[Cite as *State v. Zepeda*, 2014-Ohio-1311.]

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

State of Ohio — Court of Appeals No. WD-13-003

Appellee — Trial Court No. 2010CR0523

v.

Andrew Zepeda — **DECISION AND JUDGMENT**

Appellant — Decided: March 28, 2014

* * * * *

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

Mollie B. Hojnicki, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Andrew Zepeda, appeals the December 28, 2012 judgment of the Wood County Court of Common Pleas which, following a guilty plea and the court's termination of appellant's intervention in lieu of conviction, sentenced him to five years of community control and various sanctions. Because we find that the

trial court did not abuse its discretion when it imposed or terminated appellant's intervention in lieu, we affirm.

{¶ 2} The facts relevant to this appeal are as follows. On November 17, 2010, appellant was indicted on theft and failure to file and remit sales tax for the time frame of March 1, 2010 through September 30, 2010, as an owner of property or services. The complaint also charged appellant with complicity to breaking and entering.

{¶ 3} On December 10, 2010, appellant filed a motion for intervention in lieu of conviction ("ILC"). The motion alleged that appellant's alcohol abuse was a significant factor leading to the criminal offenses charged. A hearing on the motion was held on February 4, 2011. Testimony regarding appellant's family history, employment, and alcohol use was admitted as well as the reports and recommendations from the adult probation department and a private assessor. At the conclusion of the hearing the court found appellant eligible for ILC. Appellant then entered guilty pleas to the counts and the court accepted the pleas, withholding sentencing pending the two-year ILC.

{¶ 4} The February 10, 2011 judgment entry set forth the conditions of appellant's ILC which included treatment and employment conditions as well as the condition at issue in this case which provided: "Defendant shall not frequent any establishment serving alcoholic beverages or associate with those who are consuming alcoholic beverages. Defendant shall not be employed as a bartender/barmaid."

{¶ 5} On June 17, 2011, appellant filed a motion to modify two of the ILC conditions including the condition that he have no contact with Paul Zepeda (appellant's

uncle) and the above-quoted condition. As to the establishment serving alcohol condition, appellant argued that, due to his employment as an on-air radio personality, appearances at various events where alcohol was served was "incumbent" upon him. The court granted the motion, in part, allowing appellant to have contact with his uncle. The court denied the request to modify the establishment serving alcohol condition.

{¶ 6} On July 15 and July 19, 2011, the state filed two petitions for intervention in lieu violations requesting that ILC be revoked. The probation department reported that on June 23, and July 2, 2011, appellant was seen at Fat Fish Blue/Funny Bone Comedy Club, establishments which serve alcohol. There was also an issue regarding a music video recorded in May 2011 at Quimby's, an establishment which serves alcohol. Appellant was in the video and drinking what "appeared" to be champagne. A hearing was held on the alleged violations on July 29, 2011.

{¶ 7} On August 1, 2011, the court found appellant in violation of the terms of the intervention. The court continued the intervention but stated that any further violations of the program would result in the continuation of criminal proceedings.

{¶ 8} On September 19, 2012, the state filed a petition notifying the court that appellant again violated the conditions of ILC and requesting that the intervention be revoked. According to the statement from the probation officer and testimony presented at the October 26, 2012 hearing, appellant contacted her and asked if he was allowed to participate in a charity celebrity boxing match where alcohol would be served. The officer responded negatively and advised appellant that the only way he could participate

was if he received special permission from the court. (Permission had previously been sought and granted regarding Mud Hens' baseball opening day.) No such permission was sought and appellant participated in the event.

{¶ 9} At the conclusion of the violation hearing, the court found that appellant was in violation of ILC conditions, revoked ILC, and found him guilty of the offenses. The sentencing hearing was held on December 20, 2012. In the court's December 28, 2012 judgment entry, appellant was sentenced to five years of community control with various conditions and was ordered to pay the $20,000 restitution balance. This appeal followed.

{¶ 10} Appellant raises the following assignments of error for our review:

> First Assignment of Error: The trial court abused its discretion by placing unreasonable restrictions on the appellant during his period of intervention in lieu.
>
> Second Assignment of Error: The trial court abused its discretion by finding that appellant violated the conditions of intervention in lieu.

{¶ 11} In appellant's first assignment of error he argues that the court unreasonably required that appellant not enter any establishment where alcohol was being served. Appellant argues that such a restriction essentially prevented him from going to church, family gatherings, an airplane, or a hotel. Appellant asserts that because the restriction was unduly burdensome and punitive, it is void and his conviction and sentence should be reversed.

{¶ 12} The decision whether or not to grant ILC under R.C. 2951.041 is within the trial court's sound discretion. *State v. Leisten*, 166 Ohio App.3d 805, 2006-Ohio-2362, 853 N.E.2d 673, ¶ 7 (2d Dist.). Courts have consistently noted that the opportunity to participate in ILC is not a right, but a privilege. *State v. Birch*, 12th Dist. Butler No. CA2010-10-25602, 2012-Ohio-543, ¶ 37; *State v. Dempsey*, 8th Dist. Cuyahoga No. 82154, 2003-Ohio-2579, ¶ 9.

{¶ 13} R.C. 2951.041(D) provides:

> (D) If the court grants an offender's request for intervention in lieu of conviction, the court shall place the offender under the general control and supervision of the county probation department, the adult parole authority, or another appropriate local probation or court services agency, if one exists, as if the offender was subject to a community control sanction imposed under section 2929.15, 2929.18, or 2929.25 of the Revised Code. The court shall establish an intervention plan for the offender. The terms and conditions of the intervention plan shall require the offender, for at least one year from the date on which the court grants the order of intervention in lieu of conviction, to abstain from the use of illegal drugs and alcohol, to participate in treatment and recovery support services, and to submit to regular random testing for drug and alcohol use *and may include any other treatment terms and conditions, or terms and conditions*

similar to community control sanctions, which may include community service or restitution, that are ordered by the court. (Emphasis added.)

{¶ 14} At the first violation hearing, the court specifically warned appellant as follows: "I am making it clear that if he is in any place that is serving a beer, a cocktail, pretending to serve, anyplace that has a liquor license, movie theatre, ballpark, I don't care where it is, he is going to be back here again, he is going to be found guilty of his charge." Appellant indicated that he understood.

{¶ 15} Thereafter, appellant was informed, by his probation officer, that he would need to get permission from the court to participate in the charity boxing match. Appellant admitted that the probation officer told him to ask the judge but that he chose not to. He also admitted that he knew that alcohol would be present at the event.

{¶ 16} Under the facts of this case, the argument that appellant believed that the conditions were too onerous is not a basis for reversal. Appellant was not required to agree to the terms of intervention and could have opted to proceed with the criminal prosecution. *See Dempsey*, 8th Dist. Cuyahoga No. 82154, 2003-Ohio-2579 at ¶ 9-10. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 17} In appellant's second assignment of error, he argues that the trial court abused its discretion when it found him in violation of ILC. Appellant argues that the use of the word "frequent" in the alcohol establishment condition implies that appellant would be in violation only if he appeared multiple times at a banned location.

{¶ 18} Appellant correctly notes that a trial court's revocation of ILC is reviewed for an abuse of discretion. *State v. Lingg*, 2d Dist. Montgomery No. 2011 CA 8, 2011-Ohio-4543, ¶ 11. Once a violation of ILC is found, a trial court must impose sentence on the criminal conviction. *State v. Abi-Aazar*, 149 Ohio App.3d 359, 2002-Ohio-5026, 777 N.E.2d 327, ¶ 32 (9th Dist.)

{¶ 19} Upon review, we find appellant's argument spurious, at best. Appellant was informed on several occasions that under the terms of the ILC he was not permitted to be in any establishment which served alcohol. Appellant also indicated, on multiple occasions, that he understood the condition. Further, the term "frequent" as used in the condition encompasses the common meaning of to visit or attend. Accordingly, because appellant was in violation of the terms of the ILC, the trial court did not abuse its discretion when it revoked his ILC and entered judgment. Appellant's second assignment of error is not well-taken.

{¶ 20} On consideration whereof, appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE