[Cite as *State v. Tonkinson*, 2020-Ohio-3623.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TIMOTHY M. TONKINSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0016

Criminal Appeal from the
Columbiana County Municipal Court of Columbiana County, Ohio
Case No. 2016 CR B 1341

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee, No Brief Filed.

Atty. Richard J. Hura, P.O. Box 3707, Boardman, Ohio 44513, Defendant-Appellant.

Dated: June 29, 2020

WAITE, P.J.

{¶1} Appellant Timothy M. Tonkinson, appeals the sentence he received for one count of cruelty against a companion animal in the Columbiana County Municipal Court. Appellant claims the trial court ignored the misdemeanor sentencing factors. He also argues the court erred in imposing a jail sentence for his probation violation and in failing to appoint him counsel at the probation violation hearing. Appellee, the State of Ohio, did not file a brief in this matter. Following review of the record, we conclude that imposition of a jail term was appropriate and that the trial court was not required to appoint counsel for Appellant's probation violation hearing. Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On December 2, 2016, a criminal complaint was filed by the Columbiana County Dog Warden ("CCDW") in the Columbiana County Municipal Court alleging that Appellant had negligently confined several dogs outside in cages without adequate food or shelter in violation of R.C. 959.131(D)(2) and (3), both second degree misdemeanors. An affidavit by Amy Dowd, Dog Warden with CCDW, stated that the CCDW was notified by the East Palestine Police Department on November 26, 2016, that there was an injured animal at Appellant's residence. When Dowd responded to the police complaint she discovered several dogs without food, water or shelter during extreme cold temperatures. Further, several dogs were housed in wire crates stacked on top of each other on an unheated porch. Blood and broken glass were observed both outside and inside the dog crates. Large amounts of feces and urine were inside the crates. Dowd stated that the dogs "appeared depressed and cowered in the presence of [Appellant]." (Dowd Aff., ¶ 5)

{¶3} The trial court concluded that probable cause existed and issued a summons for Appellant's arrest. This resulted in Columbiana County Municipal Court Case Number 16 CBR 1341. At the time this case originated in the trial court, Appellant had other unresolved cases pending before the same court. Due to these, there were outstanding fines and court costs Appellant had been ordered to pay and outstanding orders to perform community service which had not yet been completed by Appellant.

{¶4} On May 23, 2017, Appellant appeared with counsel in this case. He pleaded guilty and was convicted on one count of cruelty against a companion animal, in violation of R.C. 959.131(D)(2), a second degree misdemeanor. The second count of the complaint was dismissed as a duplicative clerical error. Appellant was sentenced to 90 days in jail with 87 days suspended and was placed on two years of probation. His jail term was to commence on June 17, 2017. He was ordered to enroll in an anger management program within 30 days. The court also ordered him to surrender all animals in his possession as well as those in the custody of CCDW. The court ordered 50 hours of community service with at least ten hours to be performed per month. According to the judgment entry, this was "transferred from 16 CRB 121 & 16 TRO 3265." (5/23/17 Probation Terms J.E.) He was forbidden from owning any companion animals during his probation and was to allow inspection by a CCDW dog warden to ensure enforcement of these terms. Finally, the trial court ordered Appellant to pay all outstanding fines and costs from the following open cases: 16 CRB 401, 16 CRB 1030, 16 TRO 1538, and 16 CRB 289. These totaled $2,146.20. One week later, on May 30, 2017, the trial court issued a second judgment entry to "clarify confusion" regarding the jail term imposed on Appellant. He was ordered to actually serve three days for the instant case in addition to

a three-day jail term imposed in Columbiana County Municipal Court Case Number 16 CRB 121. The term was set to commence June 17, 2017. (5/30/17 J.E.)

{¶5} The trial court held a review hearing on June 16, 2017, one day prior to the scheduled commencement of Appellant's jail term. The court considered not only the instant matter, but another pending case, 16 CRB 121. (6/16/2017 J.E.) No transcript of the hearing was made part of this record. In its judgment entry the trial court concluded, "the previously imposed sentence shall stand and that Defendant shall serve the balance of the unsuspended jail term commencing 7-22-17." (6/16/17 J.E.) Additionally, "[t]he Court finds from the evidence that the previous sentence shall be modified as follows: It is agreed & ordered that Def shall serve 6 days in each case consecutively Total 12 days with release." (6/16/2017 J.E.) Appellant was granted a six-month extension to complete his 50 hours of community service and a limited work release, to commence on July 23, 2017. While Appellant was originally ordered to complete 50 hours of community service at no less than 10 hours per month, the new order gave Appellant an additional six months in which to complete his community service.

{¶6} On September 8, 2017, by means of a single judgment entry that specifically addressed six cases pending before the court including the instant matter, the court ordered Appellant to forfeit his driver's license for failure to pay fines and costs in any of the outstanding cases. On October 3, 2017, the trial court released the forfeiture in these cases after Appellant made a payment towards his fines. Appellant's license was once again ordered forfeited by the court on January 30, 2018, however for failure to pay any further amount towards his fines.

{¶7} Another review hearing was held on February 12, 2018. Again, there is no transcript in the record. The written judgment entry lifted Appellant's license forfeiture and ordered that Appellant was to complete his 50 hours of community service by performing at least 16 hours each month, to be reviewed bimonthly by his probation officer.

{¶8} On April 10, 2018, Appellant was served with a probable cause motion for probation violation for failure to pay his fines, complete community service, and failure to attend an anger management program.

{¶9} A hearing on the motion was held on May 14, 2018. There is no transcript in the record. The judgment entry states that, after hearing, probable cause existed to believe Appellant had violated the terms of his probation.

{¶10} Appellant's probation violation hearing was held on July 23, 2018, and again, we have no transcript of the hearing. The trial court's judgment entry notes that Appellant appeared without counsel and that, by stipulation, a review hearing was set for October 1, 2018. The review hearing was subsequently continued to February 4, 2019.

{¶11} On February 4, 2019, Appellant appeared without counsel. The record does contain a copy of the transcript of this hearing. Appellant's probation officer was also present. The court inquired of Appellant about his compliance with the terms of his probation. Appellant explained that he sought anger management counseling but after being evaluated was told it was not necessary. (2/4/19 Tr., p. 3.) Appellant's probation officer stated that an anger management class was not currently available but was being organized, and Appellant was scheduled to attend. The court next inquired about Appellant's outstanding fines. Appellant said he had paid $300 in October 2017, but had

not made a further payment. Appellant also told the court he had completed 21 hours of community service at a location in Mahoning County. The court stated it would accept these community service hours, but that the agency had to be added to the court's approved list.

{¶12} When asked if he was currently working, Appellant said he had a back injury from his previous employment and was seeking worker's compensation. Appellant did not provide any additional medical information. At the conclusion of the hearing, the court imposed Appellant's suspended jail term of 87 days, to begin April 30th. A review hearing was set for April 30, 2019.

{¶13} At the April 30, 2019, hearing Appellant was present and represented by counsel. A transcript of the hearing is included in the record. The court noted that it had previously sentenced Appellant to 87 days in jail stemming from this 2016 case. The court noted that its decision on whether to impose all or a portion of the 87-day jail term would be depend on whether Appellant had complied with any of the remaining terms of his probation since the previous hearing. Appellant's probation officer informed the court that Appellant had not completed any additional community service hours: he still had only completed 21 of the required 50 hours. While confirming that Appellant was told an anger management program was unnecessary, the probation officer confirmed that Appellant had not paid any additional amounts towards his fines and costs.

{¶14} Appellant had the opportunity to address the court, stating that his worker's compensation injury prevented him from performing any work and that he had few funds. At the conclusion of the hearing the court ordered Appellant to serve four days in jail commencing May 10, 2019, with the balance of the 90 days suspended. The court

terminated Appellant's probation and sent the remaining fines and costs to collection for nonpayment. The court stated, "I've reduced [your jail term] from 87 to four. I'm not going to reduce it any longer. You have had many -- multiple, multiple times to do stuff, and just haven't done it." (4/30/19 Tr., p. 6.) The court noted that Appellant never presented any medical records indicating that he was unable to work or to perform community service. On May 9, 2019, Appellant filed a motion for a stay of sentence with the trial court which, was granted. Appellate counsel was appointed.

{¶15} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

> The Trial Court abused its discretion when sentencing the Defendant to jail for failing to pay fines and costs as well as failure to complete community service when his probation had been extended for an additional six months.

{¶16} Appellant argues the trial court erred in finding that he violated his probation and sentencing him to a jail term. Noting the trial court had extended his probation for an additional six months, Appellant essentially contends that the trial court did not consider the factors applicable to misdemeanor sentencing or the overriding objectives of probation before revoking his probation and imposing the suspended jail sentence.

{¶17} The suspension of sentence and decision to grant probation is an act of grace allowing an offender to go free on certain conditions, and serves as a contract for leniency between the offender and the sentencing court. *State v. Anderson,* 143 Ohio St.3d 173, 2015-Ohio-2089, 35 N.E.3d 512, ¶ 21. The offender remains under the supervision of the trial court and is subject to any of the conditions imposed by the court

in return for the suspended sentence. *Id.* If the offender breaches any of those conditions, the trial court is permitted to impose the suspended sentence. *Id.*

{¶18} Before a defendant's probation can be revoked, the court must allow for due process and follow a two-part procedure. *State v. Grove,* 7th Dist. Mahoning No. 15 MA 0030, 2016-Ohio-4818, ¶ 12 citing, *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrisey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The court is first required to conduct an initial hearing to determine whether probable cause exists to believe the defendant violated the terms of probation. *Grove* at ¶ 12. Second, the court must hold a probation violation hearing to determine whether probation should be revoked. *Id.* A probation violation hearing is not a criminal trial and the state is not required to establish a violation by means of proof beyond a reasonable doubt. *State v. Delaine*, 7th Dist. Mahoning No. 08 MA 257, 2010-Ohio-609, ¶ 14; *State v. Hylton,* 75 Ohio App.3d 778, 782, 600 N.E.2d 821 (4th Dist.1991). The evidentiary burden at a probation revocation hearing is to prove "evidence of a substantial nature showing that revocation is justified." *State v. Ohly,* 166 Ohio App.3d 808, 2006-Ohio-2353, 853 N.E.2d 675, ¶ 18 (6th Dist.). This Court reviews the trial court's decision in a probation revocation proceeding for an abuse of discretion. *State v. Brown,* 7th Dist. Mahoning No. 10 MA 34, 2010-Ohio-6603, ¶ 12. An abuse of discretion implies more than an error of judgment; it connotes that the trial court's attitude was unreasonable, arbitrary or unconscionable. *In re Consol. Mtge. Satisfaction Cases,* 97 Ohio St.3d, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 5, citing *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶19} Appellant was convicted of one count of cruelty involving companion animals, in violation of R.C. 959.131(D)(2), a second-degree misdemeanor. The overriding purposes of misdemeanor sentencing are to punish the offender and to protect the public from possible future crimes. R.C. 2929.21(A). The sentence imposed must be reasonably calculated as commensurate with, and not demeaning to, the seriousness of the offender's conduct and its impact on the victims, as well as consistent with sentences imposed for similar offenses. R.C. 2929.21(B).

{¶20} A trial court has the discretion "to determine the most effective way to achieve the purposes and principles of sentencing" provided by R.C. 2929.21. R.C. 2929.22(A). If a specific sentence is not required for an offense, a court imposing a sentence for a misdemeanor may impose any sanction or combination of sanctions pursuant to R.C. 2929.24 through R.C. 2929.28. R.C. 2929.22(A). The trial court is subject to the following:

> (1) In determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors:
>
> (a) The nature and circumstances of the offense or offenses;
>
> (b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section;

(f) Whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses;

(g) The offender's military service record.

R.C. 2929.22(B)(1).

{¶21} The court may also consider any other relevant factors. R.C. 2929.22(B)(2). Moreover, before imposing a jail term the trial court must consider the appropriateness of imposing a community control sanction. R.C. 2929.22(C). Therefore, the court must

consider the criteria of R.C. 2929.22 and the principles found in R.C. 2929.21 before imposing a misdemeanor sentence. *State v. Crable,* 7th Dist. Belmont No. 04 BE 17, 2004-Ohio-6812, ¶ 24. It is not required to state its consideration of the sentencing factors on the record. *State v. Wallace,* 7th Dist. Mahoning No. 12 MA 180, 2013-Ohio-2871, ¶ 16, 18. A reviewing court is to presume the sentencing court considered the requisite factors absent an affirmative showing to the contrary. *Crable* at ¶ 24.

{¶22} The record before this Court does not support Appellant's contention that the trial court failed to consider the required factors. Appellant directs this Court to two statements made by the trial court at the probation revocation review hearing: "You're starting to talk me into not sending you to jail today," and "Mr. Tonkinson, does it seem to you that you have more excuses than cases?" Appellant believes these statements provide evidence that the court's decision to impose the suspended sentence was unreasonable, arbitrary, and unconscionable. (2/4/19 Tr., pp. 5, 8.) Appellant argues he had made significant progress towards completing the terms of his probation, including paying $300 of his fines and costs and serving almost half of his community service hours.

{¶23} Despite Appellant's assertions, a review of the entire record reveals that Appellant was ordered to complete 50 hours of community service, pay fines and costs in the amount of $2,146.20, and to complete anger management on May 23, 2017, as part of the terms of his probation. The trial court conducted multiple reviewing hearings, giving Appellant several months to abide by the terms of his probation prior to revoking probation and imposing four days of his suspended sentence. The comments to which Appellant directs this Court's attention were made almost two years after sentencing, at the February 4, 2019 hearing. The trial court conducted yet another review hearing on

April 30, 2019, giving Appellant additional time to comply with his order. This record shows Appellant had nearly reached the two-year mark from the beginning of his probation and still had completed only 21 of 50 community service hours and paid only $300 toward the $2,146.20 in fines and costs. The determination that a program of anger management was not required appears to have been accepted by the court. However, Appellant never presented any evidence over the course of several review hearings that he was unable to work or perform community service other than his vague testimony regarding the pursuit of a worker's compensation claim. The court did not find Appellant's excuses for failure to abide by the terms of his probation credible or exculpatory considering how much time had lapsed. The court emphasized that Appellant had multiple cases pending before the court and had been given many opportunities to complete the terms of his probation but never demonstrated why it was not possible for him to do so. This record shows Appellant failed to comply with multiple terms of his probation for an extended period of time. The record does not affirmatively show that the trial court failed to consider the misdemeanor sentencing factors.

{¶24} Appellant's first assignment is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> The Trial Court prejudicially erred when it held a probation violation hearing without affording the Defendant appointed counsel and accepted his stipulation.

{¶25} Appellant argues the trial court erred when it held a probation violation hearing and accepted his stipulation to the violation without appointing counsel. Appellant

claims that a hearing was held on May 23, 2018 where he appeared without counsel and stipulated to his probation violation.

{¶26} Appellant was convicted of a second degree misdemeanor and was placed on probation. The motion for probable cause was filed by the state on April 10, 2018 and a probable cause hearing was held on May 14, 2018.

{¶27} Crim.R. 32.3(B) governs the right to counsel during the revocation of probation and provides, in pertinent part:

> The defendant shall have the right to be represented by retained counsel and shall be so advised. Where a defendant convicted of a serious offense is unable to obtain counsel, counsel shall be assigned to represent the defendant, unless the defendant after being fully advised of his or her right to assigned counsel, knowingly, intelligently and voluntarily waives the right to counsel. Where a defendant convicted of a petty offense is unable to obtain counsel, the court may assign counsel to represent the defendant.

{¶28} In *Gagnon,* the United States Supreme Court held that no absolute right to counsel arises in a probation revocation hearing. Instead, the issue is to be considered on a case-by-case basis. *Id*. at 782. Crim.R. 32.3(B) clarifies a defendant's rights, requiring that counsel be appointed when the defendant has committed a serious offense, unless the defendant knowingly, intelligently and voluntarily waives that right. For petty offenses, Crim.R. 32.3(B) provides only that counsel may be assigned, acknowledging that the trial court has the discretion whether to assign counsel for petty offenses.

{¶29} Further, in *State v. McKnight,* 10 Ohio App.3d 312, 462 N.E.2d 441 (12th Dist.1983), the Twelfth District held that where a defendant is indigent, he has a right to counsel at a final hearing on a probation violation. However, there is no such right to counsel at a preliminary probable cause hearing. *Id*. at 314.

> If Crim.R. 32.3(B) were to be construed to require counsel at the preliminary hearing, it would be necessary to amend the rule to provide for an initial appearance such as that required by Crim.R. 5, but we are unable to find anything in the Rules of Criminal Procedure which requires such an initial appearance. As a result, we conclude that the preliminary hearing before the trial judge on a charge of violation of the terms of the defendant's probation is the hearing at which the defendant is to be advised of the nature of the charge against him. Also, it is at this hearing that the trial court must determine probable cause, schedule the final hearing and ascertain whether or not the defendant has counsel. To hold otherwise would be to read into the Rules of Criminal Procedure something that does not exist.

Id.

{¶30} Appellant's probable cause hearing was held on May 14, 2018. Counsel for Appellant did not file a transcript of that proceeding as part of this record. Where a transcript has not been made part of the appellate record, the reviewing court presumes the regularity of the proceedings below and does not review factual questions. *State ex rel. Bardwell v. Cuyahoga Cty. Bd. of Commrs.,* 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274, ¶ 14. The written judgment entry states that Appellant was not

represented by counsel. However, contrary to Appellant's assertion, Appellant did not stipulate to probable cause at that hearing. Instead, the record reflects that a hearing was held, at the end of which the trial court concluded probable cause existed.

{¶31} A review hearing was set for July 23, 2018. There is no transcript of the hearing in the record, but the written judgment entry states that while Appellant was not represented by counsel, he stipulated that another review hearing was to be set in October. This hearing was continued until February of 2019.

{¶32} The trial court did conduct a probation violation hearing in this matter on February 4, 2019. There is a transcript of the February 4, 2019 hearing in the record which reveals that Appellant was not represented by counsel. Although it appears from the record that the trial court conducted the February 4, 2019 hearing as a probation violation hearing despite holding subsequent review hearings, the trial court had the discretion to determine whether counsel should be assigned pursuant to Crim.R. 32.3(B) as Appellant's conviction was for a petty offense. See *McKnight* at 314. At the conclusion of the hearing the trial court determined that Appellant had violated his probation. The court terminated his probation and ordered the imposition of three days of jail time with 87 days suspended. Appellant's jail term was to commence April 30, 2019.

{¶33} Prior to the actual start of Appellant's jail term, on April 30, however, the trial court held an additional hearing where Appellant was represented by counsel. At the conclusion of the hearing, the trial court imposed a four-day jail term with the remaining days suspended. Thus, rather than conducting a probation violation hearing immediately after the probable cause hearing, the trial court held additional review hearings prior to the time Appellant's jail term was to commence. Appellant was represented by counsel

at this final hearing. Contrary to Appellant's assertion, he was represented by counsel prior to the actual imposition of jail time. This record reveals that at every review hearing the trial court clearly informed Appellant the court would not proceed with imposing Appellant's jail term if Appellant was in compliance with the conditions of his probation. Because the probable cause hearing and the review hearings were not final determinations of Appellant's probation violation and because Appellant was represented by counsel at the final hearing where jail time was actually imposed for this type of offense, Appellant's right to counsel was not violated.

{¶34} Therefore, the trial court did not abuse its discretion in not assigning counsel at the probation violation hearing as Appellant's conviction was for a petty offense. Appellant was represented by counsel when his probation was actually revoked and four days of the suspended sentence was finally imposed.

{¶35} Accordingly, Appellant's second assignment of error is without merit and is overruled.

{¶36} Based on the foregoing, both of Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Columbiana Municipal Court of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.