

[Cite as *State v. Lenard*, 2010-Ohio-81.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93373**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**RICHARD LENARD**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-463837 and CR-468589

**BEFORE:** Cooney, P.J., Blackmon, J., and Jones, J.

**RELEASED:** January 14, 2010

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Richard Lenard (“Lenard”), appeals the trial court’s judgment finding that he violated his community control sanction and ordering him to serve the remainder of his four-year prison term. Finding no merit to the appeal, we affirm.

{¶ 2} In December 2005, Lenard and three codefendants were charged in a multi-count indictment in Case No. CR-463837. Pursuant to a plea agreement, Lenard pled guilty to receiving stolen property, tampering with records, telecommunications fraud, forgery, theft, and grand theft of a motor vehicle. The trial court sentenced him to an aggregate of four years in prison. The court ordered the sentence in Case No. CR-463837 to be served consecutively to Case No. CR-468589.

{¶ 3} In Case No. CR-468589, Lenard pled guilty to attempted theft and tampering with records. The trial court sentenced him to eleven months in prison on each count, to be served concurrently with each other, but consecutively to his four-year prison term in Case No. CR-463837 for an aggregate of four years and eleven months in prison.<sup>1</sup>

{¶ 4} In February 2007, Lenard moved for judicial release. After a hearing in March 2007, the trial court granted judicial release, finding that Lenard had served any mandatory prison time. The court placed him on five

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<sup>1</sup>The trial court also ordered full restitution in both cases.

years of community control sanction pursuant to R.C. 2929.20(K) with the following conditions set forth in the court's journal entry:

{¶ 5} “defendant to abide by the rules and regulations of the probation department and defendant to be supervised by intensive special probation unit; submit to regular urine sample, arrest on first positive; show proof of employment and second chance program. No cognovit note be paid, probation department to contact court within 30 days regarding restitution; probation department to determine dollar amount. Full restitution to be paid. The court expressly reserves the right to re-impose the prison sentence herein reduced upon violation of the above condition(s) of the community controlled sanctions herein set forth.”

{¶ 6} In January 2009, Lenard was arrested and indicted in Case No. CR-520755.<sup>2</sup> Lenard's probation officer notified the court of this alleged violation, along with Lenard's failure to notify him of his arrest and his failure to pay court costs and supervision fees within the time allotted by the rules of probation. Lenard refused to waive probable cause, so the trial court held a hearing in May 2009 and found that probable cause existed that Lenard had violated his community control sanction in Case Nos. CR-463837 and CR-468589.

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<sup>2</sup>Case No. CR-520755 was dismissed at the State's request.

{¶ 7} The court then held a hearing on Lenard's alleged violations.<sup>3</sup> In Case No. CR-468589, the trial court found that Lenard was in violation of his community control sanction. Because Lenard had served approximately one year in prison before receiving judicial release, the trial court determined that he had served his eleven-month sentence and therefore terminated that case.

In Case No. CR-463837, the trial court determined that Lenard had violated his community control sanction, so the court terminated community control and sentenced him to the time remaining on his four-year prison term for which he had been granted judicial release.

{¶ 8} Lenard now appeals, raising three assignments of error for our review. In the first assignment of error, he argues that he was denied due process when the trial court terminated his community control sanction because he was not notified in writing of the alleged violations. In the second assignment of error, he argues that the State failed to prove by a preponderance of the evidence that he violated the conditions of his community control sanction. In the third assignment of error, he argues that

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<sup>3</sup>Lenard had a third case, Case No. CR-508101, that was included at the hearing, but is not part of this appeal. At the hearing, the trial court found him to be in violation of community control and sentenced him to an aggregate of two years in prison, to be served consecutively to Case No. CR-463837.

the trial court abused its discretion and violated his due process rights when it revoked his community control sanction.

{¶ 9} In *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, the United States Supreme Court set forth the minimum due process requirements for probation revocation proceedings. First, a court must conduct a preliminary hearing to determine whether probable cause exists to believe that the probationer has violated the conditions of his or her probation. *Id.* at 784-786. “Once it is determined that the conditions of probation have been violated, a second, less summary proceeding is held to determine whether the probation should be revoked or modified.” *Columbus v. Lacy* (1988), 46 Ohio App.3d 161, 162, 546 N.E.2d 445, citing *Gagnon* at 784-786.

{¶ 10} The *Gagnon* Court, relying on its earlier decision of *Morrissey v. Brewer* (1972), 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484, stated that this final revocation hearing must encompass the following six minimum due process requirements:

“(a) written notice of the claimed violations of (probation or) parole; (b) disclosure to the (probationer or) parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses \* \* \*; (e) a neutral and detached hearing body \* \* \*; and, (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking (probation or) parole.” *Gagnon* at 786.

{¶ 11} Lenard claims that he was not given written notice of his alleged violations. We note that although the preferred course is for a trial court to give the probationer notice of the claimed probation violations in written form, oral statements that explain the basis of the revocation proceeding may be sufficient where the statements provide adequate notice to probationer and also a record for appellate review of the revocation proceeding. *Lakewood v. Sullivan*, Cuyahoga App. No. 79382, 2002-Ohio-2134, ¶26, appeal not allowed, 96 Ohio St.3d 1514, 2002-Ohio-4950, 775 N.E.2d 856, citing *State v. Jordan* (Nov. 12, 1998), Cuyahoga App. No. 73478.

{¶ 12} In the instant case, the trial court verbally advised Lenard of the claimed violations at the probable cause hearing. Then at the revocation hearing, the trial court noted that: “[i]n all the conversations that have been had on the record with Mr. Lenard, he’s been readily made aware of the probation violation because I let him be aware of that.” Furthermore, Lenard admitted that he was aware of an alleged violation when he was in jail in January 2009 because there was a probation detainer on his bail. Thus, we find that the failure to initially receive written notice was a purely formal defect, and Leonard has not demonstrated any negative impact on his ability to prepare a defense to the revocation. *State v. Bleasdale* (1990), 69

Ohio App.3d 68, 70-71, 590 N.E.2d 43. Any error was harmless under the facts of the instant case.

{¶ 13} Lenard also argues that the trial court abused its discretion when it terminated his community control sanction because the State failed to prove that he violated the conditions of his community control.

{¶ 14} A community control revocation hearing is not a criminal trial, so the State is not required to establish a violation of the terms of community control “beyond a reasonable doubt.” *State v. Hayes*, Cuyahoga App. No. 87642, 2006-Ohio-5924, ¶11, citing *State v. Payne*, Warren App. No. CA2001-09-081, 2002-Ohio-1916; *State v. Hylton* (1991), 75 Ohio App.3d 778, 600 N.E.2d 821. Instead, the quantum of evidence required to establish a violation and to revoke a community control sanction must be “substantial.” *Hylton* at 782. In a community control violation hearing, the trial court must consider the credibility of the witnesses and make a determination based on substantial evidence. *Hayes* at ¶11, citing *State v. Miller*, Franklin App. No. 03AP-1004, 2004-Ohio-1007. A trial court’s decision finding a violation of community control will not be disturbed on appeal absent an abuse of discretion. *Hayes* at ¶11.

{¶ 15} Here, we find no abuse of discretion. The record reveals that Lenard acknowledged that he had a duty to obey the rules of community



control. He admitted that these rules require him to pay his court costs within six months and to notify his probation officer of any arrests. Lenard's probation officer testified that Lenard had not paid his court costs and Lenard failed to notify him of the arrest, which was revealed when the bond commissioner called the probation officer on January 22, 2009.

{¶ 16} Therefore, we find that the first, second, and third assignments of error lack merit.

Judgment is affirmed.

It is ordered that appellee recover of appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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COLLEEN CONWAY COONEY, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and  
LARRY A. JONES, J., CONCUR