[Cite as *State v. Ellington*, 2016-Ohio-3467.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103790

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDON ELLINGTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580672-A

BEFORE: Kilbane, P.J., E.T. Gallagher, J., and Stewart, J.

RELEASED AND JOURNALIZED: June 16, 2016

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Brandon Ellington ("Ellington"), appeals the trial court judgment terminating his community control sanction and imposing a one-year prison sentence. For the reasons set forth below, we affirm.

{¶2} In December 2013, Ellington was charged with aggravated vehicular assault, with a furthermore specification, and failure to stop after an accident. The charges arise from an incident where Ellington collided with a motorcyclist, severing the motorcyclist's leg, and then leaving the scene of the accident.

{¶3} In March 2014, Ellington pled guilty to the aggravated vehicular assault and specification as charged, and the remaining count was nolled. The court sentenced him to one year in prison. Two days later, the trial court granted Ellington's "oral motion to reconsider sentencing." The court vacated the one-year prison term and imposed three years of community control sanction instead. The state of Ohio then appealed to this court in *State v. Ellington*, 8th Dist. Cuyahoga No. 101404, 2015-Ohio-601. On appeal, the state argued the trial court was without jurisdiction to reconsider its one-year prison sentence. We agreed with the state, reversing the judgment and remanding the matter to the trial court. *Id.* at ¶ 6.

{¶4} Following this court's remand, Ellington filed a motion to withdraw his guilty plea. The trial court granted his motion and held a new plea hearing in May 2015. Just as in the first guilty plea hearing, at this hearing, Ellington pled guilty to the

aggravated vehicular count as charged in the indictment, and the remaining count was nolled. The court sentenced Ellington to four years of community control sanctions.

{¶5} In August 2015, after Ellington was indicted in Case No. CR-15-597715, the trial court held a hearing for an alleged community control sanctions violation. Ellington was charged in Case No. CR-15-597715 with felonious assault, domestic violence, and intimidation of crime victim or witness. The charges arise from a June 2015 incident with his wife. At the hearing, the court found Ellington in violation of the terms of his community control sanction, continued his community control, and placed a "hold" on Ellington until the disposition of this new case.

{¶6} In September 2015, Ellington pled guilty in Case No. CR-15-597715, to amended charges of attempted retaliation and domestic violence. Ellington was sentenced to 15 months of community control sanction. Thereafter, the trial court, in the matter before us, held a probation violation hearing. The court held another hearing on the matter in October 2015. Ellington's probation officer was not present at the hearing, but the court read the probation officer's report into the record. Ellington acknowledged that his guilty plea in Case No. CR-15-597715 was grounds for a probation violation. The trial court terminated Ellington's community control and sentenced him to one year in prison. The court gave him 94 days of jail-time credit.

{¶7} Ellington now appeals, raising the following three assignments of error for our review.

Assignment of Error One

> The trial court erred in allowing several departures [from] normal [probation violation] procedures, including no officer present and no formal allegations to rebut.

Assignment of Error Two

> The trial court erred in mentioning irrelevant and constitutionally impermissible material.

Assignment of Error Three

> Scandalous material is subject to being stricken.

Probation Violation Hearing

{¶8} In the first assignment of error, Ellington argues the trial court erred when it did not have the probation officer present at the probation violation hearing. In the second assignment of error, he claims the "proceeding was laced with innuendo about irresponsible marriage and reproduction." In the third assignment of error, Ellington argues the court exhibited animosity toward him and his wife during the hearing.

Presence of Probation Officer

{¶9} In *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the United States Supreme Court found that a final probation revocation hearing must encompass the following six minimum due process requirements:

> "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses * * *; (e) a 'neutral and detached' hearing body * * *; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking [probation or] parole."

Id. at 786, quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d

484 (1972). *See also Lakewood v. Sullivan*, 8th Dist. Cuyahoga No. 79382, 2002-Ohio-2134. In applying these requirements to the instant case, we find that due process was met.

1. Written notice of claimed violations

{¶10} The state concedes that Ellington did not receive written notice of the alleged violation, but it argues that the trial court's oral notification of the alleged violation is sufficient. This court has previously found that when a defendant does not receive written notice of the probation violation, the defendant is not deprived of his or her due process rights if the defendant knew why he or she was before the court for a probation revocation hearing. *State v. Stowers*, 8th Dist. Cuyahoga Nos. 48572, 48575, 48576, 48577, 48578, 48584, 48590, 48872, and 78873, 1985 Ohio App. LEXIS 5610, *11 (Jan. 31, 1985) citing *State v. Delaney*, 11 Ohio St.3d 231, 465 N.E.2d 72 (1984); *State v. Nichols*, 48 Ohio App.2d 330, 357 N.E.2d 417 (1st Dist.1976); *State v. Jordan*, 8th Dist. Cuyahoga No. 734738, 1998 Ohio App. LEXIS 5393 (Nov. 12, 1998).

> Although the preferred course is for a trial court to give the probationer notice of the claimed probation violations in written form, oral statements which explain the basis of the revocation proceeding may be sufficient where the statements provide an adequate notice to probationer and also a record for appellate review of the revocation proceeding.

Jordan at *7-8, citing *State v. Starcic*, 8th Dist. Cuyahoga No. 72742, 1998 Ohio App. LEXIS 2411 (June 4, 1998)).

{¶11} Here, the trial court gave Ellington verbal notice on the record that the basis for the revocation hearing was the fact he had pled guilty to the domestic violence case

with his wife. Ellington acknowledged that the trial court warned him if he "pick[ed] up another domestic violence case, [he was] going to have a problem." This sufficiently preserved Ellington's right to due process.

2. Disclosure to the probationer of evidence against him

{¶12} Here, the trial court read the probation officer's report into the record. This report outlined the evidence against Ellington. The violation was based on Ellington's domestic violence case, which he had already pled guilty to at the time of this hearing. Therefore, the trial court complied with the second prong of the *Gagnon* test.

3. Opportunity to be heard in person and to present witnesses and evidence

{¶13} The record is clear that Ellington was present at the probation revocation hearing. He was represented both by advisory counsel and court-appointed counsel. Ellington was given the opportunity to address the trial court. Additionally, his wife, the victim in the domestic violence case that led to his probation violation, was also present as a witness for Ellington. Thus, the trial court complied with the third requirement of the *Gagnon* test.

4. The right to confront and cross-examine adverse witnesses

{¶14} In the instant case, there were no witnesses to confront or cross-examine during Ellington's hearing. At the hearing, the trial court read the probation officer's report into the record. Ellington did not object to the probation officer's report. This court has previously held that "the failure to object to the unsworn testimony of a probation officer at a violation hearing waives any error regarding the trial court's

determination." *State v. Fonte*, 8th Dist. Cuyahoga No. 98144, 2013-Ohio-98, ¶ 10, citing *State v. Rose*, 8th Dist. Cuyahoga No. 70984, 1997 Ohio App. LEXIS 1072 (Mar. 20 1997), citing *State v. Williams*, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977).

{¶15} Therefore, the fourth requirement of the *Gagnon* test has been met.

5. A "neutral and detached" hearing body

{¶16} We recognize that a trial court that "placed a defendant on probation is considered a 'neutral and detached' hearing body for purposes of probation revocation, 'unless there is evidence to demonstrate that undue bias, hostility, or absence of neutrality existed on the part of the court.'" *State v. Groce*, 8th Dist. Cuyahoga No. 99857, 2014-Ohio-389, ¶ 12, *discretionary appeal not allowed*, 139 Ohio St.3d 1417, 2014-Ohio-2487, 10 N.E.3d 737, quoting *State v. Murr*, 35 Ohio App.3d 159, 520 N.E.2d 264 (6th Dist. 1987), syllabus, applying *Gagnon.*

{¶17} It is clear from the record in the instant case that the trial court discussed any potential issues prior to proceeding with the hearing, and counsel waived any ethical objections to the trial judge presiding over the hearing. The trial court also stated on the record that it did not want advisory counsel or Ellington to think that it was prejudiced against them, and as a result, the court appointed new counsel to represent Ellington at the hearing. The potential issues between the trial court and Ellington's advisory counsel arose from the trial court reporting Ellington's advisory counsel's behavior to the Office of Disciplinary Council because of a prior conflict.

{¶18} Based on the foregoing, we find that the record does not demonstrate any evidence of undue bias or hostility on behalf of the trial court.

6. A written statement by the factfinder

{¶19} In the present case, the trial court found Ellington to be in violation of his community control sanctions for pleading guilty in Case No. CR-15-597715 while on community control sanction in the aggravated vehicular assault case. Ellington acknowledged his guilty plea and understood that he was warned of the ramifications if he was charged in a new case. The trial court verbally stated its reasons for revoking Ellington's probation on the record. Although the use of oral "explanations" in lieu of written statements detailing the basis for a trial court's determination in revocation proceedings is not the preferred method, we find that the trial court's statements in the instant case sufficiently informed Ellington of the reasons for which his probation was revoked, while also providing an adequate record for review on appeal. *Delaney*, 11 Ohio St.3d at 235, 465 N.E.2d 72, citing *United States v. Rilliet*, 595 F.2d 1138 (9th Cir.1979); *Howie v. Commonwealth*, 222 Va. 625, 283 S.E. 2d 197 (1981); *State v. Harris*, 368 So.2d 1066 (La. 1979); *Pearson v. State*, 308 Minn. 287, 241 N.W.2d 490 (1976).

{¶20} Based on the foregoing, we find that the trial court complied with each of the *Gagnon* requirements, and Ellington was not denied his due process rights.

{¶21} Therefore, the first assignment of error is overruled.

Statements by the Trial Court

{¶22} In the second assignment of error, Ellington argues the trial court erred when it discussed his marriage and children at the hearing. In support of his argument, he cites to *Casdorph v. Kohl*, 90 Ohio App.3d 294, 629 N.E.2d 34 (6th Dist.1993). In *Casdorph*, the trial court banned the appellant from the state of Ohio for five years as a condition of probation. Appellant violated the order by returning to the state. He was incarcerated for a violation of his probation condition. The appellant filed a writ of habeas corpus. The Sixth District Court of Appeals granted appellant's writ, finding that "the condition of probation in this case (leaving the state of Ohio and remaining outside the state of Ohio for five years) is unconstitutional." *Id*. at 295.

{¶23} In the instant case, the trial court did not impose unconstitutional conditions on Ellington. While the court discussed with Ellington and his wife their decision to be in an unhealthy relationship and their decision to have children, the court did not order Ellington and his wife to separate, discontinue having children, or place any other unconstitutional condition upon them.

{¶24} Therefore, the second assignment of error is overruled.

Scandalous Material

{¶25} In his third assignment of error, Ellington argues the trial court projected animosity against advisory counsel toward him and his wife.

{¶26} At the beginning of the hearing, the trial court discussed that it was required to report advisory counsel's behavior to the Office of Disciplinary Council because of a prior conflict. The court appointed counsel to represent Ellington at the revocation hearing. The court stated:

> [COURT]: I don't want you or the defendant to think that I'm biased or prejudiced against you. I don't want to prohibit you (advisory counsel) necessarily from working in my courtroom, but, you know, I think at a bare minimum you are going to have to work in conjunction with [appointed counsel], and you're going to have to waive any kind of ethical issue that you may have with my conduct.
>
> [ADVISORY COUNSEL]: That's fine[.]
>
> * * *
>
> [COURT]: And you waive any ethical objections to me proceeding with this hearing?
>
> [ADVISORY COUNSEL]: Yes.

{¶27} It is clear that the trial court discussed any potential issues prior to proceeding with the hearing, and counsel waived any ethical objections to the trial judge presiding over the hearing. The trial court also stated on the record that it did not want advisory counsel or Ellington to think that it was prejudiced against them, and as a result, the court appointed new counsel to represent Ellington at the hearing. Based on the foregoing, we find Ellington's argument unpersuasive.

{¶28} Therefore, the third assignment of error is overruled.

{¶29} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR