

[Cite as *State v. Bobo*, 2010-Ohio-3405.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93162

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HARRY BOBO

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508409

BEFORE: Stewart, P.J., Sweeney, J., and Jones, J.

RELEASED: July 22, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Edwin J. Vargas
The Vargas Law Firm Co., LPA
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, OH 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Lorraine Debose
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 9th Floor
Cleveland, OH 44113

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Harry Bobo, was found guilty of violating the terms of his community control by failing to report timely to his probation officer. As a result, the court imposed a 12-year sentence. Bobo appeals, complaining that a 12-year sentence is too harsh a sanction for the mere failure to report to a probation officer.

{¶ 2} In 2002, the court found Bobo guilty of unlawful sexual conduct with a minor, placed him on community control, and classified him as a sexually oriented offender with a duty to register his address with the sheriff.

In November 2008, the court found that Bobo violated the terms of community control when he failed to report to his probation officer. The court extended community control and added conditions for a drug referral and stable employment.

{¶ 3} In March 2009, the state charged Bobo with failing to verify his address, failing to provide a change of address, and tampering with records. Bobo pleaded no contest to the counts and the court found him guilty. The court sentenced Bobo to four years on each count, with all counts to run consecutive. It then placed him on three years of community control and ordered him to “abide by the rules and regulations of the probation department.” The court also warned Bobo that a “violation of the terms and conditions [of community control] may result in more restrictive sanctions, or a prison term of 12 year(s) as approved by law.”

{¶ 4} In May 2009, Bobo was again charged with failing to report to the probation officer, so the court conducted a community control revocation hearing. At the conclusion of the hearing, the court found Bobo in violation of the terms of community control and ordered the original 12-year sentence into execution.

{¶ 5} Bobo's second assignment of error is dispositive of the appeal: whether the court had sufficient evidence to find that Bobo violated community control and, whether in the course of the hearing, it denied Bobo due process by refusing to grant him the opportunity to be heard and present evidence.

{¶ 6} A probation revocation hearing is not a criminal trial but is “an informal hearing structured to assure that the finding of a * * * [probation] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the * * * [probationer's] behavior.” *State v. Hylton* (1991), 75 Ohio App.3d 778, 781, 600 N.E.2d 821, quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484. Despite the informality of the proceedings, due process guarantees, among other things, an opportunity to be heard in person and to present witnesses and documentary evidence. *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656. Community control revocation proceedings are not, however, considered a stage of criminal prosecution, so the state need only prove a violation by a preponderance of the evidence. *State v. McCord*, 8th Dist. No. 92268, 2009-Ohio-2493, at ¶4.

{¶ 7} During the hearing on the alleged violation of community control, Bobo conceded that he received notice to report to his probation officer on March 3, 2009, but claimed that he and his probation officer changed his

reporting schedule from the first Wednesday of the month to the second Wednesday of the month. He recounted how he reported on the first Wednesday of February 2009 and his probation officer said that Bobo was reporting early. Bobo said that the probation officer reminded him that they changed his reporting day “to the second week.” When the court stated, “[y]ou are saying that this is all a big mistake,” Bobo replied that it was. The court then suggested that they call the probation officer “to see if he told you that.” Bobo replied, “he’s saying he don’t remember us going through that.” The court said it would call the probation officer, but that if Bobo’s assertion were not true, “then don’t send us through this.” Bobo answered, “[w]hat I’m saying is, he’s saying he don’t remember it. That’s the reason why the warrant was issued.” The court stated, “[h]e don’t remember it because it’s not true.” Bobo insisted that his reporting date had been changed from the first Wednesday of the month and that he reported on the second Wednesday of the month as ordered.

{¶ 8} Although the state need only prove a violation of community control by a preponderance of the evidence, it failed to meet any standard of proof in this case. The state made no appearance at the community control revocation hearing, so it offered no evidence of any kind to rebut Bobo’s assertions. Moreover, to the extent that Bobo conceded that he did not appear on the first Wednesday of the month, he told the court that his failure was

the result of a misunderstanding with his probation officer and that he did appear the following week. While the court plainly did not believe Bobo, it would have been a simple matter for the court to examine the probation officer to verify or contradict Bobo's claims. Certainly justice requires more than what took place at the hearing, particularly given that the court reimposed a 12-year sentence on what may well have been nothing more than a misunderstanding about the reporting time.

{¶ 9} We therefore sustain the second assignment of error. The first assignment of error and supplemental assignment of error are moot.¹ See App.R. 12(A)(1)(c).

{¶ 10} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

¹At oral argument, we granted Bobo's motion to file a supplemental assignment of error. See Motion No. 434297.

MELODY J. STEWART, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR