

[Cite as *State v. Black*, 2011-Ohio-1273.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24005
v.	:	T.C. NO. 09 CR 3595
	:	
MICHAEL L. BLACK	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 18th day of March, 2011.

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FROELICH, J.

{¶ 1} Michael L. Black pled no contest to felony non-support of dependents, in violation of R.C. 2919.21(B), a fifth degree felony, after the trial court overruled his motion to dismiss on double jeopardy grounds. The court sentenced Black to community control for a period not to exceed five years.

{¶ 2} Black appeals from the denial of his motion to dismiss. Because we conclude that double jeopardy did not bar Black's prosecution in this case, the trial court's judgment will be affirmed.

I.

{¶ 3} In July 2006, Black was charged with four counts of felony non-support of a dependent, A.D., on the following dates: (1) January 1, 1999, to December 31, 2000 (Count 1); (2) January 1, 2001, to December 31, 2002 (Count 2); (3) January 1, 2003, to December 31, 2004 (Count 3); and (4) January 1, 2005, to March 31, 2006 (Count 4). *State v. Black*, Montgomery C.P. No. 2006 CR 1506. Black pled guilty to two of those counts and the other two were dismissed. The trial court in Case No. 2006 CR 1506 sentenced Black to five years of community control. The order set forth several community control sanctions, including requirements that Black comply with the child support order and pay restitution of \$10,644. The court informed Black that the violation of community control could result in a prison term of 12 months on each count.

{¶ 4} In September 2007, the Division of Criminal Justice Services notified Black that he had violated his community control and that he was required to appear on September 19, 2007, to admit or deny the alleged violations. The notice informed Black that he had violated three rules, including Rule #4, which required him to maintain employment and support his dependents. Specifically, the notice stated: "You failed to support your legal dependents in January, February, April, May, June, July, and August of 2007. You also violated this rule when you failed to maintain full-time verifiable employment." The notice was signed by the trial judge, the deputy court administrator, and the intensive probation

officer.

{¶ 5} After a revocation hearing, the court in Case No. 2006 CR 1506 found that Black had violated the conditions of his community control. On October 9, 2007, the court sentenced Black to twelve months in prison on each count, to be served concurrently, and ordered him to pay restitution of \$10,644.

{¶ 6} In December 2009, Black was indicted for failing to support a dependent, A.D., between April 1, 2006 through May 31, 2007, in violation of R.C. 2919.21(B). *State v. Black*, Montgomery C.P. No. 2009 CR 3595. Black moved to dismiss the indictment, arguing that double jeopardy barred his prosecution for the period of non-support that formed the basis for the revocation of his community control in Case No. 2006 CR 1506. Black further argued that the indictment “does not provide for 104 consecutive weeks, as is required for an offense under R.C. 2919.21(B).” Black attached several documents from Case No. 2006 CR 1506, including a copy of the online docket, the notice of violation, and the termination entry revoking his community control.

{¶ 7} The trial court overruled the motion to dismiss. The court concluded that, because “[t]he indictment in Case No. 2009 CR 3595 does not include the dates encompassed by the indictment in Case No. 2006 CR 1506[,] *** the 2006 case does not present a double jeopardy bar to the 2009 case against Defendant for non-support.” The Court also overruled Black’s argument concerning the 104 consecutive weeks.

{¶ 8} Black subsequently pled no contest to the 2009 non-support charge. The trial court sentenced Black to five years of community control sanctions.

II.

{¶ 9} In his sole assignment of error, Black claims that the trial court erred in denying his motion to dismiss. He argues that charging him in this case for the same non-support of dependents that was used to revoke his community control in Case No. 2006 CR 1506 (i.e., the period of January, February, April, and May 2007) violated his rights and subjected him to double jeopardy. Black analogizes to cases from this appellate district that have held that a finding of criminal contempt for non-support of dependents bars a subsequent prosecution for non-support of dependents based on the same facts.

{¶ 10} “The Federal prohibition against double jeopardy is binding on the states. The prohibition has three distinct aspects. ‘It protects against a second prosecution for the same offense after acquittal. It protects against the same prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.’” (Internal citation omitted.) *State v. Ocasio*, Montgomery App. No. 19859, 2003-Ohio-6240, ¶8, quoting *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2089, 23 L.Ed.2d 656. Black argues, in essence, that the revocation of his community control based on his non-support of dependents in 2007 is the same as a conviction for his 2007 non-support, which protects him from subsequent prosecution for the same conduct.

{¶ 11} Black was placed on community control, subject to several terms and conditions, in Case No. 2006 CR 1506. The right to continue on community control depends on compliance with community control conditions and is a matter left to the sound discretion of the trial court. *State v. Schlecht*, Champaign App. No. 2003-CA-3, 2003-Ohio-5336, ¶7.

{¶ 12} Community control violation proceedings are not equivalent to criminal

prosecutions. See *Morrissey v. Brewer* (1972), 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (“the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations”); *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (“Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty”). A community control revocation hearing is not a criminal trial, and the State need not prove a violation beyond a reasonable doubt. *State v. Cofer*, Montgomery App. No. 22798, 2009-Ohio-890, ¶12; *State v. Eversole*, Montgomery App. No. 23444, 2010-Ohio-1614, ¶33. Indeed, community control 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. (Citations omitted.) *Barnett v. Ohio Adult Parole Authority* (1988), 81 Ohio St.3d 385, 387; *State v. Jackson*, Montgomery App. Nos. 23457, 23458, 2010-Ohio-2836, ¶58.

{¶ 13} Moreover, a finding that a defendant violated the terms and conditions of community control does not result in a conviction. *Jackson* at ¶55. And, upon finding that a community control violation occurred based on a violation of law, the trial court’s imposition of a prison sentence is not a punishment for the new offense but, rather, is a “continuing consequence of the original conviction.” (Citation omitted.) *State v. Wellbaum* (Sept. 1, 2000), Champaign App. No. 2000-CA-5; *State v. Myers*, Richland App. No. 2003 CA 62, 2004-Ohio-3715, ¶23. Accordingly, several Ohio appellate districts, as well as federal circuits, have held that double jeopardy does not apply to prosecutions following the revocation of probation or community control. See, e.g., *United States v. Miller* (C.A.6,

1986), 797 F.2d 336, 340 (citing cases); *State v. Peters*, Cuyahoga App. No. 92791, 2009-Ohio-5836; *Myers*, supra.

{¶ 14} In the similar context of post-release control, the Supreme Court of Ohio has held that double jeopardy does not preclude a defendant who was sanctioned for violating post-release control from being prosecuted for the same conduct. *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661. The Supreme Court reasoned, in part: “[P]ost-release control is part of the original judicially imposed sentence.’ Therefore, jeopardy does not attach when a defendant receives a term of incarceration for the violation of conditions of postrelease control. Such a term of incarceration is attributable to the original sentence and is not a ‘criminal punishment’ for Double Jeopardy Clause purposes that precludes criminal prosecution for the actions that constituted a violation of the postrelease control conditions.” *Martello* at ¶26, quoting *Woods v. Telb*, 89 Ohio St.3d 504, 512, 2000-Ohio-171.

{¶ 15} In this case, pursuant to R.C. 2929.19(B)(5), Black was notified at the time of his original sentencing to community control in Case No. 2006 CR 1506 that, in the event he violated the conditions of community control, he could face the specific prison term of 12 months. The trial court’s imposition of concurrent 12-month sentences after revoking Black’s community control constituted a sanction for violating the conditions of his community control, not a conviction and punishment for his 2007 non-support of dependents. Double jeopardy did not preclude the State’s subsequent prosecution in Case No. 2009 CR 3595.

{¶ 16} Black asserts that the revocation of community control is analogous to criminal contempt. Double jeopardy protections apply in cases involving contempt charges,

but only if the contempt is criminal in nature, rather than civil. *State v. Galluzzo*, Champaign App. No. 2004 CA 25, 2006-Ohio-309, ¶37, citing *Dayton Women’s Health Ctr. v. Enix* (1991), 68 Ohio App.3d 579, 591. “Criminal contempt is a lesser included offense of felony non-support of dependents per R.C. 2919.21(B). Therefore, a prior criminal contempt finding for failure to pay child support bars, on double jeopardy grounds, a subsequent prosecution for felony non-support of dependents per R.C. 2919.21(B).” *Id.*, citing *State v. Mobley*, Montgomery App. No. 19176, 2002-Ohio-5535.

{¶ 17} Unlike community control violation proceedings, criminal contempt proceedings require the same fundamental constitutional protections as are required in criminal trials. *Dayton Women’s Health Ctr.*, 68 Ohio App.3d at 591. A finding of criminal contempt results in sanctions intended to punish the defendant for the contemptuous conduct and vindicate the authority of the court. *State v. Kilbane* (1980), 61 Ohio St.2d 201, 205. In contrast, as stated above, community control revocation proceedings are not the same as a criminal trial, and a revocation of community control punishes the failure to comply with the terms and conditions of community control, not the specific conduct that led to the revocation. Black’s argument is without merit.

{¶ 18} The assignment of error is overruled.

III.

{¶ 19} The trial court’s judgment will be affirmed.

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HALL, J. and BROGAN, J., concur.

(Hon. James A. Brogan, retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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