[Cite as *State v. Brandon*, 2010-Ohio-1902.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23336
v.	:	T.C. NOS. 2008 CR 815 2008 CR 1530
JOHN BRANDON	:	
Defendant-Appellant	:	(Criminal appeal from Common Pleas Court)
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O P I N I O N

Rendered on the 30th day of April, 2010.

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KIRSTEN A. BRANDT, Atty. Reg. No. 0070162, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

SHA HINDS-GLICK, Atty. Reg. No.0080822, 7501 Paragon Road, Dayton, Ohio 45459
Attorney for Defendant-Appellant

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FROELICH, J.

John Brandon appeals from two judgments of the Montgomery County Court of Common Pleas, which found that Brandon violated the conditions of his community control in two cases by committing breaking and entering and revoked his community control. The court sentenced him to serve three years in prison in Case No. 2008 CR 815 and

administratively terminated his community control in Case No. 2008 CR 1530. For the following reasons, the judgments will be affirmed.

I

In June 2008, Brandon pled guilty to one count of burglary, a third degree felony, in Case No. 2008 CR 815, and to one count of breaking and entering, a fifth degree felony, in Case No. 2008 CR 1530. In both cases, the court sentenced him to up to five years of community control. The community control was conditioned on Brandon's completion of several requirements, including that Brandon complete a term of intensive probation supervision. Brandon was informed that the violation of any condition of community control or of any law could result in, among other things, a prison term of three years for the burglary charge and nine months for the breaking and entering charge, to be served concurrently or consecutively.

On June 18, 2008, Brandon signed a form, for both cases, listing the general conditions of supervision. The first condition stated: "I shall refrain from violation of any law (Federal, State and City). I shall get in touch immediately with my probation officer if arrested or questioned by a law enforcement officer."

On November 26, 2008, Brandon's probation officer and the probation officer's supervisor filed an "Offender Arrest Notice," informing the court that Brandon had been arrested on November 22, 2008, for breaking and entering and possession of criminal tools. A week later, Brandon was sent a "Notice of Community Control Violation Hearing and Order." Through that notice, Brandon was ordered to appear on December 9, 2008, at which time he would be called upon to admit or deny that he had violated the terms of his

community control by failing to "refrain from violation of any law (Federal, State, and City)" when he was arrested on November 22, 2008, for breaking and entering and possession of criminal tools. The revocation hearing was continued several times.

On January 22, 2009, the trial court held a hearing on Brandon's motion to suppress in Case No. 2008 CR 4543, which concerned the November 2008, charges of breaking and entering and possession of criminal tools. At the beginning of the suppression hearing, the court indicated that counsel should "cover any issues that might be raised for purposes of probation violation," in case there was a request for the court to take judicial notice of that testimony during the revocation hearing.

In February 2009, Brandon was sent an amended notice of community control violation. The amended notice indicated that Brandon was arrested on November 22, 2008, and had been indicted for breaking and entering, a fifth degree, in Case No. 2008 CR 4543. Shortly thereafter, Brandon's counsel became unavailable due to health reasons, and Brandon was appointed new counsel.

A revocation hearing was held on March 13, 2009. At the State's request and over Brandon's objection, the court took judicial notice of the evidence presented at the suppression hearing.[1] The State also presented three witnesses: (1) Serita Lowery, Brandon's probation officer; (2) Dayton Police Officer Joshua Frisby, who investigated the November 22, 2008, burglary; and (2) Sandra Beard, the Operations Manager of the Miami Valley Child Development Center.

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[1]Brandon's second appointed counsel stated at the revocation hearing that he had received a DVD of the suppression hearing and "it was thoroughly reviewed." The DVD is not included in the appellate record.

According to the testimony presented at the revocation hearing, between 9:00 p.m. and 9:30 p.m. on Saturday, November 22, 2008, Officer Frisby responded to a silent burglar alarm at the Miami Valley Child Development Center, located at 3805 King's Highway in Dayton, Ohio. Frisby parked his cruiser on King's Highway and was standing behind a bush on MVCDC property, when he observed Brandon walking toward him from a school building, carrying a duffle bag. When Brandon approached, Frisby handcuffed Brandon and read him his *Miranda* rights. Frisby asked if he could look in Brandon's bag. Brandon consented.

Upon opening the duffle, Frisby observed a plastic Kroger bag with five frozen Banquet meals and a white plastic bag with cans of Diet Pepsi. The duffle also contained a flashlight, a screwdriver, snip scissors, and other tools. Brandon told the officer that he had been working with the tools on apartments that afternoon. Brandon also said that he had just purchased the Banquet meals from Nabali's on Gettysburg Avenue; he stated that the bag had ripped and he put the items in a Kroger bag that he already had. Brandon did not have a receipt for the food or any other Kroger bags.

Upon investigating the scene, Frisby observed that a window in the teacher's lounge was open and the screen for the window had been cut. The teacher's lounge contained two refrigerators. Frisby returned the Banquet meals to the freezer section and the Diet Pepsi cans to the refrigerator section of the refrigerator next to the window.

Beard testified that she routinely purchased five or six of Banquet meals on Thursday from Kroger and brought them to work in a plastic Kroger bag on Friday. She left the meals in the refrigerator over the weekend. Her supervisor kept cans of soda in the refrigerator.

When Beard returned to work on Monday, November 24, 2008, she learned that the school had been broken into and she saw that the screen to the teacher's lounge window had been cut. Beard further found that her Banquet meals were in the freezer by the window, not in the refrigerator where she had left them. Her supervisor's Diet Pepsi cans were also in a different refrigerator than where she had placed them. Beard stated that no one would have permission to be in the school on Saturday evening or to take any items from the teacher's lounge.

Brandon's counsel requested a continuance to obtain a witness who would testify that the tools that Brandon had were tools of his trade. Counsel further sought to obtain the duffle bag and the tools found inside it. The court took the matter under advisement.

Upon resumption of proceedings on March 17, 2009, the court denied Brandon's counsel's requests, because "neither of those things affect the issue of whether or not, more likely than not, the Defendant committed a breaking and entering at the school that he was at, at the time of this event." The court stated that it would disregard the possession of criminal tools charge and assume that there was no evidence of that offense. The court asked if Brandon had any further evidence to present on the breaking and entering charge. Counsel replied that he did not. The court found that Brandon violated the conditions of his community control and sentenced him to three years in Case No. 2008 CR 815. The court administratively terminated his community control in Case No. 2008 CR 1530.

II

Brandon appeals from the revocation of his community control. His sole assignment of error states:

"THE TRIAL COURT ERRED IN REVOKING DEFENDANT'S PROBATION WITHOUT SUBSTANTIAL EVIDENCE THAT HE HAD VIOLATED A CRIMINAL LAW AND THUS THE TERMS OF HIS PROBATION."

"The right to continue on community control depends on compliance with community control conditions and is a matter resting within the sound discretion of the court." *State v. Schlecht*, Champaign App. No.2003-CA-3, 2003-Ohio-5336, ¶7. Accordingly, we review the trial court's decision to revoke a defendant's community control for an abuse of discretion. *State v. Brown*, Montgomery App. No. 22467, 2008-Ohio-4920, ¶9. Such decision is an abuse of discretion if no sound reasoning process supports the decision. Id.; *State v. Picklesimer*, Greene App. No. 06-CA-118, 2007-Ohio-5758, ¶28.

Because a community control violation hearing is not a criminal trial, the State need not prove a violation beyond a reasonable doubt. *State v. Cofer*, Montgomery App. No. 22798, 2009-Ohio-890, ¶12. "The State need only present substantial evidence of a violation of the terms of a defendant's community control." Id.

As an initial matter, Brandon asserts that the trial court erred in allowing the State to present hearsay evidence. Specifically, Brandon objected during the revocation hearing to Officer's Frisby's testimony that the police "were able to contact the owner of that property [the food] that night via the cell phone, and they acknowledged that that was their property prior to me telling them." The trial court overruled the objection, stating that hearsay evidence was admissible at revocation hearings.

The rules of evidence do not apply to community control revocation hearings and, therefore, hearsay is admissible at such hearings. *State v. Dunning*, Greene App. No. 08 CA

07, 2009-Ohio-691, ¶10. Nevertheless, in some circumstances, the admission of hearsay evidence at a revocation hearing can deny the defendant his due process right to confront and cross-examine adverse witnesses. Id.

In this case, there was no denial of Brandon's due process rights. Although Frisby was permitted to testify that he had spoken with the property's owner and the food was returned to where it was to have been, the owner of the property, i.e., Beard, testified at the hearing about the food that she kept at the school, and she was subject to cross-examination by Brandon.

Even absent any hearsay testimony, there was substantial evidence that Brandon committed breaking and entering at the Miami Valley Child Development Center, located at 3805 King's Highway, on Saturday, November 22, 2008. As detailed above, the evidence established that Brandon was detained by a Dayton police officer on the premises of the school while the officer was responded to a silent burglar alarm at the building. The window screen to the teacher's lounge had been cut and the window was open. When Brandon was detained, he was carrying a duffle bag, which contained five frozen Banquet dinners in a plastic Kroger bag and Diet Pepsi cans in another plastic bag; Beard testified that she had kept five or six Banquet dinners in a refrigerator in the teacher's lounge, and her supervisor kept cans of soda there. Brandon did not have a receipt for the items, and he did not have any other empty Kroger shopping bags, which might have supported his claim that he was carrying spare bags. Frisby put the food and drink from Brandon's duffle bag in the refrigerator by the window in the teacher's lounge. When Beard came to work on Monday, she found that her Banquet meals and her supervisor's soda cans had been moved to another

refrigerator in the teacher's lounge over the weekend. No one had permission to be in the school during the weekend or to take items from the teacher's lounge.

Frisby's and Beard's testimony at the March 13, 2009, hearing provided substantial evidence from which the trial court could reasonably find that Brandon had committed breaking and entering at the Miami Valley Child Development Center and that he had stolen the food located in a refrigerator in the teacher's lounge. The trial court did not abuse its discretion in revoking Brandon's community control for failing to "refrain from violation of any law (Federal, State, and City)," as required by the terms of his community control.

The assignment of error is overruled.

III

The judgments of the trial court will be affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Kirsten A. Brandt
Sha Hinds-Glick
Hon. Michael T. Hall