

[Cite as *State v. Hanacek*, 2009-Ohio-6944.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA0011-M

Appellee

v.

JILL K. HANACEK

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08-CR-0186

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Jill Hanacek, appeals from the judgment of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On March 26, 2009, the Medina County Grand Jury indicted Hanacek on one count of illegal assembly or possession of chemicals for the manufacture of drugs, in this instance, methamphetamine, in violation of R.C. 2925.041(A), a felony of the third degree. On March 26, 2009, the State amended the charge to attempted illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2923.02, a felony of the fourth degree. Hanacek pleaded guilty to the amended charge. The trial court sentenced Hanacek to 90 days in the county jail and a six month driver's license suspension. Additionally, the court placed Hanacek on community control for five years. As a condition of community control, the court ordered that Hanacek have no contact with Phillip Cubic, Dale Cubic, Jonathon Russ, Erick

Hash and Jason Cubic, her husband. As a result of his convictions related to the underlying events, Jason Cubic received a six-year prison sentence. Hanacek has appealed and has raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED, AS A CONDITION OF PROBATION OR COMMUNITY CONTROL SANCTION, AN ORDER REQUIRING THAT [HANACEK] HAVE NO CONTACT WITH HER HUSBAND, THE FATHER OF HER CHILDREN FOR THE DURATION OF HER PROBATION IN VIOLATION OF HER FUNDAMENTAL CONSTITUTIONAL RIGHTS.”

{¶3} In her single assignment of error, Hanacek contends that the trial court abused its discretion and violated her fundamental constitutional rights when it ordered that she have no contact with her husband as a condition of community control. We disagree.

{¶4} Initially, we note that Hanacek failed to raise the constitutional issue before the trial court at sentencing. In *State v. Messer* (1995), 107 Ohio App.3d 51, 58, we stated that:

“Failure to raise an apparent constitutional claim at trial operates as a waiver of that claim. *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Although appellate courts have the discretion to review claims when they are not raised below, that discretion ordinarily is not exercised where the right to be vindicated was in existence prior to or at the time of trial.” *Messer*, 107 Ohio App.3d at 58.

{¶5} Further, Hanacek failed to object to her sentence on the basis that the trial court abused its discretion. Therefore, she has forfeited this issue on appeal. Typically, if a party forfeits an objection in the trial court, reviewing courts may notice only “[p]lain errors or defects affecting substantial rights[.]” Crim.R. 52(B). Pursuant to Crim.R. 52(B), a plain error or defect that affects a substantial right may be noticed although it was not brought to the attention of the trial court. “A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection.” *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No.

01CA007808, at *2, citing *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the defendant has “established that the outcome of the trial clearly would have been different but for the alleged error.” *Kobelka*, supra, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, and *State v. Phillips* (1995), 74 Ohio St.3d 72, 83. Hanacek has not argued plain error on appeal. As such, we will not address her abuse of discretion argument regarding her sentence.

III.

{¶6} Hanacek’s single assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶7} I respectfully dissent. I would address the assignment of error on its merits. Marriage has long been considered to be a basic civil and fundamental right. See, e.g., *Skinner v. Oklahoma* (1942), 316 U.S. 535, 541; *Loving v. Virginia* (1967), 388 U.S. 1, 12. The trial court’s order infringes on that fundamental right and is, therefore, unconstitutional. Because I believe that the trial court’s community control condition prohibiting contact between Hanacek and her husband is unconstitutionally overbroad, I would vacate that portion of the trial court’s sentencing order. See *State v. Jones* (1990), 49 Ohio St.3d 51, 52 (holding that “[s]uch conditions cannot be overly broad so as to unnecessarily impinge upon the probationer’s liberty.”)

APPEARANCES:

DAVID V. GEDROCK, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.