

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-08-067

Appellee

Trial Court No. 2003-CR-494

v.

Damon Newell

DECISION AND JUDGMENT

Appellant

Decided: July 31, 2009

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Beverly Newell Hancock, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas. On December 17, 2004, appellant was sentenced to concurrent prison terms of four years each on one count of sexual battery, in violation of R.C. 2907.03, a felony of the third degree, and on one count of abduction, in violation of R.C. 2905.02, a felony of

the third degree. On November 7, 2006, the trial court granted appellant's motion for judicial release and placed appellant on community control subject to certain conditions.

{¶ 2} On May 23, 2008, the trial court determined that appellant was in violation of the court ordered community control. On August 28, 2008, the trial court revoked appellant's community control sentence and reinstated the original sentence.

{¶ 3} On appeal, appellant sets forth the following sole assignment of error:

{¶ 4} "ASSIGNMENT OF ERROR NO. 1

{¶ 5} "SENDING A PROBATIONER TO A SEXUAL OFFENDER PROGRAM WHICH REQUIRES POLYGRAPH EXAMINATIONS AND USES HAVING CONSENSUAL 'UNPROTECTED SEX WITH A FEMALE WHO WANTS [PROBATIONER'S] CHILD WHILE [PROBATIONER] IS NOT WORKING' AS SOME OF THE CRITERIA FOR DETERMINING WHETHER OR NOT A PROBATIONER IS A 'SIGNIFICANT' 'RISK TO RE-OFFEND' IS AN UNREASONABLE TERM OF PROBATION AND COMMUNITY CONTROL."

{¶ 6} Under Ohio law, it is well-settled that "[a]n appellate court reviews the trial court's decision to revoke community control [under] an abuse-of-discretion standard." *State v. Toler*, 154 Ohio App.3d 590, 2003-Ohio-5129, ¶ 5. "An abuse of discretion indicates [that the court's] decision * * * is unreasonable arbitrary or unconscionable." *Id.*, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 7} The following undisputed facts are relevant to this appeal. On November 14, 2003, the grand jury issued an indictment against appellant on two counts

of kidnapping, in violation of R.C. 2905.01(A)(4), felonies of the first degree, and two counts of rape, in violation of R.C. 2907.02(A)(2), felonies of the first degree.

{¶ 8} On August 4, 2004, pursuant to a voluntarily negotiated plea agreement, appellant pled guilty to one amended count of abduction, in violation of R.C. 2905.02, a felony of the third degree, and one amended count of sexual battery, in violation of R.C. 2907.03, a felony of the third degree. In exchange, the remaining two counts were dismissed nolle prosequi.

{¶ 9} On December 17, 2004, the trial court sentenced appellant to concurrent terms of incarceration of four years on each count. In addition, pursuant to R.C. 2950.09(B)(2), the trial court found appellant to be a sexually oriented offender.

{¶ 10} On December 17, 2004, in companion case No. 2004-CR-238, the trial determined that appellant had been found guilty on one count of trafficking in cocaine, in violation of R.C. 2925.03(A)(1) and (C)(4)(b), a felony of the fourth degree. The trial court sentenced appellant to a prison term of 12 months, to be run concurrently with the sentences imposed by the trial court in case No. 2003-CR-494.

{¶ 11} On January 31, 2005, appellant filed an appeal of the sentencing. On June 3, 2005, this court consolidated, based on a finding of common questions of law and fact, case Nos. 2003-CR-494 and 2004-CR-238. On April 21, 2006, this court affirmed appellant's convictions, finding that the trial court had not abused its discretion in sentencing appellant, pursuant to the relevant statutory sentencing provisions. *State v. Boyd*, 6th Dist. Nos. E-05-007, E-05-008, 2006-Ohio-1990.

{¶ 12} On September 15, 2006, appellant filed a motion for judicial release. On November 7, 2006, the trial court ordered that appellant be placed on community control, subject to conditions, for a period of five years.

{¶ 13} On June 26, 2007, the trial court determined that appellant was in violation of the terms and conditions of the community control. Specifically, as appellant himself conceded, the violations consisted of failing to attend the mandatory sex offender treatment program and appellant being charged with new offenses.

{¶ 14} On August 23, 2007, the trial court determined that these violations did not necessitate termination of the community control. The trial court reinstated the same terms and conditions that had been previously imposed upon appellant. In addition, the trial court imposed a condition requiring that appellant successfully complete any program, including after care, recommended by the counselors at Firelands Counseling and Recovery Services ("Firelands").

{¶ 15} On May 23, 2008, the trial court again found appellant to be in violation of the terms and conditions of the community control sentence. On August 28, 2008, the trial court revoked appellant's community control sanction. As a result, in reinstating the original sentence, the trial court sentenced appellant to a term of four years for abduction, in violation of R.C. 2905.02, a felony of the third degree, and to a term of four years for sexual battery, in violation of R.C. 2907.03, a felony of the third degree. In imposing this sentence, the trial court ordered that the prison terms be served concurrently and credited

appellant for time served as of August 28, 2008. It is from this judgment that appellant now appeals.

{¶ 16} In the sole assignment of error, appellant maintains that the trial court imposed unreasonable community control requirements upon him. Appellant asserts that his termination from the treatment program for failing to comply with the program's mandatory requirements constituted an unreasonable discharge.

{¶ 17} Under Ohio law, pursuant to R.C. 2929.19(B)(5), when a sentencing court imposes a community control sanction "[t]he court shall notify the offender that, if the conditions of the sanction are violated, [or] if the offender commits a violation of any law * * * the court * * * may impose a more restrictive sanction, or may impose a prison term on the offender * * *." Furthermore, it is well-settled that when "determining whether a condition of [community control] 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 * * *." *State v. Jones* (1990), 49 Ohio St.3d 51, 53. Accordingly, the Supreme Court of Ohio has determined that this standard "stands for the proposition that [community control] conditions must be reasonably related to the statutory ends * * * and must not be overbroad." *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, ¶ 16.

{¶ 18} Appellant argues that the requirements imposed by Firelands, of taking a polygraph test and being truthful with the counselors concerning unprotected sex, should be construed as unreasonable conditions of community control. However, appellant fails to distinguish between the conditions of community control imposed by the court and the requirements of the Firelands sex offender treatment program.

{¶ 19} This court has carefully reviewed the record. The record indicates that the trial court properly considered the purposes of sentencing, pursuant to R.C. 2929.11, and properly balanced the seriousness and recidivism factors, under R.C. 2929.12. Most significantly, the record shows that the trial court explicitly conditioned appellant's community control sentence on his compliance with the program recommended by the Firelands' counselors. The record clearly demonstrates that appellant failed to comply with the Firelands' requirements that appellant take a polygraph test and deal truthfully with the counselors concerning unprotected sex.

{¶ 20} In light of the above stated legal principles, the record shows that the community control conditions imposed by the trial court were reasonably related to treatment of a sexually oriented offender. As a result, this court cannot say that the trial court imposed conditions upon appellant unreasonably, arbitrarily, or unconscionably. On the contrary, the trial court acted pursuant to clear legal authority and therefore did not abuse its discretion in conditioning appellant's community control sentence on appellant's completion of the Firelands' program. Appellant's sole assignment of error is found not well-taken.

{¶ 21} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

John R. Willamowski, J.
CONCUR.

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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