[Cite as *State v. Pavlich*, 2011-Ohio-802.]

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

State of Ohio	Court of Appeals No. E-10-011
Appellee	Trial Court No. 09-CRB-291 B
v.	
Gregory Pavlich	**DECISION AND JUDGMENT**
Appellant	Decided: February 18, 2011

* * * * *

Laura E. Alkire, Law Director, City of Huron, for appellee.

Loretta A. Riddle, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Gregory Pavlich, appeals from a partial probation revocation entered by the Huron Municipal Court in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On January 5, 2010, appellant entered a plea of no contest to a charge of aggravated menacing, in violation of Huron City Ordinance 537.05(A). The same day, he was sentenced to serve 180 days in jail, with 90 of those days ordered suspended. The suspension was conditioned upon appellant remaining law abiding for a period of two years and upon appellant having no contact with any of the named victims, including one Brian Easton. Appellant was given credit for 80 days served. Thus, on the day of his sentencing, only ten days of his sentence remained to be served.

{¶ 3} On January 6, 2010, just one day after the aforementioned plea hearing and sentencing, appellant filed a petition for a civil protection order against Brian Easton, in the Erie County Court of Common Pleas. Appellant was immediately awarded an ex parte order of protection. On January 8, 2010, a full hearing was held on the matter. Following the hearing, the common pleas court issued a written judgment entry denying the petition. The judgment entry relevantly stated:

{¶ 4} "This Court * * * FINDS that after considering the testimony, exhibits, and the Petition and comparing it to the standards for granting a full Order of Protection as set forth in R.C. §2903.214 et. seq…. that Petitioner has utterly failed to meet his burden of proof (i.e., Preponderance of Evidence).

{¶ 5} "The Court FURTHER FINDS, after considering the testimony, exhibits, and the Petition that Petitioner's apparent intent in bringing this action was to harass and retaliate against the Respondent. FN1

{¶ 6} "FN1 Petitioner was found guilty in Huron Municipal Court of Aggravated Menacing against the Respondent on January 5, 2010. Petitioner [] received a jail sentence, along with a suspended jail sentence, and was placed on two years Future Good Behavior. The next day (January 6, 2010) Petitioner filed this action against Respondent.

{¶ 7} "This court FURTHER FINDS, after considering the testimony, exhibits, and the Petition, that the Petition not only lacks merit, but fringes on being frivolous."

{¶ 8} On January 20, 2010, appellant was summoned to the municipal court for a contempt hearing, based on appellant having filed the petition for the civil protection. At this time, the judge informed appellant that his filing of the petition could constitute a violation of the no contact order that was in place in connection with the aggravated menacing charge. Because appellant was without counsel for the hearing, the matter was rescheduled for January 22, 2010.

{¶ 9} On January 22, 2010, no hearing was held. Instead, the court sent appellant a notice of probation violation hearing assigned for January 29, 2010.

{¶ 10} On January 25, 2010, the state of Ohio filed a motion asking the court to find appellant in violation of his probation as a result of his filing of the civil protection order.

{¶ 11} On February 2, 2010, a hearing was held on the matter of the probation violation.[1] Both parties stipulated that: (1) a petition for civil protection order was filed

[1]Due to appellant's change in attorneys, the matter was continued from January 29, 2010 to February 2, 2010.

by appellant against Brian Easton; (2) the petition, following a full hearing on the matter, was ultimately denied; and (3) a written judgment entry was issued by the deciding judge. In addition, the parties stipulated to the contents of a certified copy of the subject judgment entry that was filed by the state. Counsel for appellant specifically stated on the record that the stipulation included the common pleas judge's findings in the matter.

{¶ 12} Arguing that appellant's filing of the civil protection order did not constitute a probation violation, counsel for appellant stated that the language of the no contact order was insufficient to give appellant notice that in filing his petition, he was putting his probation status at risk. In making this argument, defense counsel urged the municipal court to make a determination independent of the common pleas court's findings.

{¶ 13} Following the hearing, the municipal court found that appellant, in filing the petition for the civil protection order had, in fact, violated the terms and conditions of his unsupervised probation. In its February 9, 2010 judgment entry, the court relevantly stated:

{¶ 14} "The court hereby finds that there is probable cause that Defendant violated his probation in filing the Petition against the victim * * * when a no contact order was imposed on the Defendant at sentencing. The Court further finds that the order of no contact with the victim was clear in meaning and that a reasonable interpretation of this order would include that the action of filing the Petition was forbidden by the order. Furthermore, the findings of the Erie County Common Pleas Court conclude that there

was no merit to the Petition and that the filing of the Petition was Defendant's attempt to harass and retaliate against the victim.

{¶ 15} "The Court further finds that after considering the stipulation of the parties and the filings with this case that the Defendant has violated the terms of his probation. * * *"

{¶ 16} In imposing its sentence, the court did not terminate appellant's probation entirely. Instead, the court imposed a jail sentence of 20 days out of the 90 days that had previously been ordered suspended.

{¶ 17} Appellant timely appealed the trial court's determination, raising the following assignments of error:

{¶ 18} I. "The trial court erred, abused its discretion and violated defendant's constitutional rights to a fair hearing by revoking defendant's probation at a hearing where there was no sworn testimony or opportunity of the defendant to cross examine any witnesses against him and the judge was not neutral and detached."

{¶ 19} II. "A trial court errs, abuses its discretion and violates a defendant's constitutional right to a fair probation revocation hearing when the judge is not neutral and detached and the court or the court's staff is delusive with the probationer."

{¶ 20} III. "The trial court erred, abused its discretion and violated defendant's constitutional rights to a fair hearing by revoking defendant's probation at a hearing where there was no deliverance of written notice of the claimed probation violation."

{¶ 21} IV. "The trial court erred and abused its discretion by revoking defendant's probation based on dicta from another court when the court proposing the dicta never indicated their findings of facts, conclusions of law or the standard used to arrive at the dicta. The court further erred by finding a probation violation when no act occurred."

{¶ 22} We initially note that because appellant's assignments of error involve overlapping issues, they will be considered together in this analysis.

{¶ 23} A community control revocation is not a criminal trial; therefore, the state is not required to establish a violation of the terms of community control "beyond a reasonable doubt." *State v. Ryan*, 3d Dist. No. 14-06-55, 2007-Ohio-4743, ¶ 7, citing *State v. Hylton* (1991), 75 Ohio App.3d 778. Instead, the state must show "substantial" proof that the offender violated the terms of his or her community control sanctions. *Ryan*, supra.

{¶ 24} A trial court's finding of a violation of community control will not be disturbed on appeal absent an abuse of discretion. Id. An abuse of discretion implies more than an error of law or judgment; instead, it connotes that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not simply substitute its judgment for that of the trial court. Id.

{¶ 25} Although a revocation proceeding is not a criminal proceeding, it must, nevertheless, comport with certain due process requirements. See *State v. Ryan*, supra, at ¶ 8, citing *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 782. The minimum due process

requirements for a revocation hearing includes: (a) written notice of the claimed violations; (b) disclosure of evidence against the defendant; (c) the opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral and detached hearing body; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revocation. *State v. McKeithen*, 3d Dist. No. 9-08-29, 2009-Ohio-84, ¶ 22, quoting *State v. Miller* (1975), 42 Ohio St.2d 102, 104, 326 N.E.2d 259, quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484.

{¶ 26} Appellant's first, second and third assignments of error all involve alleged due process violations that were never objected to at trial. The law is clear that a failure to object to due process violations during a probation revocation proceeding waives all but plain error. See *State v. Harmon*, 2d Dist. No. 2007 CA 35, 2008-Ohio-6039. Crim.R. 52 pertinently provides that only plain errors or defects affecting substantial rights—and not harmless errors—may be noticed where those errors were not first brought to the attention of the trial court. See Crim.R. 52(A) and (B). Accordingly, appellant's first, second and third assignments of error will be reviewed only for plain error.

{¶ 27} Appellant argues in his first assignment of error that he was denied the right to a fair probation revocation hearing where there was no sworn testimony or opportunity on the part of appellant to cross-examine any witnesses against him. We disagree. Our

review of the record makes clear that appellant waived these particular rights by stipulating to all of the relevant evidence in the case.

{¶ 28} The law is well established that "[p]arties may choose to stipulate facts in lieu of presenting evidence." *Fareydoon-Nezhad v. Kilgore* (Dec. 18, 1998), 4th Dist. No. 98 CA 3. Thus, where "an adverse party is willing to stipulate to the truth of a certain allegation, the party having the burden of proving that allegation is relieved from proving it." *State v. Barstow*, 4th Dist. No. 02CA27, 2003-Ohio-7336, ¶ 37. We note that stipulations or agreements by the accused during the course of a criminal action are as binding and enforceable upon the accused as are stipulations upon parties to civil actions. See id. at ¶ 38; *State v. Folk* (June 6, 1991), 74 Ohio App.3d 468, 471, citing *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585. Thus, an accused is bound to all matters of fact and law concerned in the stipulation. *State v. Folk*, supra, at 471.

{¶ 29} In stipulating to the facts, instead of presenting evidence, appellant not only agreed to the relevant factual allegations, he also waived any error that may have occurred had he been able to demonstrate that the trial court decided the case based upon hearsay evidence, as set forth in the common pleas court's judgment entry. See *Kilgore*, supra. "Under the invited error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 471; accord, *Kilgore*, supra. In addition, "[i]t is axiomatic that a litigant's failure to raise an issue in a timely manner in the trial court waives the litigant's right to raise that issue on appeal." *Kilgore*, supra. To allow

appellant to waive the presentation of evidence during the revocation hearing and then, after receiving an adverse decision from the judge, ask to present evidence would frustrate the orderly administration of justice. See id.

{¶ 30} For all of the foregoing reasons, we find that there was no error or defect in this aspect of the revocation proceedings that would impact appellant's substantial rights. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 31} Appellant argues in his second assignment of error that his right to a fair probation revocation hearing was violated because the judge was not neutral and detached. We note with respect to this portion of our analysis that "a judge is presumed to be unbiased and unprejudiced in the matters over which he presides." *In re Disqualification of Olivito* (1994), 74 Ohio St.3d 1261, 1263. Thus, the appearance of judicial bias or prejudice must be compelling to overcome the presumption of his integrity. Id.

{¶ 32} Appellant argues that the municipal court judge displayed partiality towards appellant, but only in connection with the January 20, 2010 hearing, which took place prior to the probation violation hearing on February 2, 2010.

{¶ 33} First, appellant argues that there was no written documentation as to how appellant appeared in court on January 20, 2010, therefore there must have been some oral communication outside the presence of appellant, suggesting partiality on the part of the judge. We disagree.

{¶ 34} It is undisputed that: (1) on January 8, 2010, the common pleas court judge who presided over appellant's civil protection order proceeding ordered his clerk to execute personal service of its judgment entry in appellant's case on the Huron Police Department; and (2) by way of this service, the state found itself in receipt of the court's judgment entry. It is likewise undisputed that on January 20, 2010, appellant was brought before the Huron Municipal Court based on a potential violation of his no contact order for filing a civil protection order against Brian Easton, and that during this time, no violation determination or sentencing occurred. Instead, appellant was granted an extension of time to obtain an attorney.

{¶ 35} Nothing in the above-described procedural sequence suggests bias or prejudice sufficient to overcome the presumption of judicial integrity.

{¶ 36} Appellant also argues that because the January 20, 2010 hearing was described as a "contempt hearing," rather than as a "probation violation hearing," he was prejudiced. Once again, we disagree. For one thing, on January 20, 2010, the court took no action against appellant. Instead, the hearing was continued, ultimately until February 2, 2010, for appellant to get an attorney. In addition, it is undisputed that appellant was given timely notification of the probation violation hearing.[2] Thus, we do not find that appellant was in any way prejudiced by the court's mistake.

[2]On January 22, 2010, just two days after the original hearing, the municipal court served upon appellant's counsel notice of appellant's probation violation hearing. Further, on January 29, 2010, appellant's counsel moved for a continuance of the probation violation hearing, thereby acknowledging notice of its existence.

{¶ 37} Finally, again in connection with the January 20, 2010, hearing, appellant argues that the judge predetermined appellant's probation violation. Specifically, appellant argues that the following exchange establishes the judge's partiality:

{¶ 38} "THE DEFENDANT: So, Your Honor, may I ask another question?

{¶ 39} "THE COURT: Maybe.

{¶ 40} "THE DEFENDANT: Am I allowed?

{¶ 41} "THE COURT: What's the question?

{¶ 42} "THE DEFENDANT: You said I'm being charged with something?

{¶ 43} "THE COURT: No, you've already been charged. We are going to determine if you violated the court order to have no contact [with] the victims in this case, which included Brian Easton."

{¶ 44} Clearly, the judge was not predicting charges against appellant. To the contrary, the judge indicated that the matter before the court was to determine whether appellant had violated the court's order.

{¶ 45} As appellant failed to present evidence sufficient to overcome the presumption of the judge's integrity in this case, we find that there was no error or defect in this aspect of the proceedings that would impact appellant's substantial rights. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 46} Appellant argues in his third assignment of error that he was denied his right to a fair hearing where there was no "deliverance of written notice of the claimed probation violation."

{¶ 47} In the instant case, the record shows that appellant was provided with several means of notice of the charges against him and notice of the hearing. During the January 20, 2010 hearing, appellant was notified that he could be in violation of the no contact order for filing a petition against Brian Easton in the Erie County Court of Common Pleas. That same day, he received a continuance in order that he could consult with an attorney. On January 22, notice was sent to appellant's counsel that appellant's case had been set for a probation violation hearing on January 29, 2010. And on January 25, 2010, the state served appellant's counsel with its motion to find probable cause. The state's motion described in detail appellant's conduct that served as the basis for the motion.

{¶ 48} In addition, appellant, who appeared at the revocation hearing accompanied by counsel, stipulated to the facts underlying the alleged violation and argued against their being construed as a probation violation. Such actions suggest that appellant had notice of the violations. See *State v. Miller*, 10th Dist. No. 03AP-1044, 2004-Ohio-1007, ¶ 14 (holding that notice was sufficient when the record of the revocation hearing did not suggest that the appellant was surprised or unaware of the nature of the alleged parole violation).

{¶ 49} Further, appellant makes no claim that the outcome would have been any different had he received notice of his violations in any other manner or that he would have prepared his case any differently. See id. (holding that notice was sufficient when the appellant failed to show any prejudice as a result of the notice that he did receive

prior to the revocation hearing). As the record is void of any suggestion that appellant contested any of the statements that were made during the probation violation hearing, we presume that appellant had been sufficiently notified of the nature of the alleged violation.

{¶ 50} Because there was no error or defect in the notification proceedings that would impact appellant's substantial rights, appellant's third assignment of error is found not well-taken.

{¶ 51} Appellant argues in his fourth, and final, assignment of error that the trial court erred and abused its discretion by revoking appellant's probation based upon "dicta" from another court when the court proposing the dicta never indicated its findings of facts, conclusions of law, or the standard used to arrive at the dicta. Appellant further argues that the court erred by finding a probation violation "when no act occurred."

{¶ 52} Specifically, appellant argues that the municipal court judge's entire holding was based upon "dicta" contained in the judgment entry issued by the Erie County Court of Common Pleas. As noted by appellant, dicta is defined as "[e]xpressions in court's opinions which go beyond the facts before the court and therefore are * * * not binding in subsequent cases as legal precedent." Black's Law Dictionary (6 Ed.1990) 454. The material that was before the municipal court judge for his consideration was not dicta, but rather the findings of the Erie County Court of Common Pleas, to which appellant specifically stipulated.

{¶ 53} We note that the findings of the Erie County Court of Common Pleas are not the sole evidence that the municipal court judge relied upon in rendering his decision. In his February 9, 2010 judgment entry, the municipal court judge expressly stated that he found probable cause that appellant violated his probation in appellant's filing of the petition against Brian Easton, when a no contact order had been imposed upon appellant at sentencing. The court found that the order of no contact with the victim was clear in its meaning and that a reasonable interpretation of the order would include an understanding that the action of filing the petition was forbidden by the order.

{¶ 54} With respect to appellant's claim that no "act" occurred, we find that the act in this case was clearly appellant's filing of the civil protective order in the Erie County Court of Common Pleas. That appellant chose to take this action against Easton, a victim of appellant's aggravated menacing, the day after appellant was sentenced in the Huron Municipal Court, provided sufficient evidence for the court to reasonably conclude, in an appropriate exercise of its discretion, that appellant willfully violated the terms of his probation. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 55} For all of the foregoing reasons, the judgment of the Huron Municipal Court is affirmed. Appellant is ordered to pay the 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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE