

[Cite as *Rocky River v. Ghafter*, 2011-Ohio-600.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94559

CITY OF ROCKY RIVER

PLAINTIFF-APPELLEE

vs.

PAMELA A. GHASTER

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Rocky River Municipal Court
Case No. 07-CRB-1992

BEFORE: Sweeney, J., Celebrezze, P.J., and Gallagher, J.

RELEASED AND JOURNALIZED: February 10, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Pamela A. Ghaster (“defendant”) appeals the trial court’s determination that found her to be in violation of certain terms of her community control sanctions. For the reasons that follow, we reverse.

{¶ 2} The procedural facts relevant to this case relate to criminal charges filed against defendant for alleged violations of a temporary protection order (“TPO”) issued in Rocky River Municipal Court Case Number 07 CRB 2173 as well as defendant’s alleged violation of term numbers four and nine of community control sanctions that were imposed in Rocky River Municipal Court Case Number 07 CRB 1992.

{¶ 3} Defendant's neighbor, Mrs. Rauser ("Rauser"), was the subject of the TPO and also the victim in the community control sanction case.¹

{¶ 4} The trial court conducted a bench trial on the TPO charges and found defendant not guilty on the basis that the prosecution did not prove the charges beyond a reasonable doubt. However, in the same entry that the trial court found defendant not guilty of the TPO charges, it went on to reason as follows: "Additionally, that in considering these facts this Court also had a matter that it was considering which is a violation of probation of no contact where there was a lower standard of proof * * * the Court does not believe and is prepared to find that the facts presented during this trial and in this case that this Court is comfortable with stating that the defendant violated that term of probation and is comfortable that that was shown by a preponderance of the evidence."² When defendant objected that these comments from the trial judge exhibited a prejudgment on pending community control violations, two of the alleged community control violations

¹We are aware of another pending appeal concerning a civil protection order that involves these parties. See, *Rauser , et al. v. Ghaster*, Cuyahoga App. No. 94745. The resolution of that appeal, however, will have no effect on this matter.

²Our review is limited to what is contained in this record, which does not include the proceedings or transcripts from the TPO case. However, some of the proceedings from the TPO case are quoted throughout the voluminous record provided from the probation violation matter as exemplified from the quote contained in this footnote.

were transferred for hearing to another judge.³ Specifically, another judge of the court was to determine whether defendant violated term numbers four and nine of her community control which provide:

{¶ 5} “4. Defendant is not to harass any neighbors or spread any false rumors about neighbors or engage in stalking behavior.

{¶ 6} “* * *

{¶ 7} “9. Defendant is to follow all terms of criminal protection order that has been in 07 CRB 2173.” (referred to in this opinion as the “TPO”)

{¶ 8} For reasons unknown, the parties agreed that the only term at issue during the community control violation hearing was the alleged violation of term number nine.

{¶ 9} At the community control violation hearing, defendant stipulated to the existence of the TPO and her awareness of its terms. Also, the prosecution indicated it had “printed out” the TPO. Although the trial court indicated that the TPO was part of its record, the parties have not cited to, nor can we find, a copy of the TPO anywhere in this record.⁴

³The original judge, however, found defendant had violated term number two of her community control as alleged, which finding defendant has not appealed in this matter.

⁴The only exhibits from the community control hearing contained in the record are photographs.

{¶ 10} After the evidentiary hearing, the trial court found defendant had violated her community control sanctions and extended them to April of 2011, which coincides with the term of defendant's community control sanctions imposed in another matter.

{¶ 11} The sole assignment of error provides:

{¶ 12} "The trial court erred by not dismissing the probation violation charges on double jeopardy grounds and by finding appellant guilty of violating her probation based on the same incidents that were the basis of criminal charges of which appellant was found not guilty."

{¶ 13} "Parole and probation may be revoked even though criminal charges based on the same facts are dismissed, the defendant is acquitted, or the conviction is overturned, unless all factual support for the revocation is removed." *Barnett v. Ohio Adult Parole Authority* (1988), 81 Ohio St.3d 385, 387, 692 N.E.2d 135, citing, *Zanders v. Anderson* (1996), 74 Ohio St.3d 269, 272, 658 N.E.2d 300, 302; *Flenoy v. Ohio Adult Parole Auth.* (1990), 56 Ohio St.3d 131, 132, 564 N.E.2d 1060, 1062. In *Barnett*, the Ohio Supreme Court determined that Barnett's acquittal on involuntary manslaughter charges did not remove all factual support that he violated his parole by engaging in criminal conduct. *Id.* Specifically, the court found that the "APA could have appropriately considered evidence that Barnett had been driving while intoxicated when it reparaoled Barnett and imposed special conditions relating

to substance abuse.” Id.

{¶ 14} In a different proceeding, defendant was charged and acquitted of violating the TPO. Then, defendant faced this separate proceeding concerning the alleged violation of her community control sanctions, which the parties agreed involved term nine that required her to follow the terms of the same TPO. The same set of facts formed the basis of both proceedings.

Contrary to the not guilty finding in the criminal proceedings, the trial court in this matter found that defendant did violate the terms of her community control by not following the terms of the TPO and extended her community control sanctions for that reason.

{¶ 15} We note that there is a lower burden of proof involved in determining a community control violation in comparison to the burden of proof necessary to obtain a criminal conviction. Indeed, case law from our jurisdiction, that predates *Barnett*, focused its analysis on this distinction. E.g., *State v. Hollis* (May 15, 1997), Cuyahoga App. No. 70781. However, the Ohio Supreme Court precedent requires an analysis on the facts upon which both proceedings are based as opposed to the differing burdens of proof.

Id. The concern being whether an accused is being forced to “run the gauntlet twice” in defending criminal charges and alleged community control violations.

{¶ 16} This case is unlike *Barnett*, where Barnett’s drinking, of itself,

constituted a violation of his parole notwithstanding the fact that he was acquitted of involuntary manslaughter for other reasons not concerning his alcohol consumption. Under those circumstances, Barnett's acquittal did not remove all factual support for his parole violation.

{¶ 17} In this case, defendant was accused of violating the TPO based on two incidents where the two women encountered each other in their separate vehicles on the same day, and defendant allegedly waved at Rauser. The municipal court found that defendant had not violated the TPO based on this evidence, but then later relied on the same evidence to determine that defendant had not followed the terms of the TPO and, therefore, violated her community control.

{¶ 18} The not guilty finding in the first proceeding removed all factual support for the allegation that defendant violated the TPO and corresponding term nine of her community control sanctions; notwithstanding the different burdens of proof. Accord, *State v. Sutherlin*, 154 Ohio App.3d 765, 768, 2003-Ohio-5265, 798 N.E.2d 1137 (revocation hearing and court's ensuing sentence violated double jeopardy clause as defendant had already been acquitted of offenses that constituted community-control violations). We are constrained to make this finding as the parties agreed that the community control violation hearing was premised solely upon determining whether defendant violated term nine of her community control sanctions, which

required her to follow the terms of the TPO. The record clearly establishes that the community control violation hearing did not involve an alleged violation of any other provision of defendant's community control sanctions.

Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee her costs herein.

It is ordered that a special mandate be sent to said 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.

JAMES J. SWEENEY, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
SEAN C. GALLAGHER, J., CONCUR