[Cite as *State v. Cearfoss*, 2004-Ohio-7310.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 2004CA00085
RICHARD CEARFOSS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Stark County Court of Common Pleas Case 2002CR1000
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 8, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
LISA J. BARR 110 Central Plaza South Canton, OH 44702	RODNEY A. BACA 101 Central Plaza, South, Ste. 1000 Canton, OH 44702

Edwards, J.

{¶1} Defendant-appellant Richard Cearfoss [hereinafter appellant] appeals from the February 27, 2004, Judgment Entry of the Stark County Court of Common Pleas which revoked previously imposed community control sanctions and imposed a prison sentence upon appellant. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In June, 2002, appellant pled guilty to one count of unlawful sexual conduct with a minor. By Judgment Entry filed July 24, 2003, the trial court imposed community control sanctions for a period of two years. The terms and conditions included following all verbal and written orders given to appellant by his probation officer or the Court, no possession of any firearms or dangerous weapons, no possession of illegal drugs, no access to pornographic material, no access to alcohol and successful completion of the Melymbrosia Program for sexual offenders.

{¶3} On January 25, 2004, while appellant was still under community control sanctions, Edmund Kirkland, a parole and probation supervisor with the Ohio Adult Parole Authority and appellant's probation officer, paid an unexpected visit to the home of appellant. Appellant had moved into this residence about two weeks before and was living there with two other men, Shaun Connors and Carl Murphy. Each of the men had his own bedroom in the residence.

{¶4} Kirkland had previously visited the home when appellant moved in and had approved the home. When Kirkland visited and approved the residence, Kirkland had entered the residence through the back door and did not remember seeing a sign on the front door indicating that one should use the back door for entry.

{¶5} At approximately 1:30 A.M. on January 25, 2004, Kirkland and other officers paid an unannounced visit to appellant's residence. Kirkland knocked on the front door and appellant answered without opening the door. Kirkland ordered appellant to open the door but appellant directed Kirkland to the rear door. After entering the house through the rear door, Kirkland noticed appellant was sitting at a computer in the dining room.

{¶6} In addition, as soon as Kirkland walked into the residence, he could smell a strong odor of marijuana. Kirkland immediately went to the front door and discovered that this door was not locked and opened right up. The door opened about a foot when it met some resistance. Kirkland stated that he asked appellant why appellant did not comply with his order to open the door and that appellant did not respond.

{¶7} After Kirkland saw appellant at the computer, Kirkland confirmed that the computer was appellant's computer. This was necessary because there were two other computers in the common dining room. Kirkland checked the internet history on appellant's computer to determine what sites appellant had visited. He discovered titles in the computer's history with obvious sexual names and "XXX" as an identifier. Kirkland indicated that the names of the sites and the "XXX" in the title indicated that the sites were pornographic in nature.

{¶8} Kirkland proceeded to search appellant's bedroom. Next to a dresser or table in the center of the room was a duffle bag or laundry basket. Kirkland found two weapons there: a 3-1/3" lock-blade knife and a hand gun. The hand gun was apparently inoperable since Kirkland found a magnet jammed down the barrel of the gun. The magnet could not be removed. While Kirkland did not know whether the firing

pin was present in the gun, in Kirkland' opinion and in the opinion of other people whom Kirkland contacted, it was more probable that this weapon was a firearm as opposed to a toy.

{¶9} Searching the rest of the residence, Kirkland found a one pound brick of marijuana and a digital scale in one of the other bedrooms. A small baggy of marijuana and a hand held scale was also found on a television in that room.

{¶10} Kirkland proceeded to an attic room that had been turned into a common smoking room. The room was decorated with marijuana posters and mirrors. A protective gas mask with a smoking instrument at the bottom of it and several cigar boxes which contained marijuana residue were also in the room. Kirkland also found another one pound brick of marijuana inside a duffel bag. Kirkland then found plastic baggies and a freezer bag sealer that creates a vacuum (used to store items in baggies).

{¶11} Kirkland also found alcohol in the residence. He observed a full bottle of vodka and a bottle of Bacardi 151 Rum that was almost empty. Kirkland saw red plastic cups throughout the house with coca cola inside. Kirkland could smell alcohol in those cups. Kirkland stated that appellant did not appear to be drunk or otherwise impaired. Kirkland did not request that appellant submit to a breathalyzer to determine whether appellant had ingested alcohol. Kirkland did, however, order appellant to submit to a drug test. The drug test was given to appellant on the Monday after the search. The tests were negative.

{¶12} Lastly, Kirkland testified that appellant had not successfully completed the Melymbrosia Sex Offender Program. Kirkland discovered from the director of the

program, Phil Hagerty, that appellant had poor attendance in the program, did not participate in the group, refused to do his homework assignments, and did not keep a journal as required. Kirkland talked with appellant about these problems and appellant purportedly responded that he would straighten the situation out.

{¶13} Appellant presented a defense which included the following evidence. There was a sign on the front door, and had been for quite some time, which requested visitors to use the back door. This sign had allegedly been placed there because the door would not open properly. Appellant claimed that the computer's history may have shown "xxx" sites because one of his house mates had visited the site or because of a "pop-up" message sent to the computer. One of appellant's roommates testified that the knife and gun were his and did not belong to appellant. The roommate testified that appellant's bedroom had been his before appellant moved in and that the gun and knife had been left by him in appellant's room when he moved out to allow appellant to move into the room. The roommate also testified that the gun was really a toy. Appellant testified that the marijuana was not his and that he did not know it was in the house. As to the alcohol, appellant testified that he had not consumed any and one of appellant's housemates claimed that he, not appellant, had purchased the alcohol.

{¶14} Following the hearing, by Judgment Entry filed February 27, 2004, the trial court found that appellant had violated the terms of his community control. Accordingly, the trial court revoked appellant's community control. Appellant was ordered to serve a prison term of 12 months.

{¶15} It is from this February 27, 2004, Judgment Entry that appellant appeals, raising the following assignment of error:

{¶16} "A FINDING BY THE TRIAL COURT THAT THE APPELLANT, RICHARD CEARFOSS, HAD VIOLATED THE TERMS OF HIS PROBATION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN THE STATE FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAD VIOLATED ANY OF THE TERMS OF HIS PROBATION."

{¶17} In this case, appellant maintains that the trial court's finding that appellant had violated the terms of his community control is against the manifest weight of the evidence since the state failed to show a violation of the terms of his community control by a preponderance of the evidence. We disagree.

{¶18} Because a revocation hearing is not a criminal trial, the State only has to introduce evidence showing that it was more probable than not that the person on community control violated the terms or conditions of the community control. See *State v. Stockdale* (Sept. 26, 1997), Lake App. No. 96-L-172. For the same reasons, the rules of evidence, including hearsay rules, are expressly inapplicable to a revocation hearing. Evid.R. 101(C)(3). The trial court can consider any reliable and relevant evidence indicating whether the offender has violated the terms of his community control. *Columbus v. Bickel* (1991), 77 Ohio App.3d 26, 36, 601 N.E.2d 61 (citing *State v. Miller* (1975), 42 Ohio St.2d 102, 106, 326 N.E.2d 259). In so doing, the trial court is to consider the credibility of the witnesses. *State v. Parker*, Stark App. No. 2002CA00273.

{¶19} The decision whether to revoke an offender's community control is left to the sound discretion of the trial court, and absent an abuse of that discretion, the decision of the trial court will not be reversed. *State v. McKnight* (1983), 10 Ohio App.3d

312, 313, 462 N.E.2d 441. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Rivera* (1994), 99 Ohio App.3d 325, 328, 650 N.E.2d 906.

{¶20} Appellant was to follow all verbal orders given to him by his probation officer. Evidence showed that appellant committed a technical violation of the terms of his community control when he failed to follow Kirkland's order to open the front door. While the door may not have been routinely used, it was apparently operable.

{¶21} According to the terms of appellant's community control, appellant was not to have access to pornographic material. Appellant's computer had an internet history indicating that pornographic websites had been visited. It is also of concern that rather than meeting Kirkland at the back door, appellant chose to sit at this computer until Kirkland was in the house and had entered the room in which the computer was located. One could infer from appellant's choice to go to the computer rather than the back door that appellant had something to hide on the computer.

{¶22} Appellant was not to possess firearms or dangerous weapons. Further, appellant had a 3-1/2 inch lock-blade knife and a firearm in his room. Appellant's roommate testified that the knife and firearm were his and not appellants. The trial court had to consider and determine the credibility of this witness. Apparently, the trial court found the roommate's testimony less than credible.

{¶23} Appellant was not to possess illegal drugs. The house had a large amount of marijuana throughout it creating a smell that Kirkland detected immediately upon entering the residence. Accordingly, the trial court found appellant's claim that he did not know the marijuana was in the house incredulous. In addition, there were scales,

baggies and a vacuum sealer, all indicating the possible sale of marijuana by some resident of the home.[1]

{¶24} Although there were additional allegations of violations, these are certainly more than enough upon which to affirm the trial court's decision. While we note that the violations were not shown beyond a reasonable doubt, that is not the applicable standard. The standard is by a preponderance of the evidence. As such, we find no abuse of discretion by the trial court when it found that the State had showed, by a preponderance of the evidence, that appellant violated the terms of his community control.

{¶25} Appellant's sole assignment of error is overruled.

{¶26} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Gwin, P.J. and

Farmer, J. concur

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JUDGES

JAE/0914

[1] The trial court noted on the record that a review of the entire set of terms and conditions of appellant's community control showed that appellant was not to associate with persons who could influence appellant to engage in criminal activity. Tr. at 125-126. We agree with the trial court that whoever possessed two pounds of marijuana, baggies, scales and a vacuum sealer would seem to be someone who could influence appellant to engage in criminal activity.

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FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RICHARD CEARFOSS	:	
Defendant-Appellant	:	CASE NO. 2004CA00085

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES