

[Cite as *State v. Eversole*, 2010-Ohio-1614.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee		C.A. CASE NO. 23444
v.		T.C. NO. 2006 CR 01810
SHAWNA EVERSOLE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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OPINION

Rendered on the 9th day of April, 2010.

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FROELICH, J.

{¶ 1} Shawna Eversole appeals from a judgment of the Montgomery County Court of Common Pleas, which found her guilty of violating the conditions of her community

control and sentenced her to serve one year in prison. For the following reasons, the judgment will be affirmed.

I.

{¶ 2} In March 2007, Eversole pled guilty to one count of theft in an amount over \$500, a fifth degree felony, and one count of tampering with evidence, a third degree felony. The court sentenced her to up to five years of community control. The community control was conditioned on Eversole's completion of several requirements, including: (1) that Eversole complete a term of five years of basic community control supervision; (2) that she pay court costs and a \$50 supervision fee; (3) that she pay restitution in the amount of \$1,957.55 to Ameristop at a rate of \$100 per month; (4) that she pay attorney fees of \$130; (5) that she attend Seek Work Opportunity Program (SWOP); (6) that she obtain and maintain verifiable employment; (7) that she provide verification of all medications prescribed; (8) that she serve 50 hours of community service work; and (9) that she attend the Theft Clinic. Eversole was informed that the violation of any condition of community control or of any law could result in, among other things, a prison term of one year for each offense (theft and tampering with evidence), to be served concurrently.

{¶ 3} In November 2007, Eversole was found to be an absconder, and the court issued a capias for her arrest. In January 2008, the court found "that the circumstances which resulted in the suspension of the Offender's period of community control do not justify a violation of community control at this time." The court withdrew the capias and reinstated Eversole to active community control under the same sanctions and conditions as previously ordered. There are no indications that Eversole had been arrested or that the court held a hearing on the matter.

{¶ 4} In April 2008, the court again found Eversole to be an absconder and issued a warrant for her arrest. On September 2, 2008, Eversole was arrested, and the court again found that the circumstances did not merit a finding that Eversole violated her community control. The court reinstated her to community control on September 2, 2008, subject to the same conditions and sanctions.

{¶ 5} In January 2009, the court found Eversole to be an absconder for a third time and issued a capias for her arrest. The following month, Eversole's probation officer and the probation officer's supervisor filed an "Offender Arrest Notice," informing the court that Eversole had been arrested on February 24, 2009, for permitting drug abuse and for a probation violation. The Notice included the following comments:

{¶ 6} "Ms. Eversole was arrested by Dayton Police Officers for the above listed offenses. Dayton Municipal is filing a revocation. Her next court date is 2/26/09. Ms. Eversole was interviewed at the Montgomery County Jail this date. She admits to not complying with probation. She has not completed any sanctions or reported as scheduled. Ms. Eversole was assessed for the Monday program on 11/6/2008. She was denied due to her prescribed medications."

{¶ 7} On March 9, 2009, Eversole was sent a "Notice of Community Control Violation Hearing and Order." Through that notice, Eversole was ordered to appear on March 17, 2009, at which time she would be called upon to admit or deny three alleged violations of her community control:

{¶ 8} "You violated Rule #1, 'I shall refrain from violation of any law (Federal, State, County and City). I shall get in touch immediately with my probation officer if arrested or questioned by a law enforcement officer.' You violated this condition as you

were arrested on September 2, 2008, Permitting Drug Abuse and Endangering Children through Dayton Municipal Court in C# 2008-CR-016978.

{¶ 9} “You violated Rule #5, ‘I shall report at such time and place as directed by my Probation Officer. If my Probation Officer is unavailable, I shall report to the Officer-of-the-day, the Supervisor, the Manager or Deputy Court Administrator.’ You violated this condition as you have been declared an absconder on three occasions, 11-7-07, 4-3-08, and 1-27-09.

{¶ 10} “You violated Rule #7, ‘I shall accomplish all case plan objectives which are now and will be set for me throughout my supervision.’ You violated this condition as you have not completed any court ordered sanctions.”

{¶ 11} The revocation hearing was held on April 21, 2009. Eversole was present with counsel. Eversole’s probation officer was the sole witness. She testified that Eversole had been on community control since April 17, 2007, and there were three alleged violations listed in the notice of community control violation. The first violation stemmed from Eversole’s conviction for a new offense in October 2008 in the Dayton Municipal Court; Eversole had been sentenced to probation in that case, but her probation had been revoked and she had served 30 days in jail. Eversole had been released on April 15, 2009. Second, Eversole had violated Rule 5 by being declared an absconder on three occasions. The probation officer testified that Eversole was informed of her next probation reporting date at her appointments with the probation officer. Eversole’s failures to report had resulted in warrants being issued for her arrest.

{¶ 12} The probation officer further testified that Eversole had violated Rule 7 by failing to accomplish all case objectives, specifically her obligation to pay her financial

obligations in full, including restitution. The probation officer stated that, as of March 2, 2009, Eversole had paid only \$130 toward restitution. The probation officer stated that she was not relying on any circumstances other than those listed in the notice of revocation to support revocation of Eversole's community control. On redirect examination, the probation officer indicated that Eversole had been "marginally" compliant for approximately five or six months out of the 24 months that she had been on community control.

{¶ 13} At the conclusion of the hearing, the trial court found that Eversole had violated the terms and conditions of her community control, stating the following findings:

{¶ 14} "The Court finds that of the sanctions given to her, which were nine, she only complied with two.

{¶ 15} "The Court makes note that she did not comply with paying court costs and supervision fee.

{¶ 16} "She did not make restitution, and the Court takes judicial notice that restitution was ordered in the amount of \$1,957.55.

{¶ 17} "The record shows \$130, which means there is at least \$1,827.55.

{¶ 18} "She did not pay attorney fees.

{¶ 19} "She did not attend the Seek Work Opportunity Program.

{¶ 20} "She did not tay – obtain work.

{¶ 21} "She did not serve the 50 hours of community service.

{¶ 22} "And, she did not attend or complete the theft clinic.

{¶ 23} "Now, the Court notes that while on community control, Ms. Eversole was convicted of a new offense and that new offense, the Court takes judicial notice, was permitting drug abuse and child endangering in that – and the Court will accept that she spent

30 days in jail for that.

{¶ 24} “The Court will note that we’ll take judicial notice and accept that Ms. Eversole was declared an absconder and that she failed to follow with the case plan objectives.

{¶ 25} “Based upon all of that, the Court as stated before, finds that this Defendant has violated the terms and conditions of her community control.

{¶ 26} “This Court will revoke the community control and will impose the one-year sentence. ***”

{¶ 27} On April 24, 2009, the court filed a written entry finding that Eversole had violated the conditions of her community control and sentencing her to one year for each count of theft and tampering with evidence, to be served concurrently.

II.

{¶ 28} Eversole appeals from the revocation of her community control. Her sole assignment of error states:

{¶ 29} “THE TRIAL COURT VIOLATED THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT BY FAILING TO BE NEUTRAL AND DETACHED DURING THE PROBATION VIOLATION HEARING AND RELYING ON FACTS NOT IN EVIDENCE IN SENTENCING MS. EVERSOLE.”

{¶ 30} Eversole claims that the trial court violated her right to due process by making factual findings and sentencing her based on facts that were not supported by the evidence presented at the revocation hearing.

{¶ 31} “A defendant is entitled to certain due process protections before a court may revoke community control sanctions, although the full panoply of rights due a defendant in a criminal prosecution does not apply to the revocation of community control.” *State v.*

Harmon, Champaign App. No. 2007-CA-35, 2008-Ohio-6039, ¶6, citing, *Morrissey v. Brewer* (1972), 408 U.S. 471, 480, 93 S.Ct. 2593, 33 L.Ed.2d 484. First, a defendant is entitled to a preliminary hearing to determine whether there is probable cause to believe that the defendant has violated the terms of his or her community control. *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656; *State v. Blakeman*, Montgomery App. No. 18983, 2002-Ohio-2153. Second, due process requires a final hearing to determine whether probation should be revoked. *Id.*

{¶ 32} “At the final revocation hearing, the State must (1) provide the probationer with written notice of the alleged violations of probation; (2) disclose the evidence against [her]; (3) give the probationer an opportunity to be heard in person and to present witnesses and documentary evidence; (4) allow [her] to confront and cross-examine adverse witnesses; (5) afford [her] a neutral and detached hearing body; and, (6) provide the probationer with a written statement by the fact finder as to the evidence relied upon and the reasons for revoking probation.” *Blakeman*, *supra*, citing *Gagnon*, 411 U.S. at 782, *Morrissey*, *supra*, and *State v. Miller*, 42 Ohio St.2d 102, 104. The failure to object to a due process violation during a community control revocation hearing waives all but plain error. *Blakeman*, *supra*.

{¶ 33} Because a community control violation hearing is not a criminal trial, the State need not prove a violation beyond a reasonable doubt. *State v. Cofer*, Montgomery App. No. 22798, 2009-Ohio-890, ¶12. “The State need only present substantial evidence of a violation of the terms of a defendant’s community control.” *Id.*

{¶ 34} “The right to continue on community control depends on compliance with community control conditions and is a matter resting within the sound discretion of the court.” *State v. Schlecht*, Champaign App. No.2003-CA-3, 2003-Ohio-5336, ¶7. Accordingly, we

review the trial court's decision to revoke a defendant's community control for an abuse of discretion. *State v. Brown*, Montgomery App. No. 22467, 2008-Ohio-4920, ¶9. Such decision is an abuse of discretion if no sound reasoning process supports the decision. *Id.*; *State v. Picklesimer*, Greene App. No. 06-CA-118, 2007-Ohio-5758, ¶28.

{¶ 35} On appeal, Eversole argues that the trial court violated her right to due process at the revocation hearing by making factual findings that were not supported by the evidence.¹ She states: "While some of those facts may have been true, others certainly were not, including that Ms. Eversole was convicted of child endangering. The Court's fact finding was clearly arbitrary and capricious since almost none of the facts had been testified to during the hearing."

{¶ 36} As stated above, the trial court found that Eversole (1) failed to pay court costs and the supervision fee; (2) paid only \$130 of the ordered \$1,957.55 in restitution; (3) failed to pay attorney fees; (4) did not attend the Seek Work Opportunity Program; (5) did not serve the 50 hours of community service; (6) did not obtain work; (7) did not attend or complete the Theft Clinic; (8) was convicted of drug abuse and child endangering and spent 30 days in jail; and (9) was declared an absconder.

{¶ 37} The record supports many of the trial court's findings. Eversole's probation officer testified that Eversole had failed to pay "her financial obligation in full to the Court" and had paid only \$130 toward restitution as of March 2, 2009. She also testified that

¹Eversole does not claim that she should have been given a preliminary hearing. Regardless, because she did not request a preliminary hearing or object when the court failed to conduct one, any due process claim based on the lack of a preliminary hearing is waived. *State v. Whitaker*, Montgomery App. Nos. 21003 & 21034, 2006-Ohio-998, ¶22.

Eversole absconded on three occasions despite the fact that Eversole had been made aware of her next appointment date.

{¶ 38} The probation officer further testified about Eversole's recent conviction, stating: "Ms. Eversole was convicted of a new offenses through Dayton Municipal Court approximately October of '08. She was sentenced to municipal probation. She failed to follow through with their probation. A revocation hearing was filed and she was sentenced to 30 days in the Montgomery County Jail because she was revoked." The probation officer indicated that Eversole was released from jail on April 15, 2009.

{¶ 39} As a follow-up, the prosecutor asked the probation officer, "Now, your revocation notice indicates that she was arrested for that offense. She's now been convicted?" The probation officer responded affirmatively. Although neither the prosecutor nor the probation officer identified the specific offense of which Eversole had been convicted in the municipal court, the notice of revocation, which was filed with the court and admitted into evidence at the hearing, alleged that Eversole had been arrested for permitting drug abuse and child endangering. The trial court's finding that Eversole had been convicted of child endangering was reasonably based on that evidence.

{¶ 40} The notice of revocation alleged that Eversole had violated Rule 7, because she had "not completed any court ordered sanctions," which included attending SWOP, performing community service, obtaining work, and participating in the Theft Clinic. At the revocation hearing, Eversole's probation officer did not address these particular requirements in her testimony and, instead, focused on Eversole's financial obligations.

{¶ 41} We agree with Eversole that the trial court had no evidence upon which to find that she failed to participate in the Theft Clinic, obtain work, perform community service, or

attend SWOP. Although the notice of violation alleged that Eversole had failed to complete all of the conditions of community control and, according to the Offender Arrest Notice, Eversole admitted to the probation officer that she had not completed any sanctions or reported as scheduled, Eversole's probation officer did not address these requirements at the revocation hearing. Eversole did not object to the trial court's reliance upon these "facts" to support its revocation her community control.

{¶ 42} Nevertheless, we find substantial evidence of a violation of Eversole's community control to support the trial court's decision to revoke her community control. As found by the trial court, Eversole was found to be an absconder on three occasions, she failed to pay her financial obligations to the court and paid only \$130 out of approximately \$1,950 for restitution. Significantly, Eversole was convicted of an offense in municipal court and was required to serve 30 days in jail due to her failure to comply with the terms of community control in that court. Eversole's conviction and jail sentence in the municipal court amply supports the trial court's revocation of her community control in this case. Accordingly, we find the trial court's findings with regard to her failure to participate in the Theft Clinic, obtain work, perform community service, or attend SWOP to be harmless in this case. See *State v. Salmons*, Champaign App. No. 2003 CA 21, 2004-Ohio-3773 (concluding that the trial court acted within its discretion in finding that the defendant had violated his community control by changing his address without permission and by failing to report as ordered and in reimposing community control with additional conditions, even though the court had erroneously found that defendant had also violated his community control by going to the probation office while intoxicated).

{¶ 43} Eversole's assignment of error is overruled.

III.

{¶ 44} The trial court's judgment will be affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to

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