5, 2009, the same day appellant made the comments to Malterer. Marulli testified that appellant expressed agitation and frustration with having been incarcerated for a charge he did not commit and threatened harm against his wife. He indicated that he did not want to be charged with murder. While he did not specifically state to Marulli that he would kill his wife, he was specific that he wanted to harm his wife. Marulli completed a "duty to protect" form to notify appellant's wife of the threat.

{¶18} Both Marulli and Malterer took appellant's veiled threats against his wife seriously enough that they reported his behavior. Appellant was terminated from the program and by his expulsion from the program, he violated an essential term of his community control. The trial court's finding that appellant violated the condition of his community control is not against the weight of the evidence.

{¶19} The first assignment of error is overruled.

II

{¶20} Appellant argues that the court erred in imposing a four year sentence of incarceration for violating the terms of his community control. Appellant appears to argue that he is entitled to a new sentencing hearing during which the court must consider the relevant statutory sentencing factors as required by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, before imposing a sentence of incarceration.

{¶21} *Foster* and *Kalish* both deal with the imposition of a felony prison sentence for a felony conviction and are inapplicable to the instant action. In this case, appellant was previously sentenced for domestic violence. Contrary to appellant's argument, appellant was not sentenced for violating the terms of his community control. The court imposed the sentence appellant was originally given for domestic violence, which the court had suspended when appellant was granted judicial release. Thus, the court had previously entered sentence in accordance with the statutory scheme and the relevant case law.

{¶22} R.C. 2929.15(B) provides:

{¶23} "If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose a longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit specified in division (A) of this section, may impose a more restrictive sanction under section 2929.16, 2929.17, or 2929.18 of the Revised Code, or may impose a prison

term on the offender pursuant to section 2929.14 of the Revised Code. The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(3) of section 2929.19 of the Revised Code. The court may reduce the longer period of time that the offender is required to spend under the longer sanction, the more restrictive sanction, or a prison term imposed pursuant to this division by the time the offender successfully spent under the sanction that was initially imposed."

{¶24} At the original sentencing hearing, appellant was sentenced to a four-year prison term. The court granted him judicial release and imposed a community control sanction. When the trial court revoked appellant's community control, it imposed the sentence previously given to appellant. The court complied with the R.C. 2929.15(B) in imposing the sentence on appellant for violation of community control.

{¶25} The second assignment of error is overruled.

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

By: Edwards, J.

Farmer, P.J. and

Delaney, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES

JAE/r0805

[Cite as *State v. Evans*, 2009-Ohio-5802.]

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FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JOSEPH LEWIS EVANS	:	
Defendant-Appellant	:	CASE NO. 2009 CA 00068

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

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES