

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

State of Ohio

Court of Appeals No. S-13-026

Appellee

Trial Court No. CRB 1300035 C

v.

Ronald R. Matthews

DECISION AND JUDGMENT

Appellant

Decided: June 13, 2014

* * * * *

Brett A. Klimkowsky, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Fremont Municipal Court that found appellant guilty of one count of violating probation and sentenced him to 26 days incarceration. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} The following undisputed facts are relevant to the issues raised on appeal. On July 9, 2013, appellant's probation officer filed a notice of probation violation requesting that the court revoke appellant's probation and impose a previously suspended

sentence of 26 days for a conviction of disorderly conduct. Probation officer Daniel Sanchez swore that on July 9, 2013, appellant tested a .007 BAC on a portable breathalyzer while in the probation department for a meeting with Sanchez. Sanchez swore that on that date, appellant stated he had not consumed alcohol although Sanchez could smell an odor of alcoholic beverage. Sanchez also stated that appellant failed to blow a full deep breath into the breathalyzer as instructed. Appellant was released on bond and the matter was continued for hearing.

{¶ 3} The evidentiary hearing was continued when, on July 19, 2013, another notice of probation violation was filed. In the second notice, Sanchez swore that on June 23, 2013, appellant had been found to be under the influence of alcohol by Bowling Green Police officers when appellant's wife reported to police that appellant had grabbed her and thrown her to the ground. Appellant was charged with domestic violence as a result of that incident.

{¶ 4} On August 6, 2013, an evidentiary hearing was held. At the conclusion of the hearing, the trial court found that appellant had violated the conditions of his probation and ordered appellant to serve the 26 days in jail suspended in May 2013. Appellant filed a timely appeal.

{¶ 5} Appellant sets forth the following assignments of error:

I. The trial court's decision to find Ronald Matthews in violation of probation was not supported by the manifest weight of the evidence.

II. Ronald Matthews was deprived of his right to effective assistance of counsel.

III. Ronald Matthews was deprived of his right to cross-examine a witness who testified against him.

IV. Ronald Matthews was deprived of his right to make a closing statement.

V. The trial court committed plain error by employing the wrong burden of persuasion.

{¶ 6} In support of his first assignment of error, appellant asserts that the trial court's finding that he violated his probation was against the manifest weight of the evidence.

{¶ 7} This will be considered along with his fifth assignment of error, in which he argues that the trial court committed plain error by failing to apply the substantial evidence burden of persuasion in finding that he violated his probation.

{¶ 8} As to appellant's argument under his fifth assignment of error, 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 1140 (1983).

{¶ 9} 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. Cuyahoga No. 89572, 2008-Ohio-3015, ¶ 10. *Ohly, supra*, at ¶ 18.

{¶ 10} The evidentiary burden at a probation revocation hearing is to prove "evidence of a substantial nature showing that revocation is justified." *Id.* "Such evidence is more than a scintilla and less than a preponderance of evidence." *In re J.F.*, 6th Dist. Sandusky 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. Mahoning No. 05 MA 172, 2007-Ohio-3184, ¶ 16, citing *State v. DeHaas*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶ 11} A review of the record in this case shows that evidence was presented as to appellant's violation of the terms of his probation through the testimony presented by Officer Frank of the Bowling Green Police Department. Officer Frank testified regarding the incident on June 23, 2013, as described above, the credibility of which the trial court was in the best position to observe and evaluate. In addition, the trial court had before it two notices of probation violation sworn to and filed by appellant's probation officer as detailed above, which were served on appellant. Also, appellant stipulated as to being on probation, that he signed the rules of his probation and that one of those rules required him to refrain from using alcohol. Appellant testified he suffers from diabetes and that at the time of the alleged violations was experiencing a spell of diabetic ketoacidosis which

causes him to have an odor of alcohol about his person. He did not testify as to being under a doctor's care for the condition or offer any documentary evidence of such a condition. On consideration of the foregoing, we cannot say that the trial court applied the wrong standard or abused its discretion by finding that appellant violated the terms of his probation. Appellant's first and fifth assignments of error are not well-taken.

{¶ 12} We will next consider appellant's third assignment of error in which he asserts that he was deprived of his right to cross-examine a witness when the trial court permitted hearsay testimony. The testimony at issue involved Officer Frank's statement that appellant's wife had told him appellant had grabbed her and pushed her down. When defense counsel objected, the trial court asserted that the rules of evidence do not apply in a probation violation hearing. Further, this court has stated: "The introduction of hearsay evidence into a probation-revocation hearing is reversible error when that evidence is the only evidence presented and is crucial to a determination of a probation violation. [Citations omitted.]" *Ohly*, 166 Ohio App.3d 808, 2006-Ohio-2353, 853 N.E.2d 675, at ¶ 21.

{¶ 13} In this case, Officer Frank's statement as to appellant's wife's comment was not crucial to a determination that he violated probation by consuming alcohol. Pursuant to *Ohly*, appellant's third assignment of error is not well-taken.

{¶ 14} In support of his fourth assignment of error, appellant asserts he was deprived of his right to make a closing statement. Appellant correctly notes that he did not make a closing statement through his counsel but argues that the trial court prevented

counsel from doing so. That claim, however, is not supported by the record. The transcript of appellant's hearing shows that after the defense rested, the trial court asked defense counsel if she had "anything else" to add; counsel responded that she did not. The trial court did not fail to provide the defense with an opportunity for closing argument. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 15} In support of his second assignment of error, appellant asserts he was denied effective assistance of counsel. It is well-established that claims of ineffective assistance of counsel are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984). In order to prove ineffective assistance of counsel, appellant must demonstrate both that the performance of trial counsel was defective and that, but for that defect, the outcome would have been different. *Id.* at 687.

{¶ 16} Appellant argues that counsel's stipulations in several instances made the state's case easier. He also asserts that counsel was unprepared in that she did not immediately object when his wife was called to testify. Appellant asserts counsel demonstrated a lack of "basic procedures," did not conduct redirect of her only witness, did not bring any documentary evidence or witnesses to demonstrate that appellant's appearance of intoxication was allegedly due to being diabetic, and did not make a closing statement. Specifically as to appellant's claim that his appearance of being intoxicated was due to diabetic ketoacidosis, appellant himself testified that he has not been treated for diabetes and did not mention it earlier because it "never was brought up."

{¶ 17} Based our review of the record before us and in applying *Strickland* to this case, we find that appellant was not denied effective assistance of counsel and his second assignment of error is not well-taken.

{¶ 18} On consideration whereof, the judgment of the Fremont Municipal Court is affirmed. Costs of this appeal are assessed to appellant 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

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.

CONCUR.

JUDGE

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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