

[Cite as *State v. Grove*, 2016-Ohio-4818.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 15 MA 0030
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
JOSEPH GROVE)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 13 CR 1318

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Donna McCollum
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: June 29, 2016

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WAITE, J.

{¶1} Appellant Joseph Grove appeals his conviction and sentence pursuant to a Crim.R. 11 plea agreement entered in the Mahoning County Court of Common Pleas. Appellant's counsel has filed a no merit brief and requests leave to withdraw. For the reasons provided, counsel's motion to withdraw is granted and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On January 28, 2014, Appellant was arraigned on a charge of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(2)(B). On March 24, 2014, Appellant and the state entered into a Crim.R. 11 plea agreement where Appellant agreed to plead guilty to an amended charge of burglary, a felony of the fourth degree. Appellant was sentenced to three years of community control with the first six months to be served in the Mahoning County Justice Center. Appellant was given 91 days of jail-time credit.

{¶3} On December 15, 2014, the state filed a motion to extend or revoke probation. The motion was based on a criminal complaint charging Appellant with theft, failure to comply with order or signal of a police officer ("failure to comply"), resisting arrest, and driving under suspension. Appellant waived the probable cause hearing but did not concede to the probation violations.

{¶4} At the probation revocation hearing, the state presented three witnesses. The first witness was a Burlington Coat Factory loss prevention associate. According to the associate, he was working at the store's Boardman location when he saw Appellant, who was a known shoplifter. (1/28/15 Probation

Violation Hrg., p. 5.) Appellant took clothes into a fitting room and when he left the room, he was not carrying the clothes and the clothes were not in the fitting room. As Appellant attempted to exit the store, the associate stopped him and inquired about the clothes. Appellant pushed the associate into a display and ran out of the store.

{¶15} The next witness was Officer Richard Kridler of the Boardman Police Department. Officer Kridler testified that he saw Appellant's car and initiated a traffic stop. (1/28/15 Probation Violation Hrg., p. 13.) After Appellant pulled over, Officer Kridler ordered him to show his hands. Appellant stuck his hands out the window and Officer Kridler noticed tattoos on his arms and was able to identify him. As Officer Kridler approached the car, Appellant pulled his car back onto the road and fled. Boardman police were later able to apprehend Appellant after a K9 tracked him to a barn.

{¶16} The final witness to testify was Thomas Gatto, a probation officer. Mr. Gatto testified that, according to the terms of Appellant's probation, he was required to obey all federal, state, and local laws and ordinances. (1/28/15 Probation Violation Hrg., p. 17.) Mr. Gatto testified that it was his understanding that some of the charges had been dismissed but were still considered probation violations.

{¶17} Based on the testimony presented, the trial court found Appellant violated his probation terms based on evidence supporting the following charges: theft, failure to comply, and resisting arrest. The court determined that the final charge, driving under suspension, was unsupported by the evidence. The court

sentenced Appellant to eighteen months of incarceration. Appellant filed a motion for reconsideration, which the trial court denied. This timely appeal followed.

No Merit Brief

{¶18} Based on a review of this matter, appellate counsel seeks to withdraw after finding no meritorious arguments for appeal. This filing is known as a no merit brief or an *Anders* brief. See *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). In our district, this filing is also referred to as a *Toney* brief. See *State v. Toney*, 23 Ohio App.2d 203, 262 N.E. 2d 419 (7th Dist.1970).

{¶19} In *Toney*, we established the procedure to be used when appellate counsel wishes to withdraw from a case deemed a frivolous appeal.

3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the

arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

* * *

7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

Id. at syllabus.

{¶10} On April 24, 2015, appellate counsel filed a no merit brief in this matter. On June 1, 2015, we entered a judgment entry informing Appellant that his counsel had filed a no merit brief and gave him thirty days to file his own brief. Appellant failed to file a brief in this matter. Accordingly, we must independently examine the record to determine whether there are any potentially meritorious issues. In this matter, we review the probation hearing and sentencing.

Probation Hearing

{¶11} Appellant challenges the trial court's finding that he violated his probation based on his belief that no violation could exist once the charges against him were dismissed. Appellate counsel believes such argument is frivolous based on *State v. Bickel*, 77 Ohio App.3d 26, 601 N.E.2d 61 (10th Dist.1991). In *Bickel*, the Tenth District held that a trial court can revoke probation without a criminal conviction so long as the court finds that a probation violation has occurred. *Id.* at 32.

{¶12} Before a defendant's probation can be revoked, a two-part due process requirement must be met. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). First, the trial court must conduct a preliminary hearing to determine whether there is probable cause to believe that the defendant violated the terms of his probation. *State v. Brown*, 7th Dist. No. 10 MA 34, 2010-Ohio-6603, ¶ 12. The court must then hold a separate hearing to determine whether the probation should be revoked. *Id.*

{¶13} As a probation revocation hearing is not a criminal trial, the state need not prove a violation beyond a reasonable doubt. *State v. Harris*, 7th Dist. No. 11 MA 51, 2012-Ohio-1304, ¶ 13, citing *State v. Delaine*, 7th Dist. No. 08 MA 257, 2010-Ohio-609, ¶ 14; *State v. Hylton*, 75 Ohio App.3d 778, 782, 600 N.E.2d 821 (1991). Rather, the state must present "substantial proof that a defendant violated the terms of his community control sanction." *Harris* at ¶ 13. "The trial court's decision in a probation revocation proceeding is reviewed for abuse of discretion." *Id.*, citing *State v. Brown*, 7th Dist. No. 10 MA 34, 2010-Ohio-6603, ¶ 12.

{¶14} Pursuant to Crim.R. 32.3(A), "[t]he court shall not impose a prison term for violation of the conditions of a community control sanction or revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which action is proposed."

{¶15} Here, Appellant waived his right to a probable cause hearing. Appellant was present when the trial court conducted a probation revocation hearing. The

court informed Appellant of the alleged probation violations and heard witness testimony. After hearing testimony from three witnesses, the court found Appellant violated his terms only as to three charges: theft, failure to comply, and resisting arrest. The court found that no testimony had been presented to establish that Appellant was driving under suspension, thus did not find a probation violation based on this charge.

{¶16} Preliminarily, we note that Appellant’s probation terms included a condition that reads: “I will obey all federal, state, and local laws and ordinances * * *.” (1/28/15 Probation Revocation Hrg., p. 17.) As to the theft charge, the state presented testimony from the Burlington Coat Factory loss prevention associate. The associate testified that he took Appellant to a fitting room. He observed Appellant leave the fitting room without the clothes, which were also not in the room. Based on his experiences, the associate concluded that Appellant had “layered” the clothes, meaning that the merchandise was under his street clothes. Additionally, the associate testified that Appellant pushed him into a display and fled after being confronted about the merchandise.

{¶17} Based on this testimony, the court found that the state presented substantial proof that Appellant violated the terms of his probation. The trial court did not abuse its discretion in finding that the testimony constituted substantial proof that Appellant violated the terms of his probation by committing theft, which is a violation of state law.

{¶18} As to the failure to comply charge, the state presented testimony from Officer Kridler. Officer Kridler testified that he saw Appellant's car and he initiated a traffic stop. After the car initially pulled over and Officer Kridler approached, Appellant pulled the car back onto the road and fled. Officer Kridler explained that he recognized Appellant after seeing him in the car and through the tattoos on his arms. Based on Officer Kridler's testimony, the state presented sufficient evidence to find that Appellant violated his probation by violating state law a second time.

{¶19} Finally, as to the resisting arrest charge, the state relied on the above testimony of Officer Kridler. This testimony is also sufficient to find that Appellant committed a third probation violation, resisting arrest.

{¶20} Accordingly, the trial court did not abuse its discretion in finding that the state proved by substantial evidence that Appellant violated the terms of his probation. Contrary to Appellant's arguments, his actions constituted a probation violation even if the charges were dismissed. As such, there are no appealable issues regarding the probation violation hearing.

Sentencing

{¶21} In the original sentencing entry, the trial court stated that "any violation of this community control sanction, will result in a longer or more restrictive sanction including a sentence to the Department of Rehabilitation and Corrections for eighteen months." (5/27/14 Sentencing Entry.) At the probation hearing, the trial court sentenced Appellant to an eighteen-month term of incarceration.

If the conditions of a community control sanction are violated * * * the sentencing court may * * * impose a prison term of [sic] the offender pursuant to section 2929.14 of the Revised Code. The prison term, if any, imposed upon the violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing * * *. (Emphasis deleted.)

State v. Losey, 4th Dist. No. 14CA11, 2015-Ohio-285, ¶ 13.

{¶22} The trial court informed Appellant at his original sentencing hearing that he would be subject to an 18-month prison sentence in the event of a probation violation. At sentencing for the probation violation, the trial court sentenced Appellant to 18 months. As the sentence is within the permissible range and does not exceed the term specified at the sentencing hearing, the trial court did not err in imposing this sentence.

Conclusion

{¶23} Appellate counsel seeks to withdraw as a review of the record did not reveal any potentially meritorious arguments. For the reasons provided, there are no potentially meritorious arguments. Accordingly, counsel's motion to withdraw is granted and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.