

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
THOMAS E. REED, JR.	:	Case No. 2009CA00049
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 06CR41

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 29, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Farmer, J.

{¶1} On February 10, 2006, the Fairfield County Grand Jury indicted appellant, Thomas Reed, Jr., on two counts of theft of drugs in violation of R.C. 2913.02 and three counts of aggravated trafficking in drugs in violation of R.C. 2925.03. On March 30, 2006, appellant plead guilty to the two counts of theft of drugs and one of the aggravated trafficking counts. The remaining counts were dismissed. By judgment entry filed April 4, 2006, the trial court sentenced appellant to thirty months in prison, twenty-four months suspended in lieu of community control.

{¶2} On July 7, 2006, appellant was granted judicial release and was placed on five years of community control.

{¶3} On April 8, 2009, the state filed a motion to revoke appellant's community control, alleging appellant had violated certain terms and conditions of his community control. A hearing was held on May 7, 2009. By entry filed May 13, 2009, the trial court revoked appellant's community control and ordered him to serve his previously imposed sentence concurrently with a sentence he was currently serving in Pickaway County.

{¶4} On July 2, 2009, appellant filed a motion for correction of jail time credit. By journal entry filed July 9, 2009, the trial court denied the motion.

{¶5} Appellant filed an appeal of the July 9, 2009 journal entry, and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE DEFENDANT-APPELLANT'S PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY IN VIOLATION OF ARTICLE I, SECTIONS 5

AND 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

II

{¶7} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THE REVOCATION OF COMMUNITY CONTROL UNDER CIRCUMSTANCES WHERE HIS MENTAL ILLNESS PREVENTED HIS COMPLIANCE WITH THE TERMS OF COMMUNITY CONTROL AND ADVERSELY AFFECTED HIS ABILITY TO DEFEND AT THE HEARING."

I

{¶8} Appellant claims his plea was not knowing, intelligent or voluntary because he was not informed of jury unanimity or his right to testify in his own behalf.

{¶9} "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Glaros* (1960), 170 Ohio St. 471, paragraph one of the syllabus.

{¶10} Appellant did not challenge his plea by filing a direct appeal of his original plea and sentence. Further, appellant did not challenge his plea at the revocation hearing.

{¶11} We note the journal entry appealed from was the trial court's July 9, 2009 denial of appellant's request to correct his jail time credit:

{¶12} "This matter came on for consideration on the Defendant's Motion for Correction of Jail Time Credit filed July 2, 2009. The State filed a response on July 1, 2009.

{¶13} "Defendant requests additional jail time credit of 4 days.

{¶14} "After reviewing the facts and the law, the court overrules the Defendant's Motion for Correction of Jail Time Credit."

{¶15} We find appellant failed to raise this issue by way of direct appeal and failed to raise it via any motion before the trial court.

{¶16} Assignment of Error I is denied.

II

{¶17} Appellant claims he was denied a fair hearing on the revocation of his community control because his mental illness prevented him from complying with the terms of his community control and it adversely affected his ability to defend himself at the hearing. We disagree.

{¶18} The state's burden of proof in a probation revocation hearing is to prove by a preponderance of the evidence the defendant violated a condition of probation. *State v. Richards* (April 17, 2000), Stark App. No.1999CA362. The trial court is to consider the credibility of the witnesses and make a determination based on substantial evidence. *Id.* A trial court's decision to revoke probation will not be disturbed on appeal absent an abuse of discretion. *Id.* In order to find an abuse of that 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.

{¶19} The April 8, 2009 motion to revoke community control alleged the following violations:

{¶20} "(1) The Defendant has failed to maintain good behavior, conduct himself in a proper manner at all times, and has failed to obey the laws of the state, laws of the United States, and/or all local laws, in violation of Term #5 of the Defendant's terms of community control.

{¶21} "(2) The Defendant has failed to report to his probation officer, in violation of Term #8 of the Defendant's terms of community control.

{¶22} "(3) The Defendant has failed to maintain total sobriety in that the Defendant has used drugs illegal or habit-forming, without a doctor's prescription, in violation of Term #16 of the Defendant's terms of community control.

{¶23} "(4) The Defendant has violated special conditions of his community control, in violation of Term #19 of the Defendant's terms of community control."

{¶24} During the hearing, probation officer Jordan Bernard testified appellant pled no contest to new crimes in Pike County Court including menacing and disorderly conduct. T. at 4-5. Appellant was found guilty of both charges. T. at 5. Appellant was also charged with theft in Pike County, but he failed to appear. Id. Appellant failed to report to the courtesy supervision officer and failed to report since October 1, 2008. Id. Appellant possessed or used drugs without a doctor's prescription and admitted to his courtesy supervision officer on April 4, 2007 that he was using cocaine. Id. Appellant also violated a no-contact order. Id. At the time of the hearing, appellant was in prison serving a sentence on a drug trafficking charge for Pickaway County because he had failed to report on his community control. T. at 6.

{¶25} Appellant took the stand and testified he was on Klonopin, Seroquel, Clonidine, Tramadol, and Zantac for mental problems. T. at 15. Appellant stated he was bi-polar, ADHHD, and suffered from impulsive disorders. T. at 15-16. Appellant testified if he does not receive his medicines, he gets "real weird." T. at 18. When asked if he was currently getting his medicines, appellant stated, "I didn't get them this morning. You can ask them. They gave them to me when I left. I calmed down a little bit, but I'm a little scared right now." Id. When appellant's testimony was concluded, the trial court told appellant, "Be careful getting off the witness stand, but you can go back with Mr. Tawney now. Be careful." T. at 23.

{¶26} Neither appellant nor his counsel requested a continuance so appellant could be properly medicated. Nor did appellant claim his recent failures with the law were the result of his mental condition. Appellant blamed his problems on a girl he was "in love with" who kept stealing his medications and had lied to the police about appellant having pushed her. T. at 16. Appellant admitted to not having an excuse as to why he failed to report to his probation officer. T. at 18.

{¶27} Furthermore, appellant's community control was revoked on May 13, 2009 and his notice of appeal was filed on August 3, 2009. Pursuant to App.R. 3(A), an "appeal as of right" shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by App.R. 4. According to App.R. 4(A), a "party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed***." Appellant did not have leave of court pursuant to App.R. 5 to file his untimely appeal.

{¶28} Assignment of Error II is denied.

{¶29} The judgment of the Court of Common Pleas of Fairfield County, Ohio is affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES

SGF/sg 0308

