[Cite as *State v. Diaz*, 2013-Ohio-1711.]

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

State of Ohio	Court of Appeals No. WD-12-019
Appellee	Trial Court No. 2010CR0572
v.	
Rebecca Diaz	**DECISION AND JUDGMENT**
Appellant	Decided: April 26, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, David E. Romaker, Jr. and Aram M. Ohanian, Assistant Prosecuting Attorneys, for appellee.

John C. Filkins, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, following a probation violation hearing, in which appellant, Rebecca Diaz, was found guilty of violating probation imposed in case No. 2010CR0572 on August 26, 2011. On appeal, appellant sets forth the following two assignments of error:

1. The trial court's finding that the appellant violated the terms and conditions of her community control sanctions is not supported by the evidence for the drug test results were negative for the presence of prohibited substances.

2. The trial court erred in permitting the introduction of testimony and evidence of a prior positive drug screen result which did not form the basis for the motion for revocation of community control sanctions.

{¶ 2} On August 26, 2011, following a guilty plea, appellant was found guilty of one count of illegal processing of drug documents, in violation of R.C. 2925.23(B)(1) and (F)(2), a fifth degree felony. The trial court sentenced appellant to serve three years of community control, and ordered her to successfully complete an Intensive Supervision Probation Program that included weekly drug screens. At the time the plea was entered, the trial court advised appellant that a violation of her community control could "lead to a more restrictive sanction, a longer period of community control, or a prison term of twelve (12) months."

{¶ 3} On February 9, 2012, appellant's weekly drug screen was positive for oxycodone. At that time, appellant signed a "positive drug test admission statement" in which she "voluntarily confirmed" the results of the drug test. On February 16, 2012, appellant submitted to another drug screen, which proved to be negative. However, during a routine interview with Wood County Probation Officer Brian Laux, appellant signed an "admission statement" in which she admitted to smoking a cigarette that

contained marijuana and cocaine on February 10, 2012. Appellant was then placed under arrest. She was not informed that her drug test was negative until after she signed the admission form.

{¶ 4} A community control violation hearing was held on March 9, 2012, at which testimony was presented by Laux and appellant. Laux testified that he did not initiate a community control violation after appellant's positive test on February 9, 2012, because she took "complete ownership" of the situation and he thought at the time that "giving her one chance could change things." Laux further testified that, on February 16, 2012, he asked appellant "is there anything going on with the test?" after which she said "that she smoked a cigarette that may have been marijuana, it may have had cocaine in it." After appellant signed the admission form, a decision was made by Laux and his supervisor to take appellant into custody and charge her with a community control violation. Laux stated that the basis for the arrest was the second admission statement.

{¶ 5} On cross-examination, Laux stated that he knew appellant's screen was negative before she signed the form and that, ordinarily, if a urine screen is negative, the person is "free to go." He further stated that appellant had a negative screen on March 2, 2012. Laux stated that, normally marijuana is detectable in urine for several weeks, but it is possible for a urine screen to fail to detect both marijuana and cocaine after only a few days. He also testified that variables affecting the results of the test include body size and type, and that "all types of herbal teas and supplements" can be used to cleanse drugs from the system.

{¶ 6} Appellant testified at the hearing that she completed treatment at the Firelands Counseling and Recovery facility on March 8, 2012, and she continues to receive group therapy in Tiffin and individual therapy in Fostoria. Appellant testified that, while talking to Laux on February 16, she stated that she could not say "yes or no" as to whether she recently smoked marijuana and/or cocaine. Appellant stated that Laux threatened to send her to jail if she did not sign the admission statement, and that he did not tell her the urine screen was negative until after she filled out and signed the form. Appellant stated she felt she had no choice but to sign the form. On cross-examination, appellant stated that she was originally convicted for forging drug prescriptions. She further stated that, on February 9, she did not tell Laux she had a valid prescription for Vicodin, a narcotic, until after her urine screen tested positive for narcotics. Appellant repeated that she did not know if she used drugs on February 10, and she did not understand the admission statement that she filled out on February 16.

{¶ 7} At the conclusion of appellant's testimony, closing statements were made by the prosecutor and appellant's defense attorney. Thereafter, the trial court found that appellant continued to use prescription and nonprescription drugs, in violation of the terms of her community control, and ordered her to serve a 12-month prison sentence. A timely notice of appeal was filed in this court on April 13, 2012.

{¶ 8} Appellant's two assignments of error are related and will be considered together. Initially we note that, on appeal, the trial court's decision to revoke probation will not be disturbed absent a finding of an abuse of discretion. *State v. Ohly*, 166 Ohio

App.3d 808, 2006-Ohio-2353, 853 N.E.2d 675, ¶ 19 (6th Dist.). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983).

{¶ 9} At a probation revocation hearing, the evidentiary burden is to prove "evidence of a substantial nature showing that revocation is justified." *Ohly, supra*, at ¶18. "Such evidence is more than a scintilla and less than a preponderance of evidence." *In re J.F.*, 6th Dist. No. S-07-016, 2007-Ohio-6885, ¶ 15. "As always, the weight to be given to the evidence and the credibility of the witnesses are primarily the province of the trier of facts." *State v. Wallace*, 7th Dist. No. 05 MA 172, 2007-Ohio-3184, ¶ 16, citing *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶ 10} Ohio courts have held that a probation revocation hearing is an informal hearing, the purpose of which is to ascertain the facts and ensure that the trial court's decision is based on accurate knowledge of the probationer's behavior. *State v. Lofton*, 8th Dist. No. 89572, 2008-Ohio-3015, ¶ 10; *Ohly, supra*, at ¶ 18. Accordingly, many of the protections afforded in a criminal trial, including the rules of evidence, do not apply. *Id.* Nevertheless, the fundamental due process rights that are to be observed in a probation revocation proceeding are:

> "(a) written notice of the claimed violations of [probation or] parole;
>
> (b) disclosure to the [probationer or] parolee of evidence against him;
>
> (c) 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 factfinders as to the evidence relied upon and reasons for revoking [probation or] parole. * * *" *State v. Lofton*, 2008-Ohio-3015, ¶ 12, quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

{¶ 11} A review of the record in this case shows that all of the requirements for due process were met. In addition, evidence was presented as to appellant's violation of the terms of her community control through documentation and the testimony presented by Laux and appellant, the credibility of which the trial court was in the best position to observe and evaluate.

{¶ 12} On consideration of the foregoing, we cannot say that the trial court abused its discretion by finding that appellant violated the terms of her community control. Appellant's two assignments of error are not well-taken.

{¶ 13} The judgment of the Wood County Court of Common Pleas 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE