

[Cite as *State v. Thompson*, 2015-Ohio-2836.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-140746
		C-140747
Plaintiff-Appellee,	:	TRIAL NOS. B-1302053
		B-1302516-B
vs.	:	
		<i>OPINION.</i>
BRANDEN THOMPSON,	:	
Defendant-Appellant.	:	

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed

Date of Judgment Entry on Appeal: July 15, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

MOCK, Judge.

{¶1} Defendant-appellant Branden Thompson appeals from the judgments of the trial court revoking his community control and sentencing him to a total of 12 months' incarceration. We affirm.

{¶2} This case involves two trial numbers, B-132053 and B-132516-B. In the case numbered B-132053, Thompson was convicted of aggravated assault, a fourth-degree felony, in violation of R.C. 2903.12. In the case numbered B-1302516-B, Thompson was convicted of possession of drugs, also a fourth-degree felony, in violation of R.C. 2925.11(A). The trial court originally sentenced Thompson to community control in both cases. Thompson was later charged with violating the terms of his community control. At Thompson's community-control-revocation hearing, the trial court stated:

THE COURT: State of Ohio versus Branden Thompson. It's case B-132053, set for community control violation. And I know, Mr. Ellis, you represent Mr. Thompson here today. Do you waive probable cause, sir?

MR. ELLIS: We waive probable cause.

{¶3} A short time later, the court indicated that "there's another case number, case B-132053, and then case B-132516-B." The court did not ask Thompson if he waived probable cause in the case numbered B-132516-B. Thompson then pleaded no contest to both charges. The trial court accepted his pleas, found him guilty, and revoked Thompson's community control. Thompson was sentenced to one year of incarceration on each charge, to be served concurrently. This appeal followed.

{¶4} In his first assignment of error, Thompson alleges that the trial court erred when it did not determine if he waived probable cause in the case numbered B-132516-B. This argument has no merit.

{¶5} Because Thompson failed to object below, we review for plain error. Notice of plain error 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. Plain error does not exist unless it can be said that, but for the error, the outcome of the proceeding clearly would have been otherwise. *State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (1990).

{¶6} Certain minimum requirements of due process under the Fourteenth Amendment apply at community-control-revocation proceedings, including the requirement that a court conduct a preliminary hearing. *State v. Delaney*, 11 Ohio St.3d 231, 233, 465 N.E.2d 72 (1984), citing *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); see *State v. King*, 1st Dist. Hamilton No. C-010330, 2002-Ohio-373, ¶ 8 (recognizing that after probation was abolished for convicted felons in 1996, the due-process requirements that had been applied to probation-revocation hearings applied to community-control-violation hearings). The preliminary hearing, commonly referred to as a “probable-cause” hearing, serves two purposes. First, it prevents the incarceration of an alleged offender without probable cause pending the outcome of the case in instances where there is a time lag between arrest and the revocation hearing. *Delaney* at 233; *State v. Craig*, 130 Ohio App.3d 639, 643, 720 N.E.2d 966 (1st Dist.1998). Second, a preliminary hearing allows independent review of the charges while information is fresh and sources are

available. *Delaney* at 233. At the preliminary hearing, an individual is entitled to notice of the alleged violation, an opportunity to appear and to present evidence, a conditional right to confront adverse witnesses, an independent decision-maker, and a written report of the hearing officer's decision. *Gagnon* at 786.

{¶7} Here, the court did not conduct a preliminary “probable-cause” hearing, and Thompson did not waive his right to this hearing in the case numbered B-132516-B. But Thompson cannot demonstrate, nor has he even alleged, any prejudice. Thompson admitted to the facts underlying the alleged violation, and he was found to have violated the terms of community control during the same, initial hearing. Under these circumstances, the need for a preliminary hearing was obviated, and Thompson's right to due process of law was not violated. *See State v. Alexander*, 1st Dist. Hamilton No. C-070021, 2007-Ohio-5457, ¶ 3-4. We therefore find that any error was harmless error. *See* Crim.R. 52(A). Thompson's first assignment of error is overruled.

{¶8} In his second assignment of error, Thompson argues that the record does not clearly and convincingly support the trial court's sentencing findings. More specifically, he contends that the court failed to consider the overriding purposes and principles of sentencing set forth in R.C. 2929.11 and 2929.12 when it revoked Thompson's community control and sentenced him to prison.

{¶9} R.C. 2929.11 and 2929.12 do not require the trial court to make findings, but the court must consider the factors listed in those statutes before imposing sentence. *State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-110829, 2012 Ohio 3349, ¶ 24. Here, the trial court did not indicate whether it had done so. However, we can presume from a silent record that the trial court did consider R.C. 2929.11 and 2929.12, unless Thompson can affirmatively demonstrate

otherwise. *See id.* Thompson has not. We therefore overrule Thompson's second assignment of error. The judgments of the trial court are affirmed.

Judgments affirmed.

CUNNINGHAM, P.J., and **FISCHER, J.,** concur.

Please note:

The court has recorded its own entry this date.

