

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 09CA0097-M

Appellee

v.

WILLIE J. RICHARDSON

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08-CR-0556

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 20, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant, Willie J. Richardson, appeals the decision of the Medina County Court of Common Pleas that found that he violated community control and sentenced him accordingly. We affirm in part, reverse in part, and remand to the trial court.

I.

{¶2} On March 4, 2009, Willie J. Richardson pled guilty to one count of burglary and one count of theft. The trial court sentenced him to 180 days in the county jail and two years of community control. As part of his community control sanctions, Richardson was required to obey all laws. The trial court also warned Richardson that he would be sentenced to a prison term for a violation of community control.

{¶3} On October 15, 2009, Richardson was indicted in Cuyahoga County for several charges related to the use of stolen credit cards. The Medina County Probation Department

considered the indictment to be a violation of Richardson's community control and filed a complaint.

{¶4} On November 30, 2009, Richardson appeared before the Medina County Court of Common Pleas for a hearing on his alleged violation of community control. Richardson admitted that he violated the terms of his community control. The trial court found Richardson to be a violator and imposed a total sentence of six years in prison for his original charges of burglary and theft.

{¶5} Richardson has appealed the judgment of the trial court and assigns the following errors: (1) he could not have been found to be in violation of his community control based on an indictment and not a conviction; (2) his actions did not constitute violations of community control conditions imposed by the trial court; (3) the trial court could not impose a six-year sentence because it informed him at his original sentencing that a violation of community control would result in a five-year sentence; (4) his counsel was ineffective, and; (5) the trial court was required to, but did not, state his alleged violations on the record. We shall rearrange and consolidate some of the assignments of error to facilitate our review.

II.

{¶6} In his fifth assignment of error, Richardson argues that he was denied due process of law because the trial court failed to identify Richardson's alleged community control violations on the record at the hearing. We disagree.

{¶7} The community control violation complaint alleged that Richardson violated specific conditions of his sentence because he was indicted on criminal charges in another jurisdiction and had been in contact with the co-defendant in his original burglary/theft case, Harry Ricks. The complaint contains a certificate of service evidencing that Richardson was

served with a copy of the complaint. At the beginning of the hearing on the violations, the trial court stated that Richardson had been indicted in Cuyahoga County for theft offenses, including, four counts of aggravated theft, two counts of misuse of a credit card, and two counts of forgery. The court further stated that Richardson had been in contact with Ricks. Thereafter, the trial court identified the rights Richardson would be giving up by admitting to the violations. Richardson entered his admission to the violations as stated by the court and the court found him to be a violator. The court and counsel for Richardson then discussed the existence of the Cuyahoga County charges, Richardson's awareness that he was not to associate with Ricks, and that the association with Ricks had led to the Cuyahoga County charges. Richardson also made a brief statement to the trial court.

{¶8} Upon review of the transcript, it is clear that the trial court identified the alleged violations on the record and discussed the violations with Richardson's counsel. Richardson did not indicate that he was uncertain as to what actions constituted violations of the terms of his community control and, in fact, admitted to the violations. At the brief hearing, Richardson did not raise any objections nor indicate any confusion about the allegations against him. We conclude that Richardson's fifth assignment of error is without merit.

{¶9} In his first assignment of error, Richardson contends that he was denied due process because the trial court found him to be a community control violator based on an indictment rather than a conviction. In his second assignment of error, he claims he was denied due process because his actions did not violate terms of community control actually imposed by the trial court. We combine analysis of these assignments of error because they can be resolved in tandem.

{¶10} As mentioned above, Richardson was served with a complaint that enumerated the actions he was alleged to have engaged in that violated specific conditions of his community control. At the hearing, the trial court again identified the alleged violations and Richardson's rights with respect to the alleged violations. The court then asked Richardson if he "wish[ed] to admit [his] [community control] violations." Richardson responded, "Yes, your honor." Subsequently, Richardson addressed the court stating that "* * * the Court gave me the privilege of [community control]. I failed on it." Further, "I take responsibility for the part I played." In as much as Richardson admitted that his actions amounted to violations of the terms of his community control, he cannot now be heard to complain that the indictment arising out of his criminal association with his prior co-defendant was insufficient grounds upon which to convict him of community control violations. We overrule Richardson's first and second assignments of error.

{¶11} In his third assignment of error, Richardson asserts that he was denied due process because the trial court sentenced him to six years for his violation when it had told him at a prior hearing that the maximum prison sentence would be five years. We note that Richardson did not raise an objection to this sentence at the hearing, thus, he has forfeited all but plain error. *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Joseph* (1995), 73 Ohio St.3d 450, 461. Richardson has not advanced a plain error argument in his merit brief; however, based on the particular facts of this case and in the interests of justice, we will address the merits of Richardson's argument to prevent a manifest miscarriage of justice. *Kobelka*, at *2, citing *State v. Phillips* (1995), 74 Ohio St.3d 72, 83.

{¶12} On March 4, 2009, the trial court held a hearing to accept Richardson's guilty plea to his original charges of burglary and theft. The court postponed sentencing so that a

presentence investigation could be performed. At the sentencing hearing in May 2009, the court imposed 180 days in jail with credit for time served and two years of community control. The trial court informed Richardson that if he violated any of the conditions of his community control, the court would impose a prison sentence of five years. In its judgment entry of sentencing following the hearing, the trial court stated that if Richardson violated his sentence, the court would impose an eight-year prison sentence. Lastly, in November 2009, when the trial court sentenced Richardson for his community control violation, the court imposed a sentence of six years.

{¶13} If a trial court determines that an offender shall be placed on community control, the trial court is required to notify the offender of the consequences that may be imposed if the offender violates the terms of community control. R.C. 2929.19(B)(5). If a prison term is a consequence of a violation, the trial court must notify the offender of the specific prison term that may be imposed. *Id.* In *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, at paragraph two of the syllabus, the Supreme Court of Ohio held that the trial court must give the required notification at the sentencing hearing. See, also, *State v. McWilliams*, 9th Dist. No. 22359, 2005-Ohio-2148, at ¶¶16-20 (following the holding of *Brooks*). The Court further stated that the specific prison term identified at the sentencing hearing “set[s] a ceiling on the potential prison term, leaving the court with the discretion to impose a lesser term * * * when a lesser term is appropriate.” *Brooks* at ¶23. Accordingly, if the offender commits a violation and the trial court determines that a prison term is the appropriate sanction, “the term imposed may not exceed the term the offender was originally notified of under R.C. 2929.19(B)(5).” *Id.* at ¶22.

{¶14} In the case at bar, the trial court informed Richardson at his sentencing hearing that, “If you violate any of the rules and regulations of the probation department, I will send you

to jail for five years.” The trial court had the discretion to impose up to the full five years upon Richardson’s subsequent violation, but did not have the discretion to impose more than the stated five-year term. *Id.* Although Richardson received the appropriate notice of the possible penalty for a community control violation, the trial court exceeded its authority when it ordered Richardson to serve six years in prison for his violation. Richardson’s third assignment of error is sustained and the matter is remanded to the trial court to impose a new sentence. If the trial court chooses prison, the term of incarceration may not be more than five years.

{¶15} Richardson argues in his fourth assignment of error that he was denied the effective assistance of counsel. Specifically, Richardson claims that the attorney appointed to represent him at the hearing on his community control violations was ineffective because he failed to notice that Richardson had not violated stated conditions of his community control sanctions and that the sentence imposed by the trial court was improper. We disagree.

{¶16} In order to prove that trial counsel was ineffective, a defendant must demonstrate: (1) deficiency in his attorney’s representation and, (2) that he suffered prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142. Deficiency of representation “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. When evaluating counsel’s performance, this Court must be “‘highly deferential’” and “‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance * * *.’” *Bradley*, 42 Ohio St.3d at 142, quoting *Strickland*, 466 U.S. at 689.

{¶17} We begin by addressing whether counsel was ineffective for failing to argue that Richardson had not actually violated the terms of his community control. In examining a claim

of ineffective assistance, “[a]n appellate court may analyze the prejudice prong of the *Strickland* test alone if such analysis will dispose of a claim of ineffective assistance of counsel on the ground that the defendant did not suffer sufficient prejudice.” *State v. Kordeleski*, 9th Dist. No. 02CA008046, 2003-Ohio-641, at ¶37, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 83. As previously noted, Richardson admitted to violating community control at the hearing before the trial court. In light of his admission, Richardson cannot demonstrate that he was prejudiced by counsel’s representation because he has not shown that but for counsel’s actions, or inaction, he would have insisted upon challenging the probation violation. As noted above, the trial court identified two reasons why Richardson was in violation of community control: his association with Ricks and his indictment. Richardson has not pointed to anything in the record that would contradict his acknowledgment at the hearing that he committed a violation. As Richardson has failed to demonstrate prejudice, we conclude that counsel was not ineffective for failing to raise an argument that Richardson did not violate community control. See *id.*

{¶18} Next, Richardson argues that counsel was ineffective for allowing the trial court to sentence Richardson to six years incarceration instead of five. Having determined above that the trial court did, in fact, impose an improper sentence and that the matter must be remanded for resentencing; we deem this portion of Richardson’s assignment of error to be moot and decline to address it. App.R. 12(A)(1)(c).

{¶19} Consequently, Richardson’s fourth assignment of error is overruled.

III.

{¶20} In light of the above analysis, we sustain Richardson’s third assignment of error; however, we overrule his remaining four assignments of error. We reverse the sentence imposed

by the trial court for Richardson's community control violations and remand for resentencing. The remainder of the judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, 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 equally to both parties.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

PAUL MANCINO, JR., Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.