[Cite as *State v. Butler*, 2010-Ohio-3106.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-197
JEFFERY LYNN BUTLER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas Case No. 2009-CR-0259
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	June 28, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Stark County Prosecutor
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Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, Jeffery Butler, appeals the decision of the Stark County Court of Common Pleas to revoke his community control sanctions pursuant to a community control violation four days after his sentencing.

{¶2} In March, 2009, Appellant was indicted by the Stark County Grand Jury on one count of robbery, a felony of the third degree, in violation of R.C. 2911.02(A)(3). On May 4, 2009, Appellant pled guilty to this charge and was sentenced to a four-year period of community control sanctions. As part of his sentence, Appellant was informed that should he violate any provision of his community control, his probation would be revoked and he would be ordered to serve a three-year prison sentence.

{¶3} Appellant's probation officer, Rachel Carosello, went over Appellant's rules of probation with him on May 7, 2009. Appellant signed a copy of the rules, acknowledging that he understood those rules. Two of those rules included that Appellant was not to consume alcohol as part of his probation and also that he was to avoid any future contacts with law enforcement.

{¶4} On May 9, 2009, Appellant was involved in an altercation at the American Rescue Workers facility with another client of the facility. Appellant resided at the facility at that time. The Canton Police Department was called on a report that Appellant was drunk and was causing a disturbance at the facility. Officer Mark Diels responded to the scene. Upon arriving at the scene, Officer Diels observed that Appellant had a very strong odor of alcohol on him. Officer Diels also recalled that either Appellant or the other man with whom Appellant was arguing had a can of beer with them.

{¶5} While Officer Diels did not perform any field sobriety tests or breathalyzer testing on Appellant, Officer Diels stated that in his fifteen years of experience as a police officer, he comes into contact daily with people who are under the influence of alcohol. Officer Diels testified further that he is certified as an OVI trained officer and that in his opinion, Appellant was drunk. He stated that Appellant had a strong odor of alcohol about his person and "seemed to be very intoxicated."

{¶6} After hearing this testimony, the trial court found that Appellant had violated his terms of probation by consuming alcohol. Specifically, the court found:

{¶7} "* * * I do have the testimony of a Canton police officer who has received specialized training in being able to detect alcohol on the breath of people with whom he comes in contact, and he came in and testified that he detected alcohol on the breath of Mr. Butler.

{¶8} "The Court also has reviewed the rules in regard to Mr. Butler. The Court does find that Mr. Butler did consume alcohol and that that was a violation of his probation.

{¶9} "We then come to whether the three years that the Court, using the vernacular, has hanging over Mr. Butler is appropriate for a sentence because the Court does find that the State of Ohio has met its burden which is preponderance of the evidence that Mr. Butler did violate the terms and conditions of his probation by consuming alcohol.

{¶10} "It is the Court's position that when it makes a decision to place a person on probation that they are giving that person an opportunity to avail themselves of the

treatment and providers which are available to the Probation Department of the Stark County Court of Common Pleas.

{¶11} "There is no way, of course, that any judge can order the person to change their mental attitude and to avail themselves of that."

{¶12} The court went on to note that Appellant previously appeared before the court, having pled guilty to a misdemeanor charge of theft out of a felony theft indictment. The court placed him on 2 years of community control, having suspended 166 days on condition of his good behavior for a period of 2 years.

{¶13} Appellant then appeared before the trial court in February, 2009, on the robbery indictment in the present case. The court noted, "I took his plea and then I placed him on probation on the fourth of May, and again to use the vernacular, I hung three years over his head.

{¶14} "So I don't know what else I'm supposed to do in terms of giving this gentleman the chance to participate in the programs which the Court has available to him and for him and what society views as they need to do to give him the opportunity to beat whatever demons he is fighting. * * * I think I have done everything that I can do for him.

{¶15} "Mr. Butler has shown by his actions that he isn't going to participate and is not going to avail himself of those opportunities. * * * I am saying in my opinion the 3 years is appropriate because of the other opportunities which have been made available to him and he has chosen not to avail himself of."

{¶16} Appellant now contests this decision, and raises two Assignments of Error:

{¶17} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT VIOLATED THE TERMS OF HIS COMMUNITY CONTROL SANCTIONS WAS AGAINST THE SUBSTANTIAL WEIGHT OF THE EVIDENCE.

{¶18} "II. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO HEARSAY EVIDENCE THAT WAS THE SOLE BASIS OF THE PROBATION VIOLATION DETERMINATION."

I.

{¶19} In his first assignment of error, Appellant argues that the trial court erred in finding that Appellant had violated the terms of his community control sanctions.

{¶20} A community control revocation hearing is not a criminal trial; therefore, the State does not have to establish a violation with proof beyond a reasonable doubt. *State v. Henry*, 5th Dist. No. 2007-CA-0047, 2008-Ohio-2474, citing *State v. Payne*, 12th Dist. No. CA2001-09-081, 2002-Ohio-1916, citing *State v. Hylton* (1991), 75 Ohio App.3d 778, 782, 600 N.E.2d 821. Instead, the prosecution must present "substantial" proof that a defendant violated the terms of his community control sanctions. Id., citing *Hylton* at 782, 600 N.E.2d 821. Accordingly, we apply the "some competent, credible evidence" standard set forth in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, to determine whether a court's finding that a defendant violated the terms of his community control sanction is supported by the evidence. See *State v. Umphries* (July 9, 1998), 4th Dist. No. 97CA45; *State v. Puckett* (Nov. 12, 1996), 4th Dist. No. 96CA1712. This highly deferential standard is akin to a preponderance of the evidence burden of proof. See *State v. Kehoe* (May 18, 1994), 9th Dist. No. 2284-M.

{¶21} Once a court finds that a defendant violated the terms of his community control sanction, the court's decision to revoke community control may be reversed on appeal only if the court abused its discretion. *Columbus v. Bickel* (1991), 77 Ohio App.3d 26, 38, 601 N.E.2d 61. An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Maurer* (1984), 15 Ohio St.3d 239, 253, 473 N.E.2d 768.

{¶22} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881, 111 S.Ct. 228, 112 L.Ed.2d 183. Reviewing courts should accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections which cannot be conveyed to us through the written record. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 523 N.E.2d 846.

{¶23} Upon a review of the record, we find that the trial court was within its discretion to determine that Appellant violated the conditions of community control. Appellant was a resident at the American Rescue Workers facility when he was sentenced to four years of community control, having been convicted of robbery, a felony of the third degree. Appellant signed the rules and conditions of his community control, and was aware that he was prohibited from consuming alcohol during his probation. Not even four days after signing the rules of his probation, Appellant was drunk and was causing a disturbance at the facility. Officer Mark Diels responded to the scene and observed that Appellant had a very strong odor of alcohol on him. Officer Diels also recalled that either Appellant or the other man with whom Appellant was

arguing had a can of beer with them. Officer Diels, who has been a police officer for fifteen years, is certified as an OVI trained officer and testified that he comes into contact with inebriated individuals on a daily basis.

{¶24} Based upon the evidence presented at the revocation hearing, we find there was sufficient evidence that Appellant violated the terms of his community control, and that the trial court did not abuse its discretion in its decision to revoke Appellant's community control sanctions.

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

II.

{¶26} In Appellant's second assignment of error, he argues that he did not receive the effective assistance of counsel at his revocation hearing because his trial counsel failed to object to "inadmissible hearsay" that was the sole basis for finding that Appellant violated the conditions of his community control.

{¶27} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶28} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in

the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." Id. at 690.

{¶29} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶30} When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense "is meritorious," and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶31} We would note, initially, that evidentiary rules are inapplicable at probation revocation hearings. Evid. R. 101(C)(3). As such, if a statement made during the revocation were hearsay, it would not be inadmissible based solely on the grounds of hearsay.

{¶32} Additionally, the testimony of which Appellant complains is not hearsay. Officer Diels arrived at the American Rescue Workers facility and observed Appellant acting in a manner consistent with being inebriated. Officer Diels also testified that Appellant had a strong odor of alcohol about his person and that either Appellant or the

man with whom Appellant was fighting also had a can of beer. Given Officer Diels' personal observations, he determined that Appellant was drunk and causing a disturbance at the facility.

{¶33} The statement of Rachel Carosello that she spoke with Officer Diels, who "stated to her that the police department had been called to American Rescue Workers because Mr. Butler was drunk and causing a disturbance within the American Rescue Workers," is not hearsay. If the evidence rules did apply, such a statement would have been offered to show why the officer acted in the way that he did in responding to the scene. Evid. R. 803(3). Moreover, this statement was cumulative of Officer Diels' own observations of Appellant.

{¶34} Accordingly, Appellant has failed to demonstrate that counsel's conduct fell outside of the widely accepted range of professional, competent conduct as set forth in *Strickland*.

{¶35} Appellant's second assignment of error is overruled.

{¶36} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
JEFFERY LYNN BUTLER	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-197
	:	

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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HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. SHEILA G. FARMER