

[Cite as *State v. Ricks*, 2010-Ohio-4659.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA0094-M

Appellee

v.

HARRY O. RICKS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08-CR-0555

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

MOORE, Judge.

{¶1} Appellant, Harry O. Ricks, appeals from the judgment of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On April 8, 2009, Ricks pled no-contest to one count of burglary, in violation of R.C. 2911.12(A)(1), a felony of the second degree, and one count of theft, in violation of R.C. 2913.02(A)(1), a felony of the fifth degree. The trial judge found him guilty and sentenced him to two years of community control. At the sentencing hearing, the trial judge warned that violation of the community-control terms would result in an eight-year prison sentence.

{¶3} On September 16, 2009, Ricks' probation officer filed a complaint alleging that on August 24, 2009, Ricks tested positive for cocaine in violation of his community-control terms. The trial court appointed counsel to defend Ricks. On September 21, 2009, the court held

a hearing at which Ricks admitted the violation. The court sentenced Ricks to 23 days in the Medina County Jail.

{¶4} On November 6, 2009, Ricks' probation officer filed a complaint alleging that on October 15, 2009, in the Cuyahoga County Court of Common Pleas, Ricks was charged with four counts of aggravated theft, two counts of misuse of credit cards and two counts of forgery and, further, that he had contact with Willie Richardson, his co-defendant in the underlying Medina County case. On November 19, 2009, after a full evidentiary hearing, the trial court found that he violated his community control terms and sentenced him to six years of incarceration on the underlying burglary conviction and one year of incarceration on the underlying theft conviction. The trial court ordered that the sentences were to run concurrently.

{¶5} Ricks timely filed a notice of appeal and has raised eight assignments of error for our review. To facilitate our discussion, we have rearranged some of Ricks' assignments of error.

II.

ASSIGNMENT OF ERROR I

“[RICKS] WAS DENIED DUE PROCESS OF LAW WHEN HE WAS FOUND TO BE A COMMUNITY CONTROL SANCTION VIOLATOR WHERE THE CLAIMED VIOLATION HAD VARIED FROM THE COURT’S JOURNAL ENTRY.”

ASSIGNMENT OF ERROR V

“[RICKS] WAS DENIED DUE PROCESS OF LAW WHEN [HE] WAS FOUND TO BE A COMMUNITY CONTROL SANCTION VIOLATOR ON A CONDITION THAT THE COURT DID NOT ORDER.”

ASSIGNMENT OF ERROR VI

“[RICKS] WAS DENIED DUE PROCESS OF LAW WHEN THE COURT FAILED TO STATE THE FINDINGS OF THE COMMUNITY CONTROL SANCTION VIOLATION.”

ASSIGNMENT OF ERROR VIII

“[RICKS] WAS DENIED DUE PROCESS OF LAW WHEN THE COURT FOUND [HIM] TO BE A COMMUNITY CONTROL SANCTION VIOLATOR FOR A CONDITION WHICH WAS NOT IMPOSED BY THE COURT.”

{¶6} In his first, fifth, sixth and eighth assignments of error, Ricks essentially contends that his due process rights were violated when the trial court found that he violated a term of community control that did not appear in the judgment entry of conviction. Specifically, Ricks contends that the trial court never ordered that he refrain from contact with his co-defendant in the underlying case, Willie Richardson. We do not agree.

{¶7} We, however, need not reach Ricks’ contention that he was not made aware that he was to have no contact with Richardson. Even assuming that the record does not contain sufficient evidence to demonstrate that contact with Richardson was forbidden as a condition of community control, we cannot say that the trial court erred in finding that Ricks violated a condition of community control.

{¶8} In the judgment entry of conviction, the trial court ordered that Ricks “shall abide by all laws[.]” The community control violation complaint in question, filed by Ricks’ probation officer on November 6, 2009, alleged not only that Ricks had contact with Richardson, but also that he was charged with four counts of aggravated theft, two counts of misuse of credit cards and two counts of forgery in the Cuyahoga County Court of Common Pleas.

{¶9} On November 19, 2009, the trial court held a full evidentiary hearing in order to determine whether Ricks violated a community control condition. At the hearing, Detective Dan Schemmel from the Case Western Reserve University Police Department testified regarding the charges pending against Ricks. The detective testified regarding his investigation of the theft of a credit card and played two surveillance camera videos for the court. One video showed Ricks

entering and leaving a building near the time at which a wallet was stolen from inside. The second video was taken at Advance Auto Parts and showed two males, including Ricks, using a credit card from the stolen wallet and carrying the merchandise out of the store. The detective also testified that he showed a photo array to the Advance Auto Parts store manager who sold the goods to the men. The store manager identified Ricks from the array. Although the array was not introduced into evidence and the store manager did not testify, Evid.R. 101(C)(3) provides that the rules of evidence do not apply to, and therefore do not bar, hearsay testimony from admission in “proceedings with respect to community control sanctions[.]” There are competing views as to whether the State’s burden of proof in instances of community-control violations is “substantial evidence” or “preponderance of the evidence”. *State v. Walton*, 9th Dist. No. 09CA009588, 2009-Ohio-6703, at ¶14-16. We need not decide the issue here, because under either standard, the State proved that Ricks violated the community-control term that required him to “abide by all laws,” without regard to whether he was properly notified that he was not to have contact with Willie Richardson. See *Id.* Ricks’ first, fifth, sixth and eighth assignments of error are overruled.

ASSIGNMENT OF ERROR III

“[RICKS] WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED BASED UPON HEARSAY TESTIMONY.”

{¶10} In his third assignment of error, Ricks contends that he was denied due process because he was convicted of the community-control violation based on hearsay testimony by Detective Schemmel. Ricks also contends that his right of confrontation under *Crawford v. Washington* (2004), 541 U.S. 36, was violated. We do not agree.

{¶11} As noted above, Evid.R. 101(C)(3) provides that the rules of evidence are not applicable to “proceedings with respect to community control sanctions[.]” Ricks does,

however, direct this Court to *State v. Ohly*, 166 Ohio App.3d 808, 2006-Ohio-2353. The *Ohly* court held that “[t]he introduction of hearsay evidence into a probation-revocation hearing is reversible error when that evidence is the only evidence presented and is crucial to a determination of a probation violation.” *Id.* at ¶21.

{¶12} The Detective did testify that he spoke with the store manager of Advance Auto Parts, the individual who sold the merchandise to Ricks. The Detective testified that the stolen credit card was used at Advance Auto Parts at the time Ricks made his purchases. The Detective further testified that he showed a photo array to the store manager, who identified Ricks. As noted above, the Detective also played two videos at the evidentiary hearing. One showed Ricks entering and leaving the building from which the credit card Ricks used at the auto parts store was stolen. The second video depicted Ricks and another man consummating a transaction and removing merchandise from Advance Auto Parts. Accordingly, the trial court had physical evidence before it, and its finding was not supported exclusively by hearsay testimony. That said, *Ohly* does not apply to this matter.

{¶13} With regard to Ricks’ *Crawford* argument, “[t]his Court need not consider a claimed error that an appellant failed to bring to the trial court’s attention at a time when that court could have avoided or corrected the supposed error.” (Citation omitted.) *State v. Goff*, 9th Dist. No. 23292, 2007-Ohio-2735, at ¶47. Ricks forfeited his confrontation argument by failing to object below. *State v. Hilton*, 9th Dist. No. 09CA0036, 2010-Ohio-1923, at ¶25. Forfeiture precludes the consideration of all but plain error under Crim.R. 52(B). *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23. Ricks, however, has not argued plain error on appeal so we do not address the issue. *State v. Hanacek*, 9th Dist. No. 09CA0011-M, 2009-Ohio-6944, at ¶5. Ricks’ third assignment of error is overruled.

ASSIGNMENT OF ERROR VII

“[RICKS] WAS DENIED DUE PROCESS OF LAW WHEN HE WAS FOUND GUILTY AND SENTENCED AS A COMMUNITY CONTROL SANCTION VIOLATOR.”

{¶14} Although not alluded to in Ricks’ statement of his assignment of error, he contends, again, that he was found guilty of violating community control sanctions that were not part of the trial court’s judgment entry of conviction, he did not receive a preliminary and final revocation hearing, he was convicted on hearsay testimony in violation of *Crawford*, 541 U.S. 36, and he was denied effective assistance of counsel at the final evidentiary hearing. We do not agree.

{¶15} We have previously disposed of Ricks’ contentions regarding notification of community control conditions and hearsay testimony.

{¶16} With regard to his contention that he did not receive a preliminary and final revocation hearing, Ricks makes only a bare allegation that “*Gagnon v. Scarpelli*, 411 U.S. 778 (1973), mandates that certain procedural matters be given and followed before there can be a probation violation hearing. This was not complied with in this case.” In its brief, the State contends that the preliminary hearing took place on November 9, 2009. According to a journal entry filed on November 19, 2009, Ricks was present at the November 9, 2009 hearing with counsel and he denied the violations. Although the court’s journal entry does not mention a preliminary hearing, Ricks did not file a reply brief to address the State’s contention. Further, Ricks did not provide a transcript of the November 9, 2009 proceedings or point to any other part of the record to support his assignment of error. “Because [Ricks] bears the burden of demonstrating error on appeal, it is his duty to provide this Court with the transcript of the proceedings necessary to support his contention. *State v. Skaggs* (1978), 53 Ohio St.2d 162, 163.

[Ricks] did not order the portion of the transcript that recorded [the November 9, 2009] proceedings[.] *** Therefore, we must presume regularity. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.” *State v. McIntyre*, 9th Dist. Nos. 24934 & 24945, 2010-Ohio-2569 at ¶10.

{¶17} Ricks next contends that he was denied effective assistance of counsel because his lawyer did not object to hearsay evidence, effectively denying Ricks’ right of confrontation and cross-examination under *Crawford*, supra. In order to show ineffective assistance of counsel, Ricks must satisfy a two prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, he must show that his trial counsel engaged in a “substantial violation of any *** essential duties to his client.” *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, he must show that his trial counsel’s ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. “Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel.” *State v. Velez*, 9th Dist. No. 06CA008997, 2007-Ohio-5122, at ¶37, citing *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. This Court need not address both *Strickland* prongs if Ricks fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶18} Ricks has failed to demonstrate that his counsel engaged in a substantial violation of any essential duties. Even assuming that hearsay was objectionable, courts have held that *Crawford* is inapplicable to community control proceedings. *State v. Crace*, 5th Dist. No. 05CA93, 2006-Ohio-3027, at ¶17-18, citing *State v. Abd-Rahmaan* (2005), 154 Wash.2d 280, 111 P.3d 1157; *Peters v. State* (Fla.App.2006), 919 So.2d 624, 626. Further, Ricks does not point this Court to any portion of the record to demonstrate that his counsel should have

objected. App.R. 16(A)(7). Therefore, we need not address the prejudice prong of *Strickland*. *Ray* at ¶10. Ricks' seventh assignment of error is overruled.

ASSIGNMENT OF ERROR IV

“[RICKS] WAS DENIED DUE PROCESS OF LAW WHEN THE COURT RULED [HIM] TO BE A COMMUNITY CONTROL SANCTION VIOLATOR BASED UPON AN ARREST AND NOT A CONVICTION.”

{¶19} In his fourth assignment of error, Ricks contends that the trial court found him to be in violation of community control merely because he was arrested and charged with several crimes. We do not agree.

{¶20} Ricks correctly states that “[m]ere arrest does not constitute a violation of probation,” citing this Court’s decision in *State v. Moine* (1991), 72 Ohio App.3d 584, 589. In making this argument, Ricks ignores all of the evidence the State introduced, which we set forth in our discussion of Ricks’ first, fifth, sixth and eighth assignments of error. Ricks’ fourth assignment of error is overruled.

ASSIGNMENT OF ERROR II

“[RICKS] WAS DENIED DUE PROCESS OF LAW WHEN ON THE DATE OF HIS NO-CONTEST PLEA TO A FELONY HE WAS SENTENCED TO A COMMUNITY CONTROL SANCTION WITHOUT A PRESENTENCE INVESTIGATION REPORT.”

{¶21} In his second assignment of error, Ricks contends that he was denied due process of law when the trial court, at the time of Ricks’ original plea and conviction, sentenced him to community control without the benefit of a presentence investigation report. We do not agree.

{¶22} Ricks’ second assignment of error addresses an issue from his original plea and sentence rather than an issue stemming from his community-control violation. Any issues from the original sentence should have been raised in a timely appeal from that judgment entry. The

time for such an appeal has passed. App.R. 4(A). Accordingly, Ricks' second assignment of error is overruled as untimely.

III.

{¶23} Ricks' assignments of error are 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

CARR, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

PAUL MANCINO, JR., Attorney at Law, for Appellant.

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