

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
	:	CASE NOS. CA2011-10-195
Plaintiff-Appellee,	:	CA2011-10-196
	:	
- vs -	:	<u>OPINION</u>
	:	10/29/2012
	:	
JOSHUA THOMAS MULLINS,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case Nos. CR2010-04-0728 and CR2010-12-2010

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Heather A. Fellerski, P.O. Box 191342, Fairfield, Ohio 45018, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Joshua T. Mullins, appeals his revocation of community control and sentence from the Butler County Court of Common Pleas.

{¶ 2} On May 5, 2010, the Butler County Grand Jury indicted appellant on one count of failure to verify a current residence, school, institution of higher education or place of employment address in violation of R.C. 2905.06, and one count of failure to provide notice of change of address or place of employment in violation of R.C. 2950.05(A), both third-

degree felonies. Appellant initially pled not guilty to both counts. However, on June 7, 2010, appellant pled guilty to the second count, failure to provide notice of change of address. On July 19, 2010, the trial court sentenced appellant to five years community control. At the time of the plea, the trial court, pursuant to Crim.R. 11(C), addressed appellant's constitutional rights and the possible sentences associated with the plea.

{¶ 3} On March 14, 2011, appellant admitted to violating his community control and pled guilty to a new charge of failure to provide notice of address or place of employment. As with the first plea, the trial court, pursuant to Crim.R. 11(C), addressed appellant's constitutional rights and the possible sentences associated with the plea. After continuing the matter until May 9, 2011, the trial court sentenced appellant to five years of community control on the condition that he successfully complete the MONDAY program.

{¶ 4} On September 27, 2011, a notice of alleged violations was filed against appellant. The notice stated that appellant had been unsuccessfully terminated from the MONDAY program on September 26, 2011, due to habitual noncompliance with the rules of the program. On October 17, 2011, through counsel, appellant admitted to that violation of his community control. The trial court then revoked appellant's community control and imposed a sentence of two years in prison for each violation and ordered that the sentences run consecutively.

{¶ 5} Appellant now appeals from that revocation of community control and sentence, raising one assignment of error for our review:

{¶ 6} Assignment of error No. 1:

{¶ 7} THE APPELLANT DID NOT GIVE A KNOWING AND INTELLIGENT GUILTY PLEA WHEN THE TRIAL COURT FAILED TO STRICTLY COMPLY WITH CRIM.R. 11(C) AND DUE PROCESS WAS VIOLATED UNDER THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

{¶ 8} Appellant argues that the trial court did not address his constitutional rights during the October 17, 2011 proceedings. In turn, appellant alleges that the trial court failed to include the necessary dialogue established under Crim.R. 11(C) to verify that he was entering an intelligent, voluntary plea.

{¶ 9} Contrary to appellant's argument, he was not entitled to Crim.R.11(C) dialogue at the revocation proceeding. In *State v. Payne*, 12th Dist. No. CA2001-09-081, 2002-Ohio-1916, ¶ 17, we held that, "Crim.R. 11 is not applicable to revocation proceedings." "Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding.' Not all protections afforded in a criminal trial apply to revocation proceedings. For example, the Ohio Rules of Evidence do not apply, Evid.R. 101(C)(3), there is no right to a jury trial, and the privilege against self-incrimination is not available to a probationer. Other Ohio courts have determined that the Rules of Criminal Procedure do not apply to revocation proceedings." (Citations omitted.) *Id.* at ¶ 15.

{¶ 10} A defendant whose probation may be revoked as a result of a probation violation is entitled to the protections of due process. *State v. Payne*, citing *State v. Weaver*, 141 Ohio App.3d 512, 516 (7th Dist.2001), citing *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62. These protections include a preliminary hearing at which the defendant is entitled to notice of the alleged violation and a final hearing at which time evidence is presented. *See id.*

{¶ 11} The trial court clearly complied with these due process requirements. A notice of alleged violations was filed on September 27, 2011. A probable cause hearing was held on October 4, 2011, wherein the magistrate found that there was probable cause that appellant violated the conditions of supervision. On October 17, 2011, a final hearing was held. Appellant's counsel stated that appellant would admit the violation, and the court then

addressed appellant. Appellant admitted that he "got in trouble" while taking part in the MONDAY program. The court took further evidence from Deputy Jacobs that appellant had violated the terms of his community control. The trial court then found that appellant violated the rules and regulations of community control and sentenced him to two years in prison. Accordingly, the trial court complied with the necessary due process requirements.

{¶ 12} After reviewing the record to consider appellant's assignment of error, we notice and raise, sua sponte, an error in the trial court's addressing of appellant's constitutional rights pursuant to Crim.R.11(C) during the June 7, 2010 plea hearing. At that hearing, the trial court advised appellant that,

[T]he burden is on the State of Ohio. They have to prove every element of the offense charged, and they have that same standard they have to meet for each offense, and if they fail to meet that standard, there's a finding of not guilty on whatever offense they can't make the burden on; do you understand that?

{¶ 13} Through this dialogue, the trial court failed to inform appellant that the state must prove the defendant's guilt beyond a reasonable doubt. Instead, the trial court ambiguously informed appellant that the burden of proof is on the state. However, the Ohio Supreme Court held that, "an alleged ambiguity during a Crim.R. 11 oral plea colloquy may be clarified by reference to other portions of the record, including the written plea, in determining whether the defendant was fully informed of the right in question." *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, ¶ 25. After reviewing the record, we find that the ambiguity in the colloquy was clarified by the written plea, which specifically informs appellant of the state's burden.

{¶ 14} In light of the foregoing, having found that Crim.R.11(C) dialogue is not required during a community control revocation proceeding, that the revocation proceeding comported with the requirements of due process, and that the ambiguity in the colloquy of the June 7, 2010 hearing was clarified by the written plea, appellant's sole assignment of error is

overruled.

{¶ 15} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.