[Cite as *State v. Dye*, 2017-Ohio-9389.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	Case No. 16CA17
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
STEVEN T. DYE,	:	
	:	
Defendant-Appellant.	:	**Released: 12/22/17**

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for Appellant.

Michael DeWine, Ohio Attorney General, and Katherine J. Bockbrader, Assistant Ohio Attorney General and Special Prosecutor for Athens County, Columbus, Ohio, for Appellee.

McFarland, J.

{¶1} Steven T. Dye commenced an appeal of the July 13, 2016 judgment of the Athens County Court of Common Pleas which revoked his sentence of community control and ordered him to serve the remainder of his previously suspended ten-year prison sentence. On appeal, Appellant argues the trial court erred by accepting an unknowing, unintelligent, and involuntary admission to a violation of community control sanctions. However, upon review, we find Appellant was afforded the due process

protections required by Crim.R. 32.3. Accordingly, we overrule the sole assignment of error and affirm the judgment of the trial court.

FACTS

{¶2} Appellant was indicted on one count of Aggravated Burglary and five counts of Burglary in Athens County Common Pleas Court Case Number 08CR0056. Appellant was subsequently indicted on the same counts in Athens County Case No. 08CR186. The two cases were merged.

{¶3} On June 24, 2008, Appellant pleaded guilty to the six counts. He also admitted to being in violation of community control for prior criminal cases.[1] Appellant was sentenced to a total of ten years of imprisonment. The trial court also revoked Appellant's community control in the prior criminal cases and ordered him to serve remaining prison time on those cases concurrently with the ten-year sentence.[2] The judgment entry of sentence stated that Appellant would be eligible for judicial release in six years.

{¶4} Appellant applied for and was granted judicial release. By journal entry dated July 15, 2014, Appellant was placed on five years of community control. Subsequent to Appellant's judicial release, it was

[1] These were Athens County case numbers 06CR107, 05CR345, and 05CR310.
[2] This sentence was also ordered to be concurrent with prison time imposed by the Hocking County Court of Common Pleas.

alleged he violated the terms of community control. A notice of violation was filed in January 2015.

{¶5} In September 2015 at a First Stage Hearing, Appellant admitted to the violations. At the Second Stage Hearing in October 2015, the trial court ordered him to continue on community control, subject to additional terms and conditions. In December 2015, the State filed six allegations of violating the terms of his judicial release and community control sanctions.

{¶6} The trial court again held a First Stage Hearing on May 11, 2016 on the second set of alleged violations. At this hearing, Appellant again admitted the violations. The trial court found Appellant in violation of the terms of community control. The trial court further found Appellant's admissions were made knowingly, voluntarily, and intelligently.

{¶7} A Second Stage Hearing was held on June 21, 2016. This hearing was not recorded. As a result, Appellant has filed a statement with this Court pursuant to App.R. 9. According to the agreed statement, at the Second Stage Hearing, Appellant's counsel again argued for continuing community control, based on Appellant's substance abuse problem. Counsel requested Appellant receive drug treatment. The State argued that Appellant had previously had the opportunity for drug treatment options, which had

failed. The State requested Appellant's suspended prison sentence be re-imposed.

{¶8} The trial court ordered Appellant to serve the remainder of his previously suspended ten-year sentence. This timely appeal followed.

ASSIGNMENT OF ERROR

> "I. DEFENDANT-APPELLANT WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT ACCEPTED AN UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY ADMISSION TO A VIOLATION OF COMMUNITY CONTROL SANCTIONS."

A. STANDARD OF REVIEW

{¶9} In this case, Appellant contends his waiver of his due process rights was not knowingly, intelligently and voluntarily made at the preliminary hearing on his community control violations hearing as the trial court failed to strictly comply with the requirement of a valid waiver of those rights. Any constitutional right may be waived provided that the waiver is made knowingly, intelligently and voluntarily. *State v. Moschell*, 4th Dist. Athens No. 10CA5, 2010 WL 3743819; *State v. Rose* (Mar. 20, 1997), 8th Dist. Cuyahoga No. 70984; *State v. Simpson* (Jun. 20, 1981), 1st Dist. Hamilton No. C-800373; *State v. Pfeifer* (Jun. 14, 1978), 3rd Dist. Marion No. 9-77-17.

{¶10} However, the failure to object to a due process violation during a community control revocation hearing waives all but plain error. *State v. Klosterman,* 2nd Dist. Darke Nos. 2015-CA-9, 2015-CA-10, 2016-Ohio-232, at ¶ 15. Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Id. See State v. Jimenez,* 8th Dist. Cuyahoga No. 104735, 2017-Ohio-1553; *State v. Frazier,* 8th Dist. Cuyahoga No. 104596, 2017-Ohio-470, ¶ 8, citing *State v. Murphy,* 91 Ohio St.3d 516, 532, 2001-Ohio-112, 747 N.E.2d 765, quoting *State v. Childs,* 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968) ("[e]ven constitutional rights 'may be lost as finally as any others by a failure to assert them at the proper time.' ").

B. LEGAL ANALYSIS

{¶11} Appellant asserts that at the First Stage Hearing when the trial court accepted his admission, it failed to obtain a knowing, voluntary, and intelligent waiver when all it asked him was: (1) whether he was forced to make the admission; and (2) whether he was under the influence of drugs or alcohol. Appellant claims the record fails to show he was aware of his due process rights under the Fourteenth Amendment. Appellant requests this court to remand the matter for new community control revocation hearings. The State, however, argues that even if Appellant had properly preserved his

claims, they would still fail because the record supports a finding that his waiver was knowing, intelligent, and voluntary.

{¶12} "A community control revocation hearing is not a criminal trial[.]" *State v. Parsons,* 4th Dist. Athens No. 09CA4, 2009-Ohio-6098, at ¶ 11, quoting *State v. Belcher,* 4th Dist. Lawrence No. 06CA32, 2007-Ohio-4256, at ¶ 12. For that reason, a "defendant faced with revocation of probation or parole is not afforded the full panoply of rights given to a defendant in a criminal prosecution." *Parsons, supra. See also State v. Roberts,* - - N.E.3d - -, 2017-Ohio-481, at ¶ 18; *State v. Alexander,* 1st Dist. Hamilton No. C-070021, 2007-Ohio-5457, at ¶ 7; *State v. Orr,* 11th Dist. Geauga No. 2008-G-2861, 2009-Ohio-5515, at ¶ 21; *State v. Malone,* 6th Dist. Lucas No. L-03-1299, 2004-Ohio-5246, at ¶ 13-14. More specifically, "the requirements of Crim.R. 11(C)(2) do not apply to a community-control-violation hearing." *Parsons, supra,* quoting *Alexander* at ¶ 7, and *Orr* at ¶ 21.

{¶13} The Due Process Clause of the Fourteenth Amendment to the United States Constitution further requires that the offender be afforded a "probable cause" determination and an evidentiary hearing, along with (1) written notice of the claimed violation, (2) disclosure of the evidence against him, (3) an opportunity to be heard in person and to present evidence, (4) the

right to confront and cross-examine adverse witnesses, (5) a neutral and detached magistrate, and (6) a statement on the record by the court concerning the evidence relied on and the reasons for the court's action. *State v. Patton*, 8th Dist. Cuyahoga No. 103737, 2016-Ohio-4867. *State v. Miller*, 42 Ohio St.2d 102, 104, 326 N.E.2d 259 (1975), citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756 (1973), and *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593 (1972). In *State v. Orr, supra,* at 21, and *State v. Alexander, supra,* at ¶ 7-8, the appellate courts examined the question of what safeguards must a trial court comply with prior to accepting a defendant's admission to a community-control violation. The *Orr* court held at ¶ 21:

> "[T]he requirements of Crim.R. 11(C)(2) do not apply to a community-control-revocation hearing. * * * A defendant faced with revocation of probation or parole is not afforded the full panoply of rights given to a defendant in a criminal prosecution. * * * So a revocation hearing is an informal one, 'structured to assure that the finding of a * * * violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the (defendant's) behavior. * * *'"

{¶14} Crim.R. 32.3 provides the procedural framework that is to occur at a community-control-revocation hearing. *Orr, supra,* at 23. Crim.R. 32.3 is entitled "revocation of community release" and provides, in pertinent part:

> "(A) Hearing. The court shall not impose a prison term for violation of the conditions of a community control sanction or revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which action is proposed. The defendant may be admitted to bail pending hearing.
>
> (B) Counsel. 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."

{¶15} Accordingly, we have reviewed the record to determine whether the trial court complied with the requirements of Crim.R. 32.3. The record reflects at the First Stage Hearing held May 11, 2016, the trial court began by reading the 6 violations alleged as of the December 18, 2015 filing. This reading satisfied the requirements of Crim.R. 32.3(A). Appellant was present and represented by counsel. This appearance satisfied the requirement of Crim.R. 32.3(B).

{¶16} At the First Stage Hearing, defense counsel made a motion that the court order a different prosecutor due to an alleged conflict of interest. When the trial court overruled this motion, defense counsel proceeded as follows:

"Uh, with that decision your honor the defense is going to admit to the violation uh, filed December 18, 2015. That being he failed to report to his probation officer on October 8th. Was charged with a misdemeanor/possession of criminal tools, a misdemeanor of criminal trespass and a fictitious plates charge on November 9th in Fairfield County. We will admit that he was charged, he's not been convicted or even brought to court for that. Uh, admit that he failed to report to his probation officer on November 20th and admit that he did not enter SEPTA on December 2nd. Uh, with that I'll stipulate to competent and credible evidence to find those violations. With that the defense is going to ask that the Court set a second stage if the Court is willing to grant the defense counsel's request we have obtained a date that was set with the Court staff as well as the Prosecutor. Uh, and in the intermediate time the defense is going to get Mr. Dye re-evaluated for SEPTA. He was found acceptable last time so we are not expecting any problems with that. Uh, and also get him evaluated for the counseling center uh, both of which we are going to as the Court to order uh, when we get, when we come back for the Second Stage. Thank you your honor."

{¶17} The trial court then engaged Appellant as follows:

BY THE JUDGE: Very well. Mr. Dye you've heard what your attorney has said. Is this what you wish to do sir?

BY THE DEFENDANT: Yes sir.

BY THE JUDGE: And nobody has forced you, nobody has forced you to make your admissions to those violations have they?

BY THE DEFENDANT: No.

BY THE JUDGE: And you're not under the influence of any drugs or alcohol as you sit here today are you?

BY THE DEFENDANT: No.

> BY THE JUDGE: And you wish to admit to violations one, two, three, four, five and six as stated by your attorney?
>
> BY THE DEFENDANT: Yes sir.

{¶18} We find Appellant knowingly, intelligently, and voluntarily waived his right to a probable cause hearing and admitted to the community-control violations. We further find no plain error occurred. In *State v. Jimenez*, 8th Dist. Cuyahoga No. 104735, 2017-Ohio-1553, the appellate court held that oral notice coupled with the complete admission at the preliminary hearing on the violation of sanctions satisfied any due process concerns.[3] *See, e.g.*, *State v. Frazier*, 8th Dist. Cuyahoga No. 104596, 2017-Ohio-470, ¶ 8; *State v. Patton*, 2016-Ohio-4867, 68 N.E.3d 273, ¶ 9 (8th Dist.). As in *Jimenez,* Appellant had a hearing and was represented by counsel when he received oral notice. He also made a complete admission of the 6 violations. As in *Jimenez*, his admission satisfied any due process concerns.

{¶19} The record also reveals Appellant was familiar with the revocation process, having previously been through the community control revocation process in September 2015. Similarly, the appellate court in *Orr* made this observation at 43:

[3] The court included that ineffective assistance of counsel concerns were also satisfied.

> "[We] note that Orr was familiar with community-control-revocation hearings. The record demonstrates that in 2005, in this same case, Orr was before the trial court on another community-control violation. At that time, he also waived the probable cause hearing and admitted the violations as alleged. This suggests Orr was familiar with community-control-revocation hearings and fully understood the effects of waiving the hearing and admitting to the violations."

{¶20} Finally, Appellant has not shown any error which would have affected the outcome of the proceedings. He has not shown he would not have admitted to the violations even if all the constitutional rights had been explained again. And, he has not alleged his innocence as to the alleged violations, or that any exculpatory evidence exists.

{¶21} Based upon our review of the record, we find Appellant was afforded the due process protection required by Crim.R. 32.3. We find his admission to each violation was knowing, intelligent, and voluntary. For the foregoing reasons, we find no merit to Appellant's sole assignment of error. Accordingly, it is hereby overruled and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.