

[Cite as *State v. Davis*, 2010-Ohio-5126.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93959

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

ROBERT DAVIS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509762-A

BEFORE: Rocco, P.J., McMonagle, J., and Dyke, J.

RELEASED AND JOURNALIZED: October 21, 2010

ATTORNEY FOR APPELLANT

Christopher R. Lenahan
13001 Athens Avenue, Suite 200
Lakewood, Ohio 44107

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Kristin Karkutt
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Robert Davis appeals from the trial court’s decision to revoke community control sanctions and to order a sentence of eight years into execution.

{¶ 2} Davis presents two assignments of error. He asserts his original sentence was void because the journal entry failed to impose postrelease control. He further asserts he was denied his right to due process of law at the “probation revocation” hearing.

{¶ 3} Although it need not do so, the state concedes Davis’s first assignment of error. This court finds that although no error occurred at the initial

sentencing hearing, the trial court erred in the manner in which it conducted both the community control violation hearing and its subsequent imposition of sentence upon Davis. Thus, the trial court's order is reversed, and this case is remanded for further proceedings consistent with this opinion.

{¶ 4} Davis originally was indicted with a co-defendant on two counts; the two were charged with burglary and theft of property in an amount over \$5,000 with respect to an incident that occurred in March 2008.

{¶ 5} In June 2009, Davis entered into a plea agreement. The state dismissed the second count in exchange for Davis's guilty plea to Count 1, a second-degree felony. The trial court informed him he would be subject to three years of postrelease control before accepting his plea. The journal entry, however, states the trial court "advised" him of postrelease control, without specificity as to the time involved.

{¶ 6} The journal entry of sentence states that Davis was "sentenced to 5 years of community control," with conditions, and that if he violated the conditions, his violation "may result in more restrictive sanctions, or a prison term of 8 year(s) * * *." The journal entry was filed on July 20, 2009.

{¶ 7} The transcript of the original sentencing hearing indicates that, although the court was aware of the presumption of a prison term for Davis's conviction, the court was inclined to give Davis the benefit of the doubt. With this inclination, the court made no reference to postrelease control.

{¶ 8} Nearly one month and one week later, on August 24, 2009, however, the trial court called the case for a “probation violation” hearing. The record reflects defense counsel had been appointed on the spot for purposes of the hearing.

{¶ 9} At the outset of the hearing, the trial court noted there had “not been a waiver of the probable cause portion of th[e] proceeding,” and asked defense counsel if he wanted “to proceed with that?” Counsel answered, “Yes, your Honor.”

{¶ 10} The court then stated “there had been a positive urine specimen for cocaine on August 3rd, 2009 and again on August 13th.” On this basis, the court found probable cause and proceeded “to the merits,” i.e., asserting that after Davis “was sentenced on July 17th to drug counseling and testing, he then tested positive on two occasions.”

{¶ 11} The trial court found Davis “to be in violation,” and ordered sentence into execution. The resulting journal entry, filed on August 27, 2009, states that Davis is subject to three years of postrelease control.

{¶ 12} Davis appeals from the order of sentence with two assignments of error.

{¶ 13} Davis argues in his first assignment of error that the *original* sentence was void because it failed to impose postrelease control. He asserts

this case must be remanded for a new sentencing hearing.¹

{¶ 14} The state concedes Davis’s first assignment of error. The state indicates the trial court must conduct a new sentencing hearing, because the trial court did not impose a lawful sentence. In actuality, however, the sentence is not improper.

{¶ 15} R.C. 2929.19(B) provides that, if the sentencing court decides that a community control sanction is appropriate, the court “shall notify the offender that, if the conditions of the sanction are violated * * * , the court * * * may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.”

{¶ 16} For its part, R.C. 2929.15(B) sets forth the options from which the court may choose for any violations of the conditions of a community control sanction; it states that the sentencing court “may impose a longer time under the same sanction,” that it “may impose a more restrictive sanction,” or, too, it “may impose a prison term on the offender pursuant to 2929.14 of the Revised Code.”

{¶ 17} Absent from the relevant statutes is a requirement that a court that chooses to impose community control sanctions as an initial sentence must inform the offender of postrelease control. Such a requirement applies, instead,

¹Davis, however, neither sought to withdraw nor contested the validity of his plea. See *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224.

when the trial court chooses at the original sentencing hearing to impose the sanction of a *prison* term. R.C. 2967.28(B) and 2929.19(B)(3). This court previously observed:

{¶ 18} “Nothing in * * * R.C. 2929.19(B)(5) itself requires the court to inform a defendant who is being sentenced to community control sanctions, at the sentencing hearing, that *if* he violates the conditions of his sanctions, and *if* the court sentences him to a term of imprisonment for that violation, and *if* he violates prison rules, the parole board *may* extend his prison term. Likewise, there is no requirement that the court imposing community control sanctions must inform the defendant that *if* he is later sentenced to a term of imprisonment for violation of the conditions of his sanctions, then post-release control *may* be imposed. These contingencies are not part of the ‘specific prison term’ that can be imposed in the event of a future violation of the conditions of post-release control.” (Emphasis in original.) *State v. Harris*, Cuyahoga App. No. 89971, 2008-Ohio-2175, at ¶7.

{¶ 19} Other Ohio appellate districts have reached the same conclusion. See, e.g., *State v. Russell*, Richland App. No. 06CA12, 2006-Ohio-4450; *State v. Hensley*, Lucas App. No. L-07-1253, 2008-Ohio-2486. Therefore, despite the state’s concession, this court finds no error with respect to the trial court’s failure to advise Davis at his initial sentencing hearing about postrelease control.

{¶ 20} However, the record reflects the trial court failed to mention

postrelease control at the sentencing hearing that followed the court’s determination that Davis violated the conditions of his community control sanction. R.C. 2967.28(B) and 2929.19(B)(3)(c) and (e) required it to do so.

{¶ 21} The trial court’s error in this regard neither renders the sentence void nor requires a de novo sentencing hearing. Instead, R.C. 2929.191 set forth a statutory remedy for a trial court to employ to correct such an error in imposing postrelease control. This statute applies to sentences imposed on or after July 11, 2006. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

{¶ 22} Accordingly, Davis’s first assignment of error is sustained in part.²

{¶ 23} Davis argues in his second assignment of error that he was not afforded due process during his “probation violation” hearing. This assignment of error has merit.

{¶ 24} According to the record, the trial court did not afford Davis any meaningful opportunity to object to the proceeding, and thus committed plain error. *State v. Harmon*, Champaign App. No. 2007 CA 35, 2008-Ohio-6039; cf.,

² This disposition is made in order to instruct the trial court, and is dependent, as discussed *infra*, upon what occurs on remand with respect to Davis’s community control revocation hearing.

State v. Simpkins, Cuyahoga App. No. 87131, 2006-Ohio-3496.³ The record reflects that, without providing notice of its intent, the trial court simply called the case for a “probation violation” hearing. Because of the abruptness of the matter, defense counsel for Davis had to be appointed on the spot, and under such an obvious time pressure from the court, defense counsel immediately acquiesced to a “waiver” of the probable cause portion of the proceeding.

{¶ 25} The court then stated “there had been a positive urine specimen for cocaine on August 3rd, 2009 and again on August 13th.” On this basis, the court found probable cause and proceeded “to the merits,” i.e., that after Davis “was sentenced on July 17th to drug counseling and testing, he then tested positive on two occasions.” Thus relying on its own statements, the trial court also found Davis “to be in violation,” and ordered sentence into execution.

{¶ 26} *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656, required the trial court to provide Davis: 1) written notice of the claimed violations; 2) disclosure of evidence against him; 3) opportunity to be heard and to present witnesses and documentary evidence; 4) the right to confront and cross-examine adverse witnesses; 5) a “neutral and detached”

³Although the *Simpkins* court stated that a “failure to timely object to a due process violation during a probation revocation proceeding waives any error,” in view of the *Simpkins* opinion’s citation to *State v. Henderson* (1989), 62 Ohio App.3d 848, 853, 577 N.E.2d 710, and its subsequent review of the facts surrounding the proceeding for due process violations, this constituted an overly broad statement of the law.

hearing body; and 6) a written statement by the factfinder of the evidence relied upon and reasons for revocation. In this case, however, Davis did not receive even minimal due process at his community control violation hearing. *State v. Miller* (1975), 42 Ohio St.2d 102, 326 N.E.2d 259; cf., *State v. Foster*, Lucas App. Nos. L-06-1126 and 129, 2007-Ohio-1867.

{¶ 27} Since the record reflects the trial court did not afford Davis due process of law at the community control revocation hearing, Davis's second assignment of error is sustained.

{¶ 28} The trial court's order is reversed. This case is remanded for further proceedings consistent with this opinion; the trial court is reminded that, prior to deciding whether the imposition of a prison sentence is warranted, Davis must be accorded a community control violation hearing that comports with *Gagnon* and *Miller*.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court 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.

KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., CONCURS
CHRISTINE T. McMONAGLE, J.,
CONCURS AND DISSENTS
(SEE ATTACHED CONCURRING AND DISSENTING OPINION)

CHRISTINE T. McMONAGLE, J., CONCURRING AND
DISSENTING:

{¶ 29} I concur with the majority's resolution of appellant's first assignment of error, but dissent with respect to the second. I would find that not only was there no denial of due process, but that Davis waived any alleged due process violations by failing to object in the trial court.

{¶ 30} At the probation violation hearing, the court appointed counsel for Davis. The judge told counsel that "[t]here has not been a waiver of the probable cause portion of the proceeding," and then asked counsel, "Did you want to proceed with that?" Counsel answered, "Yes, your Honor."

{¶ 31} The judge then stated, "The probable cause portion indicates there had been a positive urine specimen for cocaine on August 3rd, 2009, and again on August 13th. The Court finds there is probable cause for the statute of the particular case, and, therefore, will move to the merits which indicate that after being sentenced to — on July 17th to drug counseling and testing, he then tested positive on two occasions." The judge then asked counsel, "Is that information correct?" Counsel responded, "Yes, your

Honor.” The court then found Davis in violation of the terms of his community control and imposed an eight-year prison sentence.

{¶ 32} The majority finds due process violations because the trial court allegedly called the case for a violation hearing without providing any notice of its intent, did not afford Davis a meaningful opportunity to object to the proceeding, and pressured defense counsel to acquiesce to a waiver of the probable cause portion of the proceeding. The record supports none of these conclusions.

{¶ 33} I find nothing in the record to support the majority’s conclusion that the trial court called the case for a probation violation hearing without providing notice of its intent. Davis was present for the hearing; the majority simply speculates that he did not know it was a probation violation hearing.

{¶ 34} Likewise, there is nothing in the record to support the majority’s assertions that defense counsel acquiesced to a waiver of the probable cause portion of the hearing under pressure from the judge and did not have an opportunity to object. The judge asked counsel if he wished to proceed and he said yes; counsel could have requested a continuance, but did not. There is nothing in the record that even remotely suggests the judge pressured counsel to continue or that a request for a continuance would not have been

granted. If the judge's question to counsel about whether he wished to continue with the hearing was not, as the majority concludes, "a meaningful opportunity to object" to the hearing, it is difficult to fathom what the majority would have a judge do in such a situation. On this record, I find no due process violations.

{¶ 35} Further, even if there were error, I find that Davis waived any alleged due process errors by failing to object in the trial court. "The failure to timely object to a due process violation during a probation revocation proceeding waives any error." *State v. Simpkins*, 8th Dist. No. 87131, 2006-Ohio-3496, ¶12, citing *State v. Henderson* (1989), 62 Ohio App.3d 848, 853, 577 N.E.2d 710.

{¶ 36} Accordingly, I would overrule Davis's assignment of error regarding alleged due process violations, but remand for resentencing in accord with R.C. 2929.191.