

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

State of Ohio

Court of Appeals No. WD-12-073

Appellee

Trial Court No. 09 CR 172

v.

Justin Clark

DECISION AND JUDGMENT

Appellant

Decided: November 1, 2013

* * * * *

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

Drew A. Hanna, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Justin Clark, appeals the judgment of the Wood County Court of Common Pleas, which found that he violated the terms of his community control, and sentenced him to four years in prison. We affirm.

A. Factual and Procedural Background

{¶ 2} In December 2009, appellant pleaded guilty to importuning in violation of R.C. 2907.07(A),¹ a felony of the third degree. On February 1, 2010, the trial court sentenced appellant to three years of community control that included fifteen special conditions, with a reserved prison term of five years. One of the special conditions was that appellant “shall contact an agency approved by the Adult Probation for an assessment for Sexual Offender Treatment and successfully complete any and all recommendations for services, at offender’s cost.” Appellant subsequently engaged in services through Behavioral Connections.

{¶ 3} On September 13, 2012, appellant was unsuccessfully terminated from the Sexual Offenders Treatment Program at Behavioral Connections. Consequently, the state filed a petition for revocation of community control. At the hearing on the community control violation, the state called five witnesses.

{¶ 4} Appellant’s probation officer, Brian Laux, testified that appellant was married, but living alone because under the terms of his probation he was not allowed to have contact with his wife’s daughter. Laux testified that appellant was having issues with Behavioral Corrections since he felt he should be able to have contact with his stepdaughter. Laux further testified that appellant had previously violated the terms of his community control by allowing a registered sex offender, convicted of gross sexual

¹ “No person shall solicit a person who is less than thirteen years of age to engage in sexual activity with the offender, whether or not the offender knows the age of such person.” R.C. 2907.07(A).

imposition with the victim being a male child, to live with him for approximately seven to ten days. Finally, Laux expressed his concern over a craigslist posting under the section “men seeking men,” made in September 2010, in which appellant appeared to be attempting to meet people for a sexual encounter.

{¶ 5} Clancy Yeager testified next. Yeager is the forensic program manager at Behavioral Connections. He testified that appellant had been receiving services from Behavioral Connections for approximately five years. Appellant started in the Sexual Behavior Intervention Program, but when that did not adequately address appellant’s issues, he was referred to the Sexual Offenders Treatment Program. Yeager stated that the issues he addressed with appellant included, “[h]is management of risk around deviant sexual arousal, establishing a stable lifestyle, working on attitudes, rule breaking, criminal attitudes, working to identify those and change those, [and] emotion management.” Yeager testified that appellant would sometimes be receptive to treatment, but other times would change and reject it. However, Yeager did confirm that appellant’s attendance was “very good.”

{¶ 6} The state then called Jeffrey Bischoff, a mental health therapist at Behavioral Connections. Bischoff testified that he did appellant’s initial assessment, and has remained involved in appellant’s treatment throughout the remainder of his time at Behavioral Connections. Bischoff testified that appellant was originally referred to the agency in 2007 because he had developed an inappropriate love relationship with the

12-year-old brother of a young girl he was dating. Appellant was 20 or 21 years old at the time. The relationship included appellant kissing and hugging the boy too long. Bischoff stated that appellant was referred to the Sexual Behaviors Intervention Program so that he could learn boundaries and realize how his behavior affects the young boy. Bischoff then explained that appellant was moved from the Sexual Behaviors Intervention Program to the Sexual Offenders Treatment Program because of the concern that appellant had moved in with his wife who had three young boys, and one of the boys had made some allegations. Bischoff testified that, in the Sexual Offenders Treatment Program, appellant would make progress for a short time and then regress. Appellant experienced the most success in the area of employment and maintaining a job, but Bischoff did not notice any improvements in appellant's thinking about re-offending or criminal behaviors.

{¶ 7} Bischoff testified that he ultimately discharged appellant from the program because “[appellant] was showing a lack of progress and we had tried everything we knew to try at that point, and he started to have a negative affect [sic] on the group. We were concerned that overtreatment would have a negative affect [sic] on him.” After being certified by the court as an expert, Bischoff testified that the risk assessment he completed shortly after appellant was discharged indicated that appellant had a “very high” risk for re-offense. He further concluded based on his training, experience, and interaction with appellant that appellant was not “amenable to continue treatment in the Sex Offender Treatment Program.”

{¶ 8} Another mental health counselor at Behavioral Connections, Tamara Harden, testified that in her two years of interacting with appellant she did not see any improvements in his ability to understand his offense or his risk to re-offend. She further testified that she had concerns regarding appellant's support system because appellant's wife did not appear to understand the seriousness of appellant's original offense, or the risk factors for re-offense. Harden did concede, though, that appellant had excellent attendance and tried to work with her the best that he could.

{¶ 9} Finally, the stated called Samantha Jesse who testified that she participated in administering the risk assessment test and that appellant fell in the high-risk quadrant. In addition, Jesse testified that during the time she was involved in appellant's treatment, she did not notice any improvement in his behaviors.

{¶ 10} Following the state's presentation, appellant took the stand and testified that he had attended all of his sessions at Behavioral Connections, and had completed all of the assignments they had given to him. He further testified that since leaving the Sexual Offenders Treatment Program he has sought out additional individual counseling from another doctor at Behavioral Connections, and has met with that doctor or her associate three times so far. Appellant also stated that he uses his escape and avoidance strategies as much as he can to avoid re-offending, and that he goes to two different churches that provide him support. He testified that more than anything he wants to put his past behind him and move forward and have a family.

{¶ 11} Appellant's wife was the final witness, and she testified that she had no concerns regarding the safety of her sons who live with their father as it relates to appellant. Further, she testified that she would not be concerned that appellant might molest her six-year-old daughter because she is aware and has been told that appellant's attraction is to boys, and because appellant looks at the girl as a father and has said that attraction to her has never been a problem for him.

{¶ 12} After the presentation of evidence and closing arguments, the trial court took the matter under advisement, stating, "This is a difficult issue that I need to think through a little further. Again, he is required to successfully complete his sexual offender treatment, however his failure to do so is through no fault of his own as best I can tell, so I need to sort through whether or not that does indeed constitute a violation." Ultimately, the trial court found that appellant had violated the community control condition despite his best efforts. Thereafter, the trial court sentenced appellant to a four-year prison term.

B. Assignments of Error

{¶ 13} Appellant has timely appealed and now raises two assignments of error:

1. The trial court erred and abused its discretion in finding that appellant/defendant violated community control sanctions.
2. In the alternative, the trial court erred in sentencing appellant/defendant to a four year prison term which was not commensurate with the seriousness of the violation of community control.

II. Analysis

{¶ 14} In support of his first assignment of error, appellant argues that the trial court abused its discretion when it found that he violated the terms of his community control because the evidence against him consisted of vague statements that he “was showing a lack of progress,” and “treatment doesn’t seem to be helping him.” Appellant notes that the witnesses failed to cite specific examples of his attitude, thoughts, or actions that led them to these conclusions. Appellant also contends that the program failed him, not the other way around, as evidenced by his near perfect attendance and the fact that he participated in the program “as best he could.”

{¶ 15} In a community control revocation proceeding, the state must present substantial evidence that the defendant violated the conditions of his community control. *State v. Miller*, 6th Dist. Fulton No. F-05-016, 2006-Ohio-4810, ¶ 13, citing *State v. Hylton*, 75 Ohio App.3d 778, 782, 600 N.E.2d 821 (4th Dist.1991). “Substantial evidence is considered to consist of more than a mere scintilla of evidence, but somewhat less than a preponderance.” *State v. Ohly*, 166 Ohio App.3d 808, 2006-Ohio-2353, 853 N.E.2d 675, ¶ 18 (6th Dist.). Further, a trial court’s decision revoking community control will not be reversed absent a showing of abuse of discretion. *Id.* at ¶ 19. An abuse of discretion connotes that the trial court’s attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 16} In the present case, the state alleged that appellant failed to comply with the requirement that he successfully complete sexual offender treatment. To prove his violation, the state called the program manager and appellant's counselors who testified that appellant did not make sufficient progress in his ability to recognize the seriousness of his offense and his risk to re-offend. For these reasons, appellant was unsuccessfully discharged from the Sexual Offenders Treatment Program. Thus, the state provided substantial evidence demonstrating that appellant did not successfully complete sexual offender treatment.

{¶ 17} What makes this case more difficult is that appellant attended all of the sessions, and completed all of the assignments. This is not a situation where appellant did not participate. Instead, appellant was unsuccessfully discharged because, despite his efforts, he was unable to satisfactorily remedy the issues that necessitated sexual offender treatment in the first place.

{¶ 18} In *State v. Bleasdale*, 69 Ohio App.3d 68, 590 N.E.2d 43 (11th Dist.1990), the Eleventh District reversed the trial court's decision to revoke the defendant's probation where the defendant did not willfully or intentionally violate the conditions of his probation. In that case, the defendant's probation was conditioned upon his "being accepted by, and successfully completing, appropriate programs of the CompDrug Programs." *Id.* at 69. A few months into his probation, appellant was terminated from the program. A summary of the program indicated that appellant suffered from "chronic depression, dependence and an intact delusional system which may take the form of a

paranoid disorder.” *Id.* The center concluded that it was not staffed to deal with the defendant’s mental problems, and recommended that he either be placed in a more intensive treatment facility, or be given more intensive outpatient treatment while still residing at CompDrug. *Id.* Based on these recommendations, the defendant’s probation officer elected to terminate the defendant from the program at CompDrug. *Id.*

{¶ 19} In reversing the trial court, the Eleventh District reasoned that there was no willful or intentional violation of the conditions of the defendant’s probation. Instead, the evidence showed that the defendant was cooperating with the program and that the termination was due to the program’s inability to properly minister the defendant’s case. *Id.* at 72. The court concluded,

The court initially “misdiagnosed” appellant as being drug dependent. Based upon that “finding” the court ordered drug counseling. However, after the determination that appellant suffers mentally and emotionally, the court revoked his probation. “In short, there [is] no evidence of a substantial nature in order to find the revocation [is] justified.” * * * Such action in light of the court’s initial response seems to be “unreasonable, arbitrary or unconscionable,” and an abuse of discretion. (Internal citations omitted.) *Id.*

{¶ 20} However, we find the present situation to be distinguishable from that in *Bleasdale*. There, the defendant was ordered to complete a drug program, but the program discharged him because it determined he really had a mental problem that it was

unequipped to handle. Thus, the defendant did not willfully violate the terms of his community control, and his violation was due to the court's "misdiagnosis" and the program's inability to provide the correct type of service. Here, in contrast, although the record does not indicate that appellant willfully violated the terms of his community control, he was provided with the correct type of treatment to resolve his issue. It was up to appellant to use the treatment to make the necessary changes in his life. Regrettably, as testified to by his counselors, appellant was unable to make those changes. As we quoted in *Miller*, 6th Dist. Fulton No. F-05-016, 2006-Ohio-4810 at ¶ 20, "Defendant cannot complain that society did not try to work with him, nor that it did not give him a chance. It did. Unfortunately for Defendant, the State and its citizens have run out of viable alternatives." Therefore, we hold that the trial court did not abuse its discretion in finding that appellant violated the terms of his community control by failing to successfully complete the Sexual Offenders Treatment Program.

{¶ 21} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 22} In his second assignment, appellant argues that the trial court erred by sentencing him to four years in prison. In particular, he contends that because he fully participated in the Sexual Offenders Treatment Program, complied with the other conditions of his community control, and committed no harm to the public, imposing a prison term was an excessive and disproportionate penalty for his violation.

{¶ 23} R.C. 2929.15(B) provides a trial court with three options if an offender violates a condition of community control: (1) extend the term of community control,

(2) impose more restrictive conditions, or (3) sentence the offender to a prison term that does not exceed the prison term specified by the court at the original sentencing hearing. “A trial court’s choice of sanction under R.C. 2929.15(B) * * * is subject to review, on appeal, under an abuse of discretion standard.” *State v. Suchomma*, 6th Dist. Lucas Nos. L-07-1325, L-07-1326, L-07-1327, 2008-Ohio-5018, ¶ 23.

{¶ 24} The Ohio Supreme Court has recognized that “R.C. 2929.15(B) provides the trial court a great deal of latitude in sentencing the offender.” *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, ¶ 20. Further, “R.C. 2929.15(B) requires the court to consider both the seriousness of the original offense leading to the imposition of community control and the gravity of the community control violation.” *Id.*

{¶ 25} Here, after considering the principles and purposes of sentencing in R.C. 2929.11, and the seriousness and recidivism factors in R.C. 2929.12, the trial court found that a combination of community control sanctions would demean the seriousness of appellant’s conduct. In so finding, the court stated that the necessity to protect the community from future crime was particularly important. Given the nature of appellant’s original offense, his lack of progress in the Sexual Offenders Treatment Program, and the testimony from appellant’s counselors that he was at a high-risk to reoffend, we cannot say that the trial court’s decision to impose a prison term constituted an abuse of discretion.

{¶ 26} Accordingly, appellant’s second assignment of error is not well-taken.

III. Conclusion

{¶ 27} For the foregoing reasons, 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.

Arlene Singer, P.J.

Stephen A. Yarbrough, J.

James D. Jensen, J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
