

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CAA 04 0035
	:	
	:	
MICHAEL E. FOWLE	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Delaware County Court of Common Pleas Case No. 07 CR-I-10-0544
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	February 18, 2010
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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*Edwards, J.*

{¶1} Appellant, Michael Fowle, appeals a judgment of the Delaware County Common Pleas Court denying his motion for treatment in lieu of conviction (hereinafter “ILC”), sentencing him to community control upon a plea of guilty to one count of possession of drugs in violation of R.C. 2925.11(A) and finding him in violation of his community control sanction. Appellee is the State of Ohio.

#### STATEMENT OF FACTS AND CASE

{¶2} On October 1, 2007, appellant was charged by a bill of information with possession of drugs, namely psilocybin and/or psilocin, in violation of R.C. 2925.11(A). On October 2, 2007, he filed a written motion for treatment in lieu of conviction pursuant to R.C. 2951.041. The court held a plea hearing the same day, at which time appellant entered a guilty plea to the charge pursuant to a negotiated plea agreement. In exchange for appellant’s plea to the charge of possession of drugs, the state agreed to dismiss an indictment in a separate case. The state did not acquiesce to appellant’s ILC motion. The court ordered appellant to be assessed for ILC and also ordered a pre-sentence investigation.

{¶3} On October 4, 2007, the court entered judgment accepting appellant’s guilty plea and ordering that all proceedings be stayed until the court could hear appellant’s ILC motion on the merits.

{¶4} Appellant was assessed for his suitability for ILC by Dr. Kevin Edwards at the Netcare Forensic Psychiatry Center. In a twelve-page report filed under seal, Dr. Edwards found that, while appellant met the statutory eligibility criteria, ILC would not substantially reduce the likelihood of appellant engaging in future crimes. Dr. Edwards

recommended against ILC. Appellant requested that he be referred for a second assessment. The court granted appellant's request and appellant was evaluated by Joseph Catania at Maryhaven. In a two-page, four-paragraph report, Mr. Catania found that appellant's risk of committing another offense would be greatly diminished if he completed the treatment program and maintained a clean and drug-free lifestyle.

{¶5} The trial court held a hearing on appellant's ILC motion on February 8, 2008. From the bench, the court denied the motion and proceeded to sentencing. On February 12, 2008, the court sentenced appellant to community control for a period not to exceed three years, imposing fourteen conditions. The judgment stated that violation of the conditions of appellant's community control sanction could result in a term of incarceration of twelve months.

{¶6} Appellant filed a notice of appeal from this judgment on February 12, 2008. This Court dismissed appellant's appeal on February 3, 2009, for want of a final, appealable order pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.

{¶7} The State filed a motion to suspend appellant's community control sanctions on February 19, 2009. The State's motion came before the court for hearing on March 13, 2009. At the hearing, appellant admitted to four violations of his community control sanctions: (1) appellant was charged with theft and obstructing official business in municipal court, (2) appellant consumed alcohol at a party on November 27, 2008, and tested positive for alcohol during a visit to his probation officer on December 15, 2008, having consumed a few beers before such appointment, (3) appellant failed to pay court costs, and (4) appellant attended a party on November 27, 2008, with a person on probation for vandalism and consumed alcohol at the party. The

court reinstated appellant's community control sanction, but added an additional condition that appellant enter and complete the program at West Central Community Based Correctional Facility and any aftercare as deemed necessary.

{¶8} Appellant filed a notice of appeal on April 6, 2009, which states that he is appealing both the order finding him in violation of his community control sanctions and the original sentencing entry of February, 2008. On April 16, 2009, the court filed a nunc pro tunc entry which corrected the *Baker* error and rendered the original sentence a final appealable order, journalized the overruling of appellant's ILC motion, and restated the court's judgment on the violation of appellant's community control sanction. Appellant assigns five errors on appeal:

{¶9} "I. THE TRIAL COURT ERRED AND PREJUDICED THE APPELLANT'S SUBSTANTIAL RIGHTS BY FAILING TO ENTER A DETERMINATION AS TO WHETHER APPELLANT WAS ELIGIBLE FOR INTERVENTION IN LIEU OF CONVICTION AFTER ACCEPTING APPELLANT'S GUILTY PLEA AND IMMEDIATELY ENTERING JUDGMENT OF CONVICTION AND SENTENCE FOR A FELONY DRUG POSSESSION OFFENSE.

{¶10} "II. THE TRIAL COURT ERRED AND PREJUDICED THE APPELLANT'S SUBSTANTIAL RIGHTS WHEN IT APPLIED ERRONEOUS ELIGIBILITY CRITERIA IN DENYING APPELLANT'S REQUEST FOR INTERVENTION IN LIEU OF CONVICTION AND VIOLATED APPELLANT'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶11} "III. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY DENYING APPELLANT'S TIMELY REQUEST FOR INTERVENTION IN LIEU OF

CONVICTION PURSUANT TO R.C. §2951.041 AND THEREBY VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶12} "IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PLACING APPELLANT ON COMMUNITY CONTROL SANCTIONS SUBJECT TO A MAXIMUM TWELVE-MONTH PRISON SENTENCE AND THEREBY VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶13} "V. APPELLANT WAS SUBSTANTIALLY AND UNFAIRLY PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF ASSIGNED COUNSEL AND THEREBY HIS RIGHTS TO COUNSEL, DUE PROCESS AND EQUAL PROTECTION UNDER THE UNITED STATES AND OHIO CONSTITUTIONS WERE VIOLATED."

I

{¶14} In his first assignment of error, appellant argues that the trial court erred in not formally journalizing its decision on his ILC motion before accepting appellant's guilty plea and proceeding to sentencing.

{¶15} R.C. 2951.041(C) provides in pertinent part:

{¶16} "At the conclusion of a hearing held pursuant to division (A) of this section, the court shall enter its determination as to whether the offender is eligible for intervention in lieu of conviction and as to whether to grant the offender's request. . . . If the court finds that the offender is not eligible or does not grant the offender's request,

the criminal proceedings against the offender shall proceed as if the offender's request for intervention in lieu of conviction had not been made."

{¶17} Contrary to appellant's argument, the statute does not require the court to formally journalize its ruling on the ILC motion prior to proceeding with the case as if the motion had not been made. Although the court did not formally journalize its decision to overrule the ILC motion until April 16, 2009, the court stated from the bench that the motion would be overruled, made a finding of guilt on the plea and proceeded with sentencing in appellant's presence at the sentencing hearing. Sentencing Tr. 14-15. Further, while the judgment entry journalizing appellant's sentence does not refer to the fact that the ILC motion had been overruled, implicit in the court's decision to sentence appellant to community control is a finding that the ILC request had been denied.

{¶18} Further, any error in not journalizing a ruling on the ILC motion was rendered harmless by the court's April 16, 2009, nunc pro tunc entry which corrected the *Baker* error and journalized the prior ruling from the bench denying the ILC motion.

{¶19} Appellant also argues that when the court elected to accept appellant's request for ILC and his guilty plea, it should have stayed the criminal proceedings until it properly disposed of the ILC issues, and when the court denied the request for ILC it should have vacated the guilty plea or permitted appellant to withdraw the plea.

{¶20} The court did stay the proceedings until the ILC issues were disposed of by the court. The court stated in its judgment entry on the guilty plea, "The Court then ORDERED that all criminal proceedings in this case be held in abeyance and stayed until the Defendant's Motion for Intervention In Lieu Of Conviction could be heard on the merits." Judgment Entry, October 4, 2007.

{¶21} Nothing in the statute requires the court to vacate appellant's plea following the denial of his ILC motion, nor did appellant move the court to vacate the plea. The plea agreement as stated on the record at the plea hearing and memorialized in a written Crim. R. 11(F) agreement was not premised in any way on the ILC request being granted by the court, and the prosecutor stated on the record at the plea hearing that the state did not acquiesce to appellant's request for treatment in lieu of conviction.

{¶22} The first assignment of error is overruled.

## II

{¶23} In his second assignment of error, appellant argues that the court's decision finding him ineligible for ILC is contrary to law, and asks this Court to remand the case to the trial court with instructions to enter the required determinations under the statutory criteria.

{¶24} When an offender requests intervention, a trial court may elect to reject it outright without a hearing. R.C. 2951.04(A) (1). If the trial court elects to consider an offender's motion for intervention, it must conduct a hearing to determine the offender's eligibility and order an assessment of the offender to aid in doing so. R.C. 2951.041(A)(1). *State v. Stanovich*, 173 Ohio App.3d 304, 878 N.E.2d 641, 2007-Ohio-4234, ¶ 10.

{¶25} In determining whether an offender is eligible for intervention, the trial court must find all of the following:

{¶26} "(1) The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention \* \* \* under this section or any

similar regimen, and is charged with a felony for which the court, upon conviction, would impose sentence under [R.C. 2929.13(B) (2) (b)] or with a misdemeanor.

{¶27} “(2) The offense is not a felony of the first, second, or third degree, is not an offense of violence, is not a violation of [R.C. 2903.06(A)(1) or (2), aggravated vehicular homicide], is not a violation of [R.C. 2903.08(A)(1), aggravated vehicular assault], is not a violation of [R.C. 4511.19(A), operating a vehicle under the influence of alcohol or drugs] or a municipal ordinance that is substantially similar to that division, and is not an offense for which a sentencing court is required to impose a mandatory prison term, a mandatory term of local incarceration, or a mandatory term of imprisonment in a jail.

{¶28} “(3) The offender is not charged with a violation of [R.C.] 2925.02, [corrupting another with drugs], [R.C.] 2925.03, [drug trafficking], [R.C.] 2925.04, [illegal manufacture of drugs or cultivation of marijuana], or [R.C.] 2925.06, [illegal administration or distribution of anabolic steroids], and is not charged with a violation of [R.C. 2925.11, drug possession], that is a felony of the first, second, or third degree.

{¶29} “(4) The offender is not charged with a violation of [R.C. 2925.11, drug possession], that is a felony of the fourth degree, or the offender is charged with a violation of that section that is a felony of the fourth degree and the prosecutor in the case has recommended that the offender be classified as being eligible for intervention \* \* \* under this section.

{¶30} “(5) The offender has been assessed by an appropriately licensed provider, certified facility, or licensed and credentialed professional, including, but not limited to, a program licensed by the department of alcohol and drug addiction services

pursuant to [R.C. 3793.11], a program certified by that department pursuant to [R.C. 3793.06], a public or private hospital, the United States department of veterans affairs, another appropriate agency of the government of the United States, or a licensed physician, psychiatrist, psychologist, independent social worker, professional counselor, or chemical dependency counselor for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

{¶31} “(6) The offender's drug or alcohol usage was a factor leading to the criminal offense with which the offender is charged, intervention \* \* \* would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.

{¶32} “(7) The alleged victim of the offense was not sixty-five years of age or older, permanently and totally disabled, under thirteen years of age, or a peace officer engaged in the officer's official duties at the time of the alleged offense.

{¶33} “(8) If the offender is charged with a violation of [R.C. 2925.24], the alleged violation did not result in physical harm to any person, and the offender previously has not been treated for drug abuse.

{¶34} “(9) The offender is willing to comply with all terms and conditions imposed by the court pursuant to division (D) of this section.

{¶35} R.C. 2951.041(B) (1) through (9).

{¶36} However, “even when a defendant satisfies all of the statutory requirements, a trial court has discretion to determine whether the particular defendant is a good candidate for [intervention].” *State v. Leisten*, 166 Ohio App.3d 805, 2006-

Ohio-2362, 853 N.E.2d 673, ¶ 7, quoting *State v. Schmidt*, 149 Ohio App.3d 89, 2002-Ohio-3923, 776 N.E.2d 113, ¶ 9. If the trial court grants intervention and the offender successfully completes it, the underlying criminal proceedings against the offender must be dismissed and the trial court may seal the records related to the offense. R.C. 2951.041(E).

{¶37} While eligibility determinations under R.C. 2951.041 are matters of law subject to de novo review, a trial court's decision whether to grant treatment in lieu of conviction rests within its sound discretion, and we, therefore, apply an abuse of discretion standard of review. *State v. Parker*, Putnam App. No. 12-08-08, 2009-Ohio-1835, ¶11.

{¶38} Appellant argues that the court in this case found him ineligible and therefore we must apply a de novo standard of review. Appellant relies on the following statement by the court in support of his proposition that the court found him ineligible:

{¶39} "THE COURT: The court has seen some improvement too. But the court is of the opinion considering everything about this case, the immaturity of this defendant, his immature actions, the court is not of the opinion that I should grant him the privilege. I do not grant him the privilege. I do not grant him the privilege. The court is ready to impose sentence today." Tr. 14.

{¶40} The record does not support appellant's claim that the court found him statutorily ineligible; rather, the court exercised its discretion and found that appellant was not a good candidate for intervention. Prior to the above-quoted statement, the trial judge addressed counsel for appellant concerning the manner in which the hearing was to proceed:

{¶41} “THE COURT: Mr. Hoague, the court is familiar with the criteria of the statute. And you need to go on, you will have those. The point is whether or not this court feels he is a proper candidate to grant the privilege to.” Tr. 7-8.

{¶42} It is clear from a complete reading of the record that at the time of the hearing, the court was no longer concerned with whether appellant met the statutory criteria as a matter of law, but had moved on to the issue of whether he should exercise his discretion to grant appellant’s request for ILC. This conclusion is buttressed by the court’s judgment of April 16, 2009, in which the court stated, “On February 8, 2008, the Court considered the Defendant’s Motion for Intervention In Lieu of Conviction and exercised the Court’s discretion and overruled the same.” The court did not find appellant to be statutorily ineligible.

{¶43} The second assignment of error is overruled.

### III

{¶44} Appellant argues that the court abused its discretion in overruling his motion for ILC. He argues that he met all the statutory eligibility factors, and the record supports a finding that ILC would substantially reduce the likelihood that he would commit future crimes.

{¶45} A trial court’s decision whether to grant treatment in lieu of conviction rests within its sound discretion, and we, therefore, apply an abuse of discretion standard of review. *State v. Parker*, supra at ¶11. The term abuse of discretion implies that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶46} The court did not abuse its discretion in overruling appellant's motion. Although the evaluation from Maryhaven found that appellant could benefit from ILC, the more complete and detailed report from Netcare found he was not a good candidate for ILC. Further, while the court found that appellant had demonstrated improvement during the pendency of the case, the court found that appellant had demonstrated immaturity in his actions and was not a good candidate. Tr. 14. The court further stated that there were still "things in [appellant's] attitude" that concerned the court. Tr. 15. Unlike this Court, the trial judge had the opportunity to view appellant's demeanor and judge his ability to maintain positive improvement. The record does not support appellant's claim that the court's attitude was unreasonable, arbitrary or unconscionable.

{¶47} The third assignment of error is overruled.

#### IV

{¶48} In his fourth assignment of error, appellant argues that the court's imposition of a twelve-month prison sentence in the event appellant violates his community control sanction is excessive. Appellant cites nothing in the record in support of his argument and merely generally argues that the sentence, which he admits is within the range of penalties for a felony of the fifth degree, is inconsistent with the purposes and principles of felony sentencing and is disproportionate to the relative seriousness of this offense.

{¶49} The state argues that the appeal is premature, as the 12-month sentence is a mere possibility upon violation of community control and no sentence has been imposed at this point in time. We agree. When a trial court sentences an offender to

community control sanctions, the court is statutorily required at the time of sentencing to notify the offender of the specific prison term that may be imposed for a violation of conditions of the sanction. *State v. Brooks*, 103 Ohio St.3d 134, 814 N.E.2d 837, 2004-Ohio-4746, ¶2 of the syllabus. If the trial court fails to notify the defendant of the potential prison sentence for violating the community control sanctions, the court is later precluded from imposing that sentence should the defendant subsequently violate the sanctions. *Id.*

{¶50} However, the prison term is merely a potential sentence at this point in time, and has not been imposed. In fact, the court failed to impose this potential sentence after finding appellant in violation of his community control sanctions and instead reinstated community control with new conditions. The sentence in this case is community control, not 12 months incarceration.

{¶51} The fourth assignment of error is overruled.

V

{¶52} Appellant argues that counsel was ineffective at the March 3, 2009, hearing on violation of appellant's community control by not objecting to reinstatement of the community control sanction which included a residential sanction, or in the alternative failing to move to withdraw appellant's guilty plea.

{¶53} A properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476. Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington* (1984),

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

{¶54} Appellant has not demonstrated a reasonable probability of a change in the outcome had counsel objected or moved to withdraw the plea. Appellant admitted to four violations of his community control sanctions. Appellant presents no argument as to why a motion to withdraw the plea was legally appropriate at this stage in the proceedings. Further, he concedes that had counsel not accepted the residential sanction as a part of the reinstatement of community control sanctions, he could be facing the termination of his community control sanction and the possibility of twelve months incarceration.

{¶55} The fifth assignment of error is overruled.

{¶56} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/r1201

