

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010CA0070
JOHN NEAL NORRIS	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of  
Common Pleas Case No. 2009-CR-01401

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: November 29, 2010

APPEARANCES:

For Plaintiff-Appellee:

JOHN D. FERRERO 0018590  
Stark County Prosecutor  
110 Central Plaza, S., Ste. 510  
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For Defendant-Appellant:

KRISTINA R. POWERS 0068263  
Stark County Public Defender's Office  
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*Delaney, J.*

{¶1} Defendant-Appellant, John Norris, appeals from the judgment of the Stark County Court of Common Pleas, revoking his community control and imposing a twelve month prison sentence on him. The State of Ohio is Plaintiff-Appellee.

{¶2} Appellant was originally placed on community control after he pled guilty to one count of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02(A)(1) for stealing a case of beer from Wal-Mart, and one count of vandalism, a felony of the fifth degree, in violation of R.C. 2909.05(B)(2), for stomping on a walk-through metal detector at the police station.

{¶3} When Appellant was sentenced, the court sentenced him to two years of community control with the Intensive Supervision Probation Program. As a condition of his probation, he was required to be evaluated by the Stark Regional Community Correction Center (SRCCC) and, if accepted, successfully complete all recommendations of that program. SRCCC accepted him into the program, but because of concerns that he was mentally ill, he was assigned to the Helping Offenders Psychiatrically and Emotionally (HOPE) track. As part of the HOPE track, Appellant was required to obtain treatment through the Crisis Intervention and Recovery Center, including therapy, medication, and group therapy (referred to as “thinking reports”) to control antisocial behavior.

{¶4} While in the program at SRCCC, he successfully completed the first part of his program with minimal infractions, while being monitored by a therapist and a psychiatrist at the Crisis Intervention and Recovery Center.

{¶5} The second part of his program required him to be released into the community and assigned community work. The SRCCC staff determined that Appellant could not complete this portion of his program because he was considered to be a risk to the community. As a result of this report, Appellant's probation officer filed a motion to revoke Appellant's probation on February 12, 2010.

{¶6} Part of the amended motion to revoke probation included the following reasons for revoking Appellant's probation: (1) he is considered a risk to the community and is not displaying responsible conduct of a good citizen; (2) he admits to having rape fantasies; (3) he verbalized sexual fantasies regarding an SRCCC intern; (4) he verbalized thoughts of animal cruelty and animal abuse; (5) he made statements that he would harm others before he would harm himself. The motion also noted that Appellant failed to comply with rule 16b of his probation by failing to successfully complete the SRCCC program due to the risk to the community and the risk to the SRCCC staff.

{¶7} On March 17, 2010, the motion to revoke came before the court on a probable cause hearing to determine if Appellant had in fact violated the terms of his probation.

{¶8} At the hearing, it was testified to that he resided at SRCCC for 82 days after being admitted to the program in November, 2009. During the course of his treatment, according to his therapist, Theresa Marulli, and psychiatrist, Barbara Lohn, he expressed multiple examples of anti-social thinking that alarmed the treatment team. Examples of this conduct included his expression that he had thoughts of wanting to bite another inmate at SRCCC for taunting him, a desire to rape people, a desire to mutilate animals, commit suicide and commit homicides.

{¶9} Appellant did not deny that he made these statements; rather, he blamed the statements on a change in medication and inconsistencies between his therapist and psychiatrist. He admitted that he wanted more medication, not to quell the thoughts, but so that he could sleep. Appellant admitted that he had attempted suicide on at least two occasions, was hospitalized at Heartland Behavioral Center six times, and that he suffocated cats when he was a child.

{¶10} Despite efforts on the part of SRCCC staff to help Appellant control his violent thoughts, they were unable to provide successful alternatives to him and recommended that he could not successfully complete the remainder of his program.

{¶11} Dr. Lohn opined that Appellant suffers from an antisocial personality disorder that cannot be managed by medication or hospitalization. Moreover, Dr. Lohn and therapist Marulli felt that Appellant was a risk to the community because he was unable to identify alternate behaviors to manage anger and frustration.

{¶12} At the conclusion of the hearing, the court found that Appellant had violated the terms of his community control and sentenced him to his original twelve month sentence.

{¶13} Appellant raises two Assignments of Error:

{¶14} “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.

{¶15} “II. THE IMPOSITION OF A TWELVE MONTH PRISON TERM UPON APPELLANT FOR VIOLATING THE TERMS OF HIS COMMUNITY CONTROL SANCTIONS WAS CONTRARY TO LAW.”

## I.

{¶16} In his first assignment of error, Appellant claims that the trial court abused its discretion in determining that Appellant violated the terms of his community control sanctions.

{¶17} The right to continue on community control depends on compliance with community control conditions and “is a matter resting within the sound discretion of the court.” *State v. Schlecht*, 2nd Dist. No. 2003-CA-3, 2003-Ohio-5336, citing *State v. Johnson* (May 25, 2001), 2nd Dist. No. 17420, 2001 WL 561312. Abuse of discretion is “more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.” *State v. Myers*, 97 Ohio St.3d 335, 780 N.E.2d 186, 2002-Ohio-6658, at ¶ 75.

{¶18} The weight to be given to the evidence and the credibility of the witnesses at a revocation hearing are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881, 111 S.Ct. 228, 112 L.Ed.2d 183. Reviewing courts must accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections which cannot be conveyed to us through the written record. *State v. White*, 5th Dist. No. 2009CA00111, 2009-Ohio-6447, citing *Miller v. Miller* (1988), 37 Ohio St.3d 71, 523 N.E.2d 846. Simply stated, there must be evidence of a substantial nature to justify the revocation. *State v. Soke* (Aug. 11, 1989), 11th Dist. No. 88-L-133.

{¶19} “Substantial evidence” is defined as “[s]uch evidence that a reasonable mind might accept as adequate to support a conclusion.” *Black's Law Dictionary* (5

Ed.1979) at 1281. Several courts have submitted that “substantial evidence’ \* \* \* consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. ” (Emphasis added.) *Laws v. Celebrezze* (1966), 368 F.2d 640, 642; *Marker v. Finch* (1971), 322 F.Supp. 905, 910, fn.7. The Ninth District Court of Appeals of Ohio held in *State v. Carpenter* (Dec. 17, 1986), 9th Dist. No. CA2168, unreported, that the trial court was correct in applying a “preponderance of the evidence” standard in deciding to revoke the defendant's probation. It held as such on the basis of *State v. Delaney* (1984), 11 Ohio St.3d 231, fn.3, at 234-235, where the trial court held that the state had established Delaney's probation violation by a preponderance of the evidence. Although the burden of proof was not a specific issue in that case, the Supreme Court of Ohio inferentially approved “preponderance” as the correct standard.

{¶20} Appellant argues that it was no fault of his own that he was unsuccessfully discharged from the SRCCC program; however his lack of ability to comply with orders to correct his violent thought patterns through various psychiatric exercises show otherwise. Crim. R. 32.3 does not require that a probation violation be willful. As the Eleventh District stated in *State v. Stockdale* (Sept. 26, 1997), 11th Dist. No. 96-L-172, “there is nothing in Crim. R. 32.3 ... that mandates that the state must introduce evidence that the probation violation was willful.”

{¶21} Moreover, this court has previously rejected similar arguments that a mental illness prevented a probationer from being able to comply with a condition of probation. *State v. Wolfe*, 5th Dist. No. 2008CA00064, 2009-Ohio-830.

{¶22} While Appellant may not have willfully violated probation, there was no alternative to incarceration in order to protect the community. Appellant stated he had

violent thoughts of raping people and harming others. Medication could not help his antisocial personality disorder according to Dr. Lohn. Appellant admitted that he stopped complaining about his medication in hopes that he would get a home pass, but at the same time blamed his dangerous thoughts on an incorrect dosage of medication.

{¶23} Appellant's prior contacts with the court system showed that he had previously been charged with kidnapping and domestic violence and that he had an inability to control his impulses. He admitted that he had been hospitalized six times previously in a psychiatric hospital and that he had a history of suicide attempts.

{¶24} Given the lack of options left to the trial court, and given Appellant's inability to complete the SRCCC program, we find that the trial court properly revoked Appellant's community control and sentenced him to his original sentence of twelve months.

{¶25} Appellant's first assignment of error is overruled.

## II.

{¶26} In Appellant's second assignment of error, he argues that the trial court erred in sentencing him to the original twelve month prison sentence. We disagree.

{¶27} The sentence was not contrary to law; it was within the limits set by the Ohio Revised Code for a fifth degree felony. Further, the sentence did not evidence an abuse of discretion. See, e.g., *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912.

{¶28} Appellant's second assignment of error is overruled.

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

By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

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HON. PATRICIA A. DELANEY

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN

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

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOHN NEAL NORRIS	:	
	:	
Defendant-Appellant	:	Case No. 2010CA00070
	:	

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.

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HON. PATRICIA A. DELANEY

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN