

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 108111
 v. :
 :
 MARY M. MACURA, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 3, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-619067-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Michael A. Lisk and Anthony T. Miranda,
Assistant Prosecuting Attorneys, *for appellee*.

Christina M. Joliat, *for appellant*.

MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Mary Macura (“Macura”), appeals from the
trial court’s judgment finding that she violated the terms of her community-control

sanctions and her nine-month sentence to prison. For the reasons set forth below, we affirm.

{¶ 2} On July 3, 2017, following a traffic stop, Macura was found in possession of heroin, which later tested positive for fentanyl. Macura was charged with two counts of drug possession, both fifth-degree felonies, in violation of R.C. 2925.11(A), and one count of illegal conveyance into a detention facility, a third-degree felony in violation R.C. 2921.36(A)(2).

{¶ 3} On January 11, 2018, Macura pleaded guilty to both counts of drug possession and the remaining charge was dismissed. The trial court sentenced Macura to community-control sanctions for a period of two years. The trial court set forth the following conditions for Macura's community control: (1) abide by the rules and regulations of the probation department; (2) submit to regular drug testing; (3) submit to random drug testing; (4) successfully complete an outpatient treatment program; and (5) pay a monthly supervisory fee of \$20 to the probation department. In addition, the trial court advised Macura that notification of a violation of these terms and conditions may result in more restrictive sanctions or a prison term of 12 months.

{¶ 4} On January 19, 2018, when Macura reported to the probation department, which was eight days after her sentencing, she advised her probation officer that she had a problem with Xanax and also admitted that she used heroin four days earlier. The probation department attempted to obtain a urine sample but

Macura left without providing a sample and never returned. The trial court issued a *capias* for Macura, who was apprehended on June 11, 2018.

{¶ 5} The trial court held a hearing on Macura's alleged violations. At the hearing, Macura waived probable cause and acknowledged she was in violation of her probation. The trial court found Macura in violation, continued her on community control with the prior conditions but modified the terms to have her screened for eligibility and placement into the Summit Cliff Skeen Community-Based Correctional Facility ("CBCF"). The trial court again advised Macura that notification of a violation may result in more restrictive sanctions or a prison term of 12 months. The trial court also authorized that a copy of the presentence-investigation report be given to the CBCF for purposes of screening, evaluation, and case planning.

{¶ 6} Macura tested positive again on July 26, 2018. The trial court held a hearing on these alleged violations. The probation officer reported that after the last probation-violation hearing, Macura had to be transported to the hospital to undergo alcohol detoxification. The probation officer also reported that Macura was not found eligible for CBCF because she suffered from seizures, arthritis, and COPD. Macura addressed the court and claimed that she had not used alcohol in more than six years, instead claimed she was hospitalized because of bacterial pneumonia, dehydration, and because her kidneys were shutting down.

{¶ 7} At the hearing, the trial court read a letter from Macura's 14-year-old son into the record. The son stated he missed his mother and that he knew she made

a mistake but that we all make mistakes. The trial court stated it was very moved by the letter and advised Macura that the court was trying to get her much-needed help. The trial court found Macura in violation, but continued her on community control, with modified terms. Under the modified terms, the trial court referred Macura to TASC for substance-abuse assessment.

{¶ 8} Macura completed the TASC assessment, which recommended outpatient drug treatment, regular drug screening, and attendance at self-help meetings. The TASC assessment also recommended that Macura continue meeting with the Center for Family and Children for assistance with her mental health challenges and to explore medicated-assisted treatment with Vivitrol and Suboxone.

{¶ 9} At a hearing on August 21, 2018, the trial court found that Macura was not in violation, continued her on community control, and ordered her to successfully complete outpatient drug treatment. The trial court again advised Macura that notification of a violation may result in more restrictive sanctions or a prison term of 12 months. Thereafter, Macura failed to comply with the community-control sanctions. The trial court issued a capias for Macura, and she was apprehended on October 17, 2018.

{¶ 10} On October 22, 2018, the trial court held a hearing on the violations alleged. At the hearing, the probation officer indicated that Macura had not reported to the department as required and that when she finally reported on September 19, 2018, she tested positive for opiates. Macura stated she was trying to comply, but felt she was failing before she even started. The trial court found Macura in violation

of the community-control sanctions. The trial court then read a letter from the wife of Macura's ex-husband, who expressed frustration at Macura's continued behavior after being given repeated opportunities to comply.

{¶ 11} The trial court revoked the community-control sanctions and sentenced Macura to the Ohio Reformatory for Women for nine months on each count. The trial court ordered the sentences to be served concurrently and advised Macura that she would be subject to postrelease control for three years after her release.

{¶ 12} Macura now appeals, assigning the following two errors for review:

Assignment of Error No. 1

The trial court erred when it did not hold, and [Macura] did not waive her right to a preliminary hearing to determine whether there was probable cause that [Macura] violated the terms of her community control sanction.

Assignment of Error No. 2

The trial court abused its discretion when it terminated [Macura's] community-control sanctions.

Preliminary Probable-Cause Hearing

{¶ 13} In the first assignment of error, Macura argues that the trial court erred by not holding a preliminary hearing prior to the revocation hearing. Macura also argues her due process rights were violated because she did not waive her right to a preliminary hearing.

{¶ 14} Initially, we note Macura did not object to the trial court's failure to hold a preliminary hearing. As a result, Macura has waived all but plain error.

{¶ 15} Civ.R. 52(B) provides an avenue for correcting errors that were not brought to the trial court’s attention. A reviewing court has discretion to recognize “plain errors or defects affecting substantial rights * * * although they were not brought to the attention of the court.” *Id.* Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. Thus, an alleged error “does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of [the proceeding] clearly would have been otherwise.” *Id.* at paragraph two of the syllabus.

{¶ 16} Macura relies on *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), to support her argument that the trial court was required to hold a separate preliminary hearing to determine whether there was probable cause that she violated the conditions of community control and, after determining that probable cause exists, a subsequent hearing to determine whether community control should be continued or revoked.

{¶ 17} However, we have previously held that there is no due process violation in conducting both hearings on the same day. *State v. Gaines*, 8th Dist. Cuyahoga No. 106784, 2019-Ohio-639; *State v. Greene*, 8th Dist. Cuyahoga No. 106028, 2018-Ohio-1965; and *State v. Cox*, 8th Dist. Cuyahoga No. 105932, 2018-Ohio-748.

{¶ 18} In the instant case, although the probable cause and the revocation hearings were held on the same day, the record reveals that the hearing started out as a preliminary, probable-cause hearing. During this portion of the hearing, Macura’s probation officer advised the trial court that Macura had not been reporting to the probation department as required and that when she finally reported, she had tested positive for opiates.

{¶ 19} It was at this juncture that the preliminary probable-cause hearing transitioned into a final revocation hearing. Because it is clear from the transcript that the violation hearing began as a preliminary probable-cause hearing and then transitioned into a revocation hearing, there is no due process violation. *State v. Patton*, 2016-Ohio-4867, 68 N.E.3d 273, ¶ 16 (8th Dist.).

{¶ 20} Although we find there was no due process violation in holding both the preliminary probable cause and the revocation hearings on the same day, Macura argues there was a due process violation because she did not waive her right to a preliminary hearing.

{¶ 21} This court has held that because revocation of community control can result in a serious loss of liberty, “a probationer must be accorded due process at the revocation hearing.” *Greene*, 8th Dist. Cuyahoga No. 106028, 2018-Ohio-1965, at ¶ 50, quoting *State v. Bailey*, 8th Dist. Cuyahoga No. 103114, 2016-Ohio-494, ¶ 9, citing *Gagnon*, 411 U.S. at 781, 93 S.Ct. 1756, 36 L.Ed.2d 656. At a minimum, due process requires the defendant be provided:

(1) written notice of the claimed violations; (2) disclosure of evidence against him; (3) opportunity to be heard and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a “neutral and detached” hearing body; and (6) a written statement by the factfinder of the evidence relied upon and reasons for revocation.

Greene at id., citing *State v. Davis*, 8th Dist. Cuyahoga No. 93959, 2010-Ohio-5126, ¶ 26, citing *State v. Miller*, 42 Ohio St.2d 102, 104, 326 N.E.2d 259 (1975).

{¶ 22} We have also held that although written notice of claimed violations is preferred, oral notice of the violations may be sufficient if the oral statements “explain the basis of the revocation proceedings,” “provide adequate notice to the probationer,” and “provide a record for appellate review of the revocation hearing.” *Greene at ¶ 51*, citing *Patton*, 2016-Ohio-4867, 68 N.E.3d 273, at ¶ 9; *See also State v. Thompson*, 1st Dist. Hamilton Nos. C-140746 and C-140747, 2015-Ohio-2836 (purpose of the preliminary hearing is to, among other things, provide the defendant with notice of the alleged violations).

{¶ 23} As previously noted, Macura’s probation officer advised the trial court that Macura had not been reporting to the probation department as required and that when she finally reported to the department, she tested positive for opiates. Macura’s counsel acknowledged that Macura had failed to report to the probation department as required and the fact that she tested positive for opiates once she finally reported, but queried whether Macura could receive more drug treatment.

{¶ 24} Macura also addressed the alleged violations, stating that she had investigated getting the Vivitrol injection and was planning to discuss it with her

probation officer. Macura claimed she was attempting to do all she could to satisfy the conditions of her probation, but felt she had failed before she started.

{¶ 25} Here, we find that Macura suffered no prejudice because she had an opportunity to address the allegations that she had violated the conditions of the community-control sanctions. We also find that Macura was not prejudiced because there was clear evidence that she did not report to the probation department as required and, that when she finally reported, she tested positive for opiates. As a result, there was no due process violation.

{¶ 26} Nonetheless, despite the uncontroverted evidence that Macura had not abided by the terms and conditions of the imposed community-control sanctions, she argues that the trial court relied on the aforementioned letter from the wife of her ex-husband to find that she was in violation. However, we see nothing in the record to support Macura's claim.

{¶ 27} Prior to reading the letter, which bemoaned the many opportunities Macura had been given to abide by the community-control sanctions, the trial court stated it was reading it so that Macura could hear what people in the community were thinking about her conduct. After reading the letter the trial court outlined its reasons for revoking the community-control sanctions as follows:

[Macura], you just tested positive for Fentanyl again after the third time I've given you a chance at Probation, three times. The drug system — the inpatient drug programs aren't going to take you. Every time I've given you an opportunity, you've blown it. I mean this letter is pretty accurate; it's a continuous pattern with you.

* * *

[Macura], you're using drugs. [Macura] if I continue you on Probation you're going to kill yourself.

* * *

[Macura], I've had enough. I've had enough of this case. Enough of every time I've given you a chance you've, in essence, spit in my face and the Court's face, the Probation Department's face by not showing up; having a capias issued for you, coming in positive for Fentanyl, using this drug that is a killing drug in this community. So what I'm going to do I'm going to amend my sentence, I'm going to sentence you to 9 months at the reformatory for women. I'll give you credit for any time you served in this matter. And I'm going to tell you, you need to clean your act up because you're not doing it now. And this is — you need to think about what's going on, think about this letter I read to you, think about all the things — and how many opportunities have I given you?

{¶ 28} Based on the foregoing, there is nothing to suggest that the letter played a pivotal role in the trial court's decision to revoke the previously imposed community-control sanctions. As the above excerpt makes clear, Macura had been given many opportunities to abide by the terms and conditions, but failed to do so.

{¶ 29} Therefore, we find that the trial court did not commit plain error by conducting both the preliminary probable cause and the revocation hearings on the same day. Macura was not prejudiced and her due process rights were not violated.

{¶ 30} Accordingly, the first assignment of error is overruled.

Termination of Community-Control Sanctions

{¶ 31} In the second assignment of error, Macura argues the trial court abused its discretion in terminating her community-control sanctions.

{¶ 32} “A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” *State v. Miller*, 8th Dist. Cuyahoga No. 100461, 2014-Ohio-3907, ¶ 67, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 33} In the instant case, Macura argues that because Suboxone could result in a false positive for fentanyl heroin, the trial court should have inquired when the drug use occurred, which resulted in her testing positive for opiates.

{¶ 34} Macura is raising this issue for the first time on appeal. It is well-settled that a party cannot raise new arguments and legal issues for the first time on appeal, and that the failure to raise an issue before the trial court waives that issue for appellate purposes. *Cleveland v. Davis*, 8th Dist. Cuyahoga No. 106780, 2018-Ohio-4706, citing *Glendell-Grant v. Grant*, 8th Dist. Cuyahoga No. 105895, 2018-Ohio-1094, ¶ 11. Thus, Macura’s failure to raise this issue in the trial court has waived it for appeal.

{¶ 35} Even if we were to consider this issue, we found clear evidence in the first assignment of error that Macura violated the terms and conditions of the community-control sanctions. Macura was given many opportunities to abide by the terms and conditions but failed to do so. As a result, we would not find an abuse of discretion in the trial court’s decision to terminate the previously imposed community-control sanctions.

{¶ 36} Accordingly, the second assignment of error is overruled.

{¶ 37} Judgment is affirmed.

It is ordered that appellee recover from 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. Case remanded to the trial court for execution of sentence.

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

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

**EILEEN T. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR**