[Cite as *State v. Umphlettee*, 2010-Ohio-5201.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 10-CA-18
RYAN A. UMPHLETTEE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 09 CR 056
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 12, 2010

APPEARANCES:

For Appellant:

WILLIAM T. CRAMER
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Suite 200
Westerville, OH 43082

For Appellee:

KENNETH OSWALT
LICKING COUNTY PROSECUTOR

BRIAN T. WALTZ
20 S. Second St., 4th Floor
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Delaney, J.

{¶1} Defendant-Appellant, Ryan A. Umphlettee appeals the February 16, 2010 decision of the Licking County Court of Common Pleas. Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} In September 2009, Appellant pleaded guilty to three counts of Trafficking in Marijuana in violation of R.C. 2925.03(A)(1)(C)(3)(a) and (C), and one count of Possession of Marijuana in violation of R.C. 2925.11(A)(C)(3)(d). The trial court sentenced Appellant to three years of community control, a fine of $5,000, and one year suspension of driving privileges. If Appellant violated the terms of his community control, the trial court informed Appellant that he would be sentenced to six months in prison for each of the three counts of trafficking and two years in prison for possession.

{¶3} On September 10, 2009, the trial court entered the terms and conditions of Appellant's community control sanctions. Among the terms of his community control, Appellant was subject to a period of house arrest and a curfew; the completion of a community-based correctional facility program; various restrictions on drugs and alcohol, along with treatment requirements; and a prohibition on owning, carrying, purchasing, possessing, using, or having ready-at-hand any firearm.

{¶4} On January 6, 2010, Appellant completed the correctional facility program and was ordered released. On January 21, 2010, the State filed a Motion to Revoke Community Control. The motion stated that Appellant violated the terms of his community control on January 15, 2010, when Appellant was found, after his 10:00 p.m.

curfew, in room with firearms and firearms ammunition in a house that was not his residence.

{¶5} A first-stage, probable cause hearing was held before the magistrate.[1] Appellant appeared at the hearing unrepresented by counsel. The magistrate found probable cause existed to believe that Appellant violated the terms and conditions of his community control. The matter was set for a second-stage, full hearing before the trial court on February 12, 2010.

{¶6} At the full hearing, Appellant appeared and was represented by counsel. Appellant agreed to stipulate to the violations contained in the motion to revoke Appellant's community control and waived his right to a hearing. (T. 3). The trial court accepted Appellant's waiver and admission and found Appellant to be in violation of the terms of Appellant's community control. (T. 4).

{¶7} Before imposing sentence, the trial court permitted Appellant's counsel to address the court on Appellant's behalf. Appellant was also given an opportunity to make a statement. Both Appellant and Appellant's counsel referenced that Appellant's girlfriend, Kelsey Carlisle, was due to give birth to Appellant's child in the near term. (T. 6-7).

{¶8} The trial court asked if the State wished to make any recommendations, but the State declined. (T. 7). The trial court next asked Probation Officer, Will Champlin, if he had anything to add to the sentencing memorandum he provided for the trial court. Id. The probation officer declined. Id.

[1] Appellant did not provide a transcript of the probable cause hearing.

{¶9} The trial court then imposed sentence on Appellant. It extended Appellant's community control for a period of five years from the date of Appellant's original sentence. The remainder of the terms of Appellant's community control were the same as was in place before, however, the trial court made an additional term. The trial court ordered that Appellant not have any contact with Kelsey Carlisle. (T. 8).

{¶10} Counsel for Appellant objected to the restriction that Appellant have no contact with Kelsey Carlisle. (T. 9). Counsel argued that the condition had no relationship to the actual charges in the case. Id. The trial court responded,

{¶11} "Sure it does. He was captured with her. She lied about his apprehension and he is alleged to have struck her, so I think it does. * * *" (T. 9-10).

{¶12} The trial court journalized its decision on February 16, 2010.

{¶13} Appellant appealed the trial court's February 16, 2010 decision.

{¶14} On May 28, 2010, we granted Appellant's motion to supplement the record with the presentencing investigation report (PSI) regarding Appellant and a February 3, 2010 sentencing memorandum from Probation Officer Will Champlin to Judge Marcelain in the same case. The documents were filed with the Licking County Clerk of Courts on June 30, 2010.

{¶15} The PSI does not contain any information regarding Kelsey Carlisle.

{¶16} Pertinent to this appeal, the February 3, 2010 sentencing memorandum states that on January 15, 2010, Champlin received information that Appellant had been at a party five days before where he had consumed alcohol and he struck Carlisle on the arm causing a bruise. It was further reported that Appellant had been staying at his father's home, despite a 10:00 p.m. curfew. Champlin went to the address and Carlisle

answered the door. Champlin stated that Carlisle insisted Appellant was not there and attempted to close the door. Another resident in the house allowed Champlin in and Champlin followed Carlisle to another part of the house. Champlin discovered Appellant standing approximately ten feet from a gun cabinet that appeared to be open, containing guns and ammunition. Appellant was placed under arrest. Champlin noted that he did not observe any bruises on Carlisle.

{¶17} On June 10, 2010, the State filed a motion to revoke Appellant's community control. The motion alleged that Appellant violated the conditions of his community control by being charged with disorderly conduct, disturbing the peace, and obstructing official business on May 6, 2010 and by being in contact with Carlisle on May 2, 2010.

{¶18} On July 12, 2010, the trial court revoked Appellant's community control and sentenced Appellant to prison. Appellant has appealed the July 12, 2010 judgment entry and the matter is currently on appeal with the Fifth District Court of Appeals in *State of Ohio v. Ryan Umphlettee*, Case No. 10-CA-89.

{¶19} We now consider Appellant's two Assignments of Error:

{¶20} "I. APPELLANT'S STATUTORY AND CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT JUSTIFIED A COMMUNITY CONTROL CONDITION PROHIBITING APPELLANT FROM HAVING CONTACT WITH THE MOTHER OF HIS CHILD BASED ON INFORMATION CONTAINED IN A MEMORANDUM FROM A PROBATION OFFICER THAT WAS NEVER DISCLOSED TO THE DEFENSE.

{¶21} "II. THE COMMUNITY CONTROL CONDITION PROHIBITING APPELLANT FROM HAVING CONTRACT WITH THE MOTHER OF HIS CHILD IS NOT REASONABLY RELATED TO THE PURPOSES OF COMMUNITY CONTROL AND IS THEREFORE INVALID."

I.

{¶22} Appellant argues in his first Assignment of Error that Appellant's due process rights were violated when the trial court imposed an additional term on Appellant's community control sanctions based on information never disclosed to the defense. We disagree.

{¶23} At issue is the February 3, 2010 sentencing memo prepared by Champlin for review by the trial court judge. Appellant argues that the February 3, 2010 sentencing memo is not a presentence investigation report and therefore is not subject to the requirements of R.C. 2951.03. Appellant cannot classify what status the February 3, 2010 sentencing memo holds, but relies upon *State v. Sturgeon* (2000), 138 Ohio App.3d 882, 742 N.E.2d 730, to argue that Appellant should not be sentenced on information that Appellant could not rebut.

{¶24} In *State v. Sturgeon*, the appellant was convicted of domestic violence against the mother of his children. The trial court reviewed the presentence investigation report and the victim impact statement before sentencing the appellant. The appellant reviewed the PSI before the sentencing hearing, but he was not given the opportunity to respond to the victim impact statement, which suggested that the appellant had whipped one of his children. The trial court sentenced the appellant to

four years community control and one of the terms was that the appellant have no contact with his children for four years.

{¶25} The First District Court of Appeals found the trial court abused its discretion in imposing the condition because it was not constitutionally or statutorily permitted. The court found that it was the purview of the juvenile court under Chapter 2151 to limit parental rights. The court opined that it could have also been an abuse of discretion that the appellant was not given the opportunity to respond to the new information contained within the victim impact statement as required by R.C. 2930.14(B). R.C. 2930.14(B) states, "[t]he court shall consider a victim's statement made under division (A) of this section along with other factors that the court is required to consider in imposing sentence or in determining the order of disposition. If the statement includes new material facts, the court shall not rely on the new material facts unless it continues the sentencing or dispositional proceeding or takes other appropriate action to allow the defendant or alleged juvenile offender an adequate opportunity to respond to the new material facts."

{¶26} Under the facts of the present case, we find that *State v. Sturgeon* lends no support to Appellant's argument. The basis for which the court reversed the decision of the trial court was because the trial court overstepped its jurisdictional authority and ordered that the appellant have no contact with his children. In the present case, the trial court did not prevent Appellant from having contact with his child.

{¶27} The court in *Sturgeon* discussed in the dicta of the case that it could have been error that the appellant was not given the opportunity to respond to new material facts in the victim impact statements as required by R.C. 2930.14(B). In our case, the

February 3, 2010 sentencing memo cannot be classified as a victim impact statement that is subject to the statutory requirements of R.C. 2930.14(B). We understand that Appellant is comparing his case to the concept raised by the court in *Sturgeon* that a defendant should not be sentenced on information that he cannot rebut.[2] There is no evidence in the record of the present case to show that Appellant could not rebut the information regarding Carlisle's involvement in Appellant's admitted violation of his community control. A probable cause hearing was held, but there is no transcript of the hearing. At the full hearing, Champlin was present and the trial court asked Champlin if he had anything to add to his sentencing memo.

{¶28} Finally, at the full hearing, the record shows that Appellant objected to the no contact order as to its lack of relationship to Appellant's original offense. Appellant did not object on the basis that Appellant was not aware of the information, that he desired to comment on Carlisle's involvement, or to argue that there existed any factual inaccuracies.

{¶29} Based on Appellant's arguments, we are unable to find that the trial court violated Appellant's due process rights when the trial court set a term of community control based on the information contained within the February 3, 2010 sentencing memo.

{¶30} Appellant's first Assignment of Error is overruled.

II.

{¶31} Appellant argues in his second Assignment of Error that the trial court abused its discretion when it imposed, as a condition of Appellant's community control,

[2] Appellant finds support for his argument especially in the separate concurrence of Judge Painter who likens the secrecy of victim impact statements to a "star chamber proceeding."

that Appellant has no contact with the mother of his child because the term was not reasonably related to the purposes of community control. We disagree.

{¶32} R.C. 2929.15(A)(1) governs the authority of the trial court to impose conditions of community control. That section provides that when sentencing an offender for a felony, the trial court may impose one or more community sanctions, including residential, nonresidential, and financial sanctions, and any other conditions that it considers "appropriate." The General Assembly has thus granted broad discretion to trial courts in imposing community-control sanctions. We review the trial court's imposition of community-control sanctions under an abuse-of-discretion standard. *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 10 citing *Lakewood v. Hartman* (1999), 86 Ohio St.3d 275, 714 N.E.2d 902.

{¶33} In *State v. Lacey,* Richland County App. No. 2005-CA-119, 2006-Ohio-4290, this Court examined the reasonableness of conditions imposed as part of a defendant's probation for a felony violation. We relied upon *State v. Jones* (1990), 49 Ohio St.3d 51, 52-53, 550 N.E.2d 469, where the Ohio Supreme Court established a three-prong test to evaluate the reasonableness of probation conditions: "In determining whether a condition of probation is related to the 'interests of doing justice, rehabilitating the offender, and insuring his good behavior,' courts should consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." (Citations omitted.) The Ohio Supreme Court recognized that the

same rationale applies to the imposition of community control sanctions in *State v. Talty,* supra.

{¶34} In this case, the matter was before the trial court upon a motion to revoke Appellant's community control. Appellant admitted he violated his community control because he was at a different address after his 10:00 p.m. curfew and he was in a room with an open gun cabinet containing guns and ammunition. While Champlin attempted to investigate Appellant's alleged violations at the reported address, Carlisle was present. Carlisle denied Appellant was at the house and would not allow Champlin in the house to investigate.

{¶35} We find that when the trial court sentenced Appellant to community control, instead of revoking Appellant's community control for Appellant's admitted violations, it was not an abuse of discretion to order Appellant to have no contact with Carlisle as a term of his continued community control.

{¶36} While Carlisle had no involvement with Appellant's original offense of drug trafficking, this matter was before the trial court upon a motion to revoke Appellant's community control for violations of the terms of his community control. We cannot find based on the evidence presented that the community control condition is completely unrelated to Appellant's violations. The *Jones* three-prong test has been met in this case, in that the trial court's determination that Appellant have no contact with Carlisle is reasonably related to rehabilitating Appellant, has some relationship to Appellant's violations of being out after curfew and in a home with weapons and ammunition, and relates to Appellant's future violations of his community control.

{¶37} We further find that under the facts of this case, the trial court did not overstep its authority in ordering that Appellant have no contact with Carlisle because Appellant was ordered to have no contact with Carlisle only. The term of Appellant's community control did not state that Appellant was to have no contact with his child, as was the case in *State v. Sturgeon*, supra.

{¶38} Accordingly, Appellant's second Assignment of Error is overruled.

{¶39} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD:kgb

[Cite as *State v. Umphlettee*, 2010-Ohio-5201.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RYAN A. UMPHLETTEE	:	
	:	Case No. 10-CA-18
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Licking County Court of Common Pleas is AFFIRMED. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN