[Cite as *State v. Walton*, 2009-Ohio-6703.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. JOEL R. WALTON Appellant	C. A. No. 09CA009588 APPEAL FROM JUDGMENT ENTERED IN THE ELYRIA MUNICIPAL COURT COUNTY OF LORAIN, OHIO CASE No. 2008CRB01178

DECISION AND JOURNAL ENTRY

Dated: December 21, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Joel Walton, appeals from the judgment of the Elyria Municipal Court re-imposing a portion of his suspended sentence for a violation of community control sanctions. This Court affirms.

I.

{¶2} On July 9, 2008, after he entered a no contest plea to the charge of sexual imposition under R.C. 2907.06 the trial court found Walton guilty. The trial court sentenced Walton to 60 days in jail and a $500.00 fine. The trial court then suspended all 60 days of jail and $250.00 of the fine on several conditions. The conditions included that he obey all laws for two years, have no further violations of this nature, pay fines and costs in full on the day of sentencing or comply with the terms of any court-approved installment plan, have no negative contact with the victim, and complete one year of probation monitored by the Probation Department, including attending sex offender counseling and following all recommendations.

On December 22, 2008, the trial court modified the no-contact order relating to the victim as to some of its terms and extended the duration of that order to five years from the date of sentencing, July 9, 2008. The relevant portion of the revised order stated that Walton was "to be 1500 feet from the property known as 9642 Township Road 122, Upper Sandusky, Ohio 43351." On March 10, 2009, Walton's probation officer, Craig Demyan, filed a document entitled "Court Order," which stated that "Defendnt [sic] was successfully discharged from Firelands Counseling & Recovery Services Sex Offender Program on 2-25-09 and has met program goals. Fine/costs are paid in full. Probation Case Closed." This document did not bear the signature of the judge, but appears to have been signed by the probation officer.

{¶3} On April 24, 2009, the State filed a motion to re-impose Walton's suspended sentence because Raymond Niederkohr had observed Walton looking in the windows of the residence at 9642 Township Road 122 on March 12, 2009. On May 13, 2009, the trial court held a full hearing of this matter. Walton was represented by counsel. At the conclusion of the hearing, the trial court found that Walton violated the no-contact term and ordered that 30 days of the suspended sentence be re-imposed. The trial court journalized its finding that day and stayed the re-imposition of the 30 days pending appeal.

{¶4} Walton timely filed a notice of appeal from the re-imposition of the suspended sentence. We have rearranged his assignments of error for ease of review.

II.

{¶5} Community control under Ohio's current statutory scheme is the functional equivalent of probation under the former statutes. *State v. Cooks* (1997), 125 Ohio App.3d 116, 119. Probation revocation is substantially similar to parole revocation and requires identical minimum due process protections. *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 782. Probation is

now one of the many conditions that a judge may include as community control sanctions. R.C. 2929.27. It follows that because community control is the functional equivalent of what was formerly probation, the same due process protections that applied to probation violations now apply to community control violations. *State v. McKibben* (Nov. 17, 1999), 1st Dist. No. C-990041, at *1, fn. 1.

{¶6} In *Gagnon*, supra, the United States Supreme Court adopted the due process requirements for revocations set forth in *Morrissey v. Brewer* (1972), 408 U.S. 471, which include:

> "'(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 (unless the hearing officer specifically finds good cause for not allowing confrontation);
>
> "'(e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
>
> "'(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking (probation or) parole.'" *Gagnon*, 411 U.S. at 786, quoting *Morrissey*, 408 U.S. at 489.

{¶7} We review Walton's assignments of error regarding his hearing under these guiding principles.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED BY DENYING MR. WALTON THE RIGHT OF CONFRONTATION AND CROSS EXAMINATION OF WITNESSES BY RELYING ON A LETTER THAT CONTAINED HEARSAY, WAS NOT MARKED AS EVIDENCE, NOT OFFERED OR ACCEPTED AS EVIDENCE, AND WAS NOT SUBSTANTIATED BY SWORN TESTIMONY."

{¶8} In his second assignment of error, Walton argues that the trial court committed reversible error when it considered a letter that contained hearsay that was not entered into evidence or substantiated by sworn testimony. He also argues that reliance on the letter violated the United States and Ohio constitutional prohibitions against ex post facto laws because the conduct described in the letter was not a probation violation at the time it occurred.

{¶9} In this assignment of error, Walton argues that the trial court considered a letter that contained impermissible hearsay. Walton failed to make the letter part of the record at the trial court level. Walton did not object to the trial court's consideration of the letter for any purpose nor did he attempt to enter it into evidence. Without the missing letter, "the reviewing court has nothing to pass upon and *** has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶10} Notwithstanding our presumption of regularity with regard to the proceedings below, the trial court could have relied upon Niederkohr's testimony alone. At the hearing in question, Niederkohr testified that he had seen Wilson approximately a dozen times in the last 13 or 14 years and was confident that he was able to identify him. Niederkohr testified that he observed Walton on the property at 9642 Township Road Number 122 on March 12, 2009 at around 3:30 or 4:00 p.m. Walton was not allowed on this property. Therefore, hearsay evidence from the letter was neither the only evidence presented nor was it crucial to a determination of the community control violation.

{¶11} Further, the re-imposition of the sentence did not violate constitutional protections against ex post facto laws. As established above, Niederkohr's testimony clearly established that Walton violated the no-contact provision of his community control conditions. On December

22, 2008, the trial court modified the conditions to include no contact with the property at 9642 Township Road Number 122. On March 12, 2009, Niederkohr observed Walton violating the condition. The trial court clearly credited Niederkohr's testimony. Because the contact to which Niederkohr testified occurred after Walton was on notice of the modified no-contact condition, the re-imposition of a portion of his sentence did not violate constitutional protections against ex post facto laws.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN FINDING MR. WALTON IN VIOLATION OF HIS PROBATION WITHOUT SUBSTANTIAL EVIDENCE."

{¶12} Walton's third assignment of error contends that the trial court committed error when it found that he violated a community control sanction and imposed previously suspended jail time without substantial evidence. Walton's arguments involve the plausibility of Niederkohr's testimony and a contention that Walton's ex-girlfriend, Kathleen DeBolt, provided more credible alibi testimony.

{¶13} To determine whether the trial court erred in re-imposing the suspended sentence we first look to the State's burden in proving a violation of a term of community control. It is well settled that community control violations are not criminal proceedings and need not be proved beyond a reasonable doubt. *State v. Mingua* (1974), 42 Ohio App.2d 35, 40. Once a violation of community control is proven, this Court reviews the decision to impose a portion of the suspended sentence for an abuse of discretion. *State v. Rose*, 9th Dist. No. 21750, 2004-Ohio-1614, at ¶14. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. As recently as 2004, this Court has espoused two separate standards for proof of community control violations: "preponderance of the evidence" and "substantial evidence."

PREPONDERANCE OF THE EVIDENCE

{¶14} In *Rose*, supra, at ¶7, we cited *State v. Newman* (July 10, 1991), 9th Dist. No. 14984, for the proposition that the State must prove a violation by a preponderance of the evidence. *Newman's* standard was gleaned from *State v. Carpenter* (Dec. 17, 1986), 9th Dist. No. 2168, which derived the standard from a footnote in *State v. Delaney* (1984), 11 Ohio St.3d 231, 234, fn. 3 (quoting the trial court's full explanation as to its basis for finding that Delaney violated his probation: "And I'm satisfied in my mind that the prosecution here has established by a preponderance of the evidence that Mr. Delaney is guilty of this probation violation.") However, the *Delaney* court quoted the explanation not for its standard but to demonstrate that although Delaney received no written statement of the evidence the trial court relied upon, he was, nonetheless, not prejudiced because the trial court thoroughly explained its rationale. Id. at 234-35. Interestingly, Delaney began his appellate process in this Court, where we held without explanation that "[a] review of the record indicates sufficient *substantial evidence* to support the judgment of the court." (Emphasis added.) *State v. Delaney* (June 1, 1983), 9th Dist. Nos. 10947, 10948, at *2. This Court in *Carpenter* later observed that "[a]lthough burden of proof was not an issue in *Delaney*, the Ohio Supreme Court inferentially approved preponderance as the correct burden." *Carpenter*, 9th Dist. No. 2168, at *2.

SUBSTANTIAL EVIDENCE

{¶15} In 1974, Ohio's Tenth District held that the standard of proof for probation revocation was not as high as beyond a reasonable doubt. *Mingua*, 42 Ohio App.2d at 40. Instead, that court required "evidence of a 'substantial' nature[.]" Id. We adopted the substantial evidence standard from *Mingua* as the standard for revocation in *State v. Fisher* (Nov. 26, 1975), 9th Dist. No. 7835, at *1. We have since cited *Mingua's* standard as recently as 2004 for the

revocation of community control. *In re A.B.*, 9th Dist. Nos. 04CA0017, 04CA0018, 2004-Ohio-4724, at ¶10.

{¶16} Neither party asks us to adopt a specific standard and we decline to do so at this time without the benefit of the parties briefing the issue. In any event, the evidence introduced by the State would satisfy either standard. A disinterested third party, Niederkohr, testified that he observed Walton on the property at 9642 Township Highway 122. Niederkohr was familiar with Walton. Walton was aware that the trial court expressly conditioned the suspension of his 60 day jail sentence on the condition that he have no contact with that property. However, Walton's friend DeBolt provided testimony suggesting he was with her in another county at the time. The court credited the testimony of Niederkohr, as was its prerogative. Accordingly, the trial court did not abuse its discretion in re-imposing half of the suspended sentence. *Blakemore*, 5 Ohio St.3d at 219. Walton's third assignment of error is overruled.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED WHEN IT FOUND MR. WALTON IN VIOLATION OF HIS PROBATION NINE WEEKS AFTER IT HAD BEEN TERMINATED."

{¶17} In his first assignment of error, Walton argues that his probation terminated nine weeks prior to the trial court's order imposing a portion of his suspended sentence. He argues that because his probation had been terminated, the trial court did not have jurisdiction to impose the suspended sentence for a violation of its conditions. We do not agree.

{¶18} Walton's contention that his probation had terminated and the trial court lost jurisdiction to impose the suspended sentence is incorrect. Walton cites *Davis v. Wolfe* (2001), 92 Ohio St.3d 549, for the proposition that once probation terminates the jurisdiction of the judge to re-impose a suspended sentence terminates. However, Walton's interpretation conflates

"probation" with "community control sanctions." Although probation as formerly used was the overarching term under which courts placed conditions upon convicted defendants, the overarching term is now "community control sanctions." See, e.g., R.C. 2929.25. R.C. 2929.25 controls misdemeanor community control sanctions and allows courts, as part of a sentence, to impose jail time and suspend that time subject to conditions found in, among others, R.C. 2929.27, for up to five years. The conditions in R.C. 2929.27 may be imposed in any combination and include such options as intensive probation supervision, basic probation supervision, and "any other sanction that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding purposes and principles of misdemeanor sentencing." R.C. 2929.27(A)(5), (A)(6), and (B). The trial court sentenced Walton to a period of probation to monitor, among other things, his compliance with sex offender counseling. The court also imposed a condition that Walton have no contact with the property at 9642 Township Road 122 for a period of five years. Walton completed the probation aspect of his community control sanctions by March 10, 2009, leading to the probation officer's purported termination of that provision. However, because probation was only one aspect of the overarching community control sanctions, its termination did not terminate the other community control terms. Accordingly, the community control sanction Walton violated remained in effect notwithstanding the completion of the separate probation sanction. Thus, the trial court retained jurisdiction to impose the incarceration time it had suspended when Walton violated the no-contact sanction the court had imposed. Walton's first assignment lacks merit and is overruled.

III.

{¶19} Walton's assignments of error are overruled. The judgment of the Elyria Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Elyria Municipal Court, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

MICHAEL J. CAMERA, Attorney at Law, for Appellant.

SCOTT STRAIT, Prosecutor, City of Elyria, for Appellee.