[Cite as *State v. Jackson*, 2010-Ohio-2836.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23457, 23458
v.	:	T.C. NO. 06CR967, 06CR1466
ANTHONY B. JACKSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 18th day of June, 2010.

. . . . . .

EMILY E. SLUK, Atty. Reg. No. 0082621, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

KRISTINE E. COMUNALE, Atty. Reg. No. 0062037, Law Office of the Public Defender, 117 S. Main Street, Suite 400, Dayton, Ohio 45422
Attorney for Defendant-Appellant

. . . . . .

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the consolidated Notices of Appeal of Anthony B. Jackson, filed June 5, 2009, from case numbers 2006 CR 967 and 2006 CR 1466. Jackson appeals from the trial court's decision, following a hearing, that revoked his community control in the above matters for violating the conditions of his supervision.

Jackson was sentenced to community control on June 16, 2006, in case number 2006 CR 967, having been convicted of possession of cocaine, and he was again sentenced to community control on September 6, 2006, in case number 2006 CR 1466, having been convicted of attempt to commit escape. The court sentenced Jackson to three years in case number 2006 CR 1466, to be served concurrently with an 18 month sentence in case number 2006 CR 967. These sentences were initially suspended and Jackson was placed on community control for five years.

{¶ 2} The August 5, 2008 Notice of Community Control Violation Hearing and Order cites the following violations of community control:

{¶ 3} "You violated Rule # 1, 'I shall refrain from violation of any law (Federal, State, County and City). I shall get in touch immediately with my probation officer if arrested or questioned by a law enforcement officer.' When you were charged with the offense of Felonious Assault (2 Counts).

{¶ 4} "You failed to comply with the sanctions of your community control as you failed to pay your financial obligations as owed to the Court in full."

{¶ 5} Jackson pled not guilty to the new felonious assault charges and, following a jury trial, he was found not guilty. He filed a Motion to Vacate Revocation, arguing that a revocation based upon the felonious assault charges would violate the Double Jeopardy Clause. The State opposed the Motion to Vacate Revocation.

{¶ 6} A hearing was held on May 8, 2009. The trial judge that presided over Jackson's felonious assault trial presided over the May 8th hearing. The trial court stated as follows:

{¶ 7} "I advised counsel in chambers that, obviously, I will listen to the evidence; but, based upon the evidence that I heard at trial, I felt that there was a basis for revocation. I also indicated that it was my intention to set an appeal bond because I think that the Court of Appeals needs to decide this legal issue." The State then moved the court for a continuance to amend the notice of revocation to add violations, namely that Jackson was in possession of a deadly weapon (a knife), and that he was convicted of two traffic offenses in May, 2008, in the Springboro Mayor's Court. According to the State, Jackson failed to inform his probation officer of the traffic offenses, which is also a violation. The trial court granted a continuance of the revocation hearing over Jackson's objection.

{¶ 8} On May 8, 2009, an Amended Notice of Community Control Violation Hearing and Order was filed, citing the following violations of community control:

{¶ 9} "You violated Rule #1, 'I shall refrain from violation of any law (Federal, State, County and City). I shall get in touch immediately with my probation officer if arrested or questioned by a law enforcement officer.' When you were charged with the offense of Felonious assault (2 Counts). You were convicted of Display of License on Demand and Traffic Control Lights (C# 2007-TRD-01551) on May 21, 2008.

{¶ 10} "You violated Rule #2, 'I shall not purchase, own, possess, use or have under my control, a deadly weapon (e.g.: switch blades or ballistic knives, bow and arrows, brass knuckles, swords, straight razors, martial arts style weapons) or firearm. * * *' You were allegedly in possession of a knife on July 12, [2]008.

{¶ 11} "You failed to comply with the sanctions of your community control as you failed to pay your financial obligations as owed to the Court in full."

{¶ 12} A second hearing was held on June 1, 2009, on the amended notice of community control violation. The State called Terra Bechtol of the Montgomery County Adult Probation Department, Jackson's Intensive Supervision Probation Officer. Bechtol testified that Jackson had been charged with felonious assault and convicted of failure to display license on demand and a traffic lights violation. Bechtol stated that Jackson did not initially inform her of the traffic offenses, and that his failure to do so is another violation. Bechtol further testified that Jackson allegedly possessed a knife during the altercation that led to charges of felonious assault. Finally, Bechtol stated that Jackson failed to pay his court costs.

{¶ 13} On cross-examination, Bechtol stated that she learned of Jackson's arrest for felonious assault while he was incarcerated for the offenses. Bechtol indicated that the initial revocation was filed in August of 2008 due to the arrest for felonious assault. She stated that Jackson told her of the traffic offenses in 2007, "about a month after he received the ticket," and that she did not file a notice of revocation at that time. Bechtol stated that Jackson successfully completed a drug treatment program as a condition of community control, and that he obtained and maintained verifiable employment. Regarding his failure to pay his court costs, Bechtol indicated that Jackson had inquired about performing community service in lieu of payment, and that he had been instructed to bring his bills to his next appointment for a determination of his indigency. Bechtol clarified that she was aware of Jackson's traffic tickets and failure to pay court costs prior to his arrest for felonious assault and that she did not intend to file a notice of revocation for those violations at that time.

{¶ 14} The following exchange occurred on cross-examination:

{¶ 15} "Q. * * * to put it brief[ly], possession of a deadly weapon, that was based on the allegation of the felonious assault, correct?

{¶ 16} "A. Yes.

{¶ 17} "Q. You had no independent * * * knowledge or other evidence other than what would've been presented at that trial to believe that Mr. Jackson was in possession of a weapon, correct?

{¶ 18} "A. Correct."

{¶ 19} In response to questioning by the court, Bechtol indicated that Jackson was originally arrested on a warrant for the unpaid fines. According to Bechtol, Jackson owed $249.50 in court costs, a $50 probation fee and a $130 attorney fee in case number 2006-CR-0967, and he owed $287.00 in court costs, a $50.00 probation fee and a $130.00 attorney fee in case number 2006-CR-1466. Bechtol stated that Jackson never made any payments in either case, having been placed on supervision in both cases in 2006. She indicated that his pay stubs showed that money was being withheld from the Child Support Enforcement Agency.

{¶ 20} When the State moved to admit three CDs from Jackson's trial on the felonious assault charges, the following exchange occurred:

{¶ 21} "MS. COMUNALE: * * * we would stand by our proposition that to have him retried at this juncture in a revocation based on that trial would be a violation of the double jeopardy clause.

{¶ 22} "And I would also like the record to reflect that, while the State is moving to

admit those, that there were certain motions in limine in that trial that were granted on both sides. The Court was privy to Mr. Jackson's prior criminal convictions, which were cut from the jury - -

{¶ 23} "* * *

{¶ 24} "MS. COMUNALE: * * * Mr. Jackson didn't take the stand. Also, the State moved in a motion in limine to prevent the defense from asserting certain facts or presenting evidence of certain facts of the character of the victim, specifically that he was a drug dealer and that other specific individuals had motive and opportunity to have committed this offense.

{¶ 25} " * * * if you're going to admit that trial, I want the record to be clear that that trial was not complete in that those things were not brought forward to the Court or the jury, pursuant to the Rules of Evidence * * *

{¶ 26} "THE COURT: But you can elicit that testimony in these proceedings if you choose to, but I can't ignore what I heard in that trial. And certainly, depending on my decision, that's something that the Court of Appeals, * * * would have an opportunity to consider, what goes into my decision, because since obviously that acquittal is not going to be appealed by anybody, there wouldn't be any transcript or record for the Court of Appeals to consider in that respect. So I can't ignore what I heard.

{¶ 27} "So I'm going to admit solely for the purpose of this hearing * * * as a portion of the factual basis for the allegations * * *."

{¶ 28} The court then instructed the judicial assistant to add the recording of the final pretrial conference to the record in CD format. The State then rested.

{¶ 29} Jackson called no witnesses. He argued that his acquittal on the felonious assault charges removed all factual basis for the revocation. Defense counsel continued, "The other grounds that are alleged by the notice of revocation, * * * the traffic ticket, it was a failure to display upon demand a driver's license to law enforcement, for which Mr. Jackson made Miss Bechtol aware. He may not have done so contemporaneous with his traffic ticket but he did so the very next month, according to her testimony, and followed all the other conditions of his community control sanctions, save the financial obligation that he owed; and the record is clear today that Mr. Jackson expressed some concern about his ability to pay that, and he therefore had requested at his last office visit with the probation department that his court costs and supervision fees and attorney fees be converted to community service.

{¶ 30} "* * *

{¶ 31} "We would ask the Court to dismiss the revocation against Mr. Jackson based on his acquittal for the underlying violation alleged.

{¶ 32} "And, alternatively, Judge, since the Court has made its intention clear to counsel that the Court believes that, regardless of the jury's verdict, that Mr. Jackson was guilty of this felonious assault, we would ask the court to not sentence him for a crime that he was acquitted of.

{¶ 33} "And if it feels that it has a lawful basis to revoke him based on these other very minor violations that would not have been alleged but for the charge that he was acquitted of, that it review the original pre-sentence investigation and look at the charges for which he was convicted, that being an attempted escape for not reporting to a parole officer.

He has long since been off that parole. And a possession of cocaine, for which he has completed treatment, has submitted negative urinalysis. He's obtained and maintained verifiable employment. He has substantially complied with all the terms of his community control sanctions."

{¶ 34} The court then indicated that it reviewed the case law cited by both parties regarding whether a revocation based upon a charge for which the defendant has been acquitted violates double jeopardy. According to the court, "there isn't a lot of guidance in terms of what the Supreme Court meant in a couple of its decisions in stating * * *

{¶ 35} " * * * that parole and probation may be revoked, even though criminal charges based upon the same charges are dismissed, the defendant is acquitted or the conviction is overturned 'unless all factual support for the revocation is removed.'

{¶ 36} "Unfortunately, there's really no definition of, quote 'unless all factual support for the revocation is removed.'

{¶ 37} "* * *

{¶ 38} "And, as I have indicated to counsel in chambers, I heard the testimony at trial. There were some indisputable facts, and that was that Mr. Boyce was stabbed. There was no doubt about that as a result of not only his testimony, the testimony of the doctor and the very serious nature of his injury.

{¶ 39} "There was also no doubt about the testimony from the defendant's girlfriend, that one of her knives [was] missing. * * *

{¶ 40} "There was also testimony from one of the officers who interviewed the defendant that night * * * but that the defendant admitted being with Mr. Boyce that evening

and, in fact, being in the hallway and in the stairway with Mr. Boyce.

{¶ 41} " * * *the burden with the jury was beyond a reasonable doubt. * * * And I've told counsel this and this * * * will not be a shock to anyone that I don't believe all fact[ual] basis for this allegation has been removed. And in discussing it with some of my colleagues, one of my colleagues suggested that removing all factual basis for an offense might be, for instance, a rape case where the DNA evidence reveals that the perpetrator was clearly another individual. * * *

{¶ 42} "* * * I'm hoping that the Court of Appeals will certainly give us a more definite indication of what that phrase means.

{¶ 43} " * * *

{¶ 44} "But it's undisputed that he was advised that he was not to be in possession of any deadly weapons including knives. Any knife is, under the terms of the law, a deadly weapon.

{¶ 45} "And I am going to find, based upon the evidence adduced at trial, that the defendant was in possession of a weapon in violation of his supervision * * * on July12th, 2008, and that that is a violation of his supervision.

{¶ 46} "I am also going to find that the defendant violated the law because, based upon the evidence, I would find that there is a preponderance of the evidence that the defendant committed a criminal offense relating to Mr. Boyce on July 12th, 2008, specifically an assaultive-type behavior, whether it was felonious assault or otherwise, with a knife.

{¶ 47} "With regard to the defendant's failure to pay his court costs, I understand that the defendant made some inquiry with his probation officer about the payment of his

costs and some request * * * to do some community service in lieu of those costs. He was not found to be indigent at that time, and no waiver of his costs had been made. * * *

{¶ 48} "It is clear that the defendant was employed, and Miss Bechtol indicated for at least 18 months, prior to the time of the defendant's arrest. * * * I wouldn't expect that he would make any payments after his arrest, but he was placed on supervision in June of '06 and then September of '06, yet made absolutely no payments whatsoever on any of those costs during that time, nothing whatsoever. And I'm going to find that he had the ability to pay those costs, and his lack of any payment is a violation of his supervision.

{¶ 49} "With regard to the defendant's conviction of a traffic offense, that is a violation of his supervision, which alone should not result in a revocation of his supervision; but, cumulatively, all of these issues, the fact that defendant was released from prison in April of 2004 and then has been convicted of three felonies since then and the fourth allegation of felonious assault, I'm only considering those issues as relates to whether the defendant continues to be amenable to supervision.

{¶ 50} "Based upon all of those factors, I am going to find that the defendant, as I said, violated the terms and conditions of community control sanctions. Given all of the facts that I've indicated, I'm going to find the defendant is no longer amenable to community control, and I'm going to revoke community control."

{¶ 51} Jackson asserts one assignment of error as follows:

{¶ 52} "THE TRIAL COURT ERRED IN REVOKING JACKSON'S COMMUNITY CONTROL."

{¶ 53} According to Jackson, revocation of his community control "violates the

Double Jeopardy Clause of the United States Constitution."

{¶ 54} "The Federal prohibition against double jeopardy is binding on the states. (Citation omitted). The prohibition has three distinct aspects. 'It protects against a second prosecution for the same offense after acquittal. It protects against the same prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2089, 23 L.Ed.2d 656." *State v. Ocasio*, Montgomery App. No. 19859, 2003-Ohio-6240, ¶ 8.

{¶ 55} "[A] finding that a defendant violated the terms and conditions of community control is not the equivalent of a criminal prosecution in that it does not result in a conviction, nor does it constitute punishment. *United States v. Miller* (C.A.6, 1986), 797 F.2d 336, 340." *State v. Peters*, Cuyahoga App. No. 92791, 2009-Ohio-5836, ¶ 14. "Because a community control violation hearing is not a criminal trial, the State need not prove a violation beyond a reasonable doubt. (Citation omitted). 'The state need only present substantial evidence of a violation of the terms of a defendant's community control.' (Citation omitted.)

{¶ 56} "'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.' (Citation omitted). Accordingly, we review the trial court's decision to revoke a defendant's community control for an abuse of discretion." (Citation omitted). *State v. Eversole*, Montgomery App. No. 23444, 2010-Ohio-1614, ¶ 33-34. "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. (Internal citation omitted). It is to be expected that most instances of abuse of discretion will result

in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 57} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 58} The Ohio Supreme Court has determined, "Parole and probation may be revoked even though criminal charges based on the same facts are dismissed, the defendant is acquitted, or the conviction is overturned, unless all factual support for the revocation is removed. *Zanders v. Anderson* (1996), 74 Ohio St.3d 269, 272 * * *; *Flenoy* v. *Ohio Adult Parole Auth.* (1990), 56 Ohio St.3d 1131, 132 * * *." *Barnett v. Ohio Adult Parole Authority* (1998), 81 Ohio St.3d 385, 387, 1998-Ohio-434.

{¶ 59} Jackson relies primarily upon *State v. Sutherlin* (Oct. 3, 2003), 154 Ohio App.3d 765, 2003-Ohio-5265, and he asserts that it "is abundantly clear from the record that the revocation of [his] Community Control was based solely on the felonious assault allegations for which Jackson was ultimately found not guilty." The defendant in *Sutherlin* pled guilty and was convicted of one count of robbery and three counts of kidnaping, felonies of the second degree, as well as related firearm specifications. He was sentenced to one year in prison on the firearm specifications and four subsequent years of community control. While serving community control, Sutherlin was indicted on two counts of aggravated robbery and two counts of robbery. Two victims were involved. After a trial

by jury, Sutherlin was acquitted of the new charges.

{¶ 60} The trial court ordered a revocation hearing, "explaining that the jury verdict had been rendered on the reasonable doubt standard and that the court wanted a full hearing on the matter * * *. The court also stated that it 'would go along with the jury verdict' as to one victim because that victim had very little opportunity to identify the perpetrator. But the court felt that the evidence as to the second victim was stronger and ordered the revocation hearing to go forward relating to the robbery of that victim." Id., at ¶ 4.

{¶ 61} At the hearing, a transcript of the jury trial was admitted into evidence, and the second victim testified about the robbery and identified Sutherlin. Sutherlin's probation officer testified regarding his failure to perform community service. The trial court found that Sutherlin had committed the robbery of the second victim by a preponderance of the evidence and revoked his community control solely based upon the robbery of that victim. Id., at ¶ 5-6. On appeal, the First District determined, "Sutherlin was acquitted of criminal charges related to that robbery, thus removing factual support for revocation on that basis. Sutherlin was forced to 'run the gauntlet twice' on that charge, notwithstanding the different burdens of proof. Consequently, revocation of his community control based on the robbery violated the Double Jeopardy Clause." Id., at ¶ 8.

{¶ 62} According to Jackson, "[l]ike in *Sutherlin*, all factual support for the revocation of Jackson's community control was removed when he was acquitted on the two counts of felonious assault." We disagree. The fact that Jackson was acquitted of the felonious assault offenses does not necessarily remove all factual support for his revocation. The court made findings that Jackson possessed a knife and injured Boyce based specifically

upon the "indisputable facts" adduced at Jackson's trial, and this matter is accordingly distinguishable from *Sutherlin*. The trial court admitted the evidence contained in the CDs of Jackson's trial as the "factual basis for the allegations" of felonious assault with a knife, and Jackson's revocation hearing was not a criminal trial implicating double jeopardy. In the absence of a written transcript of Jackson's trial, we presume the regularity of the trial court's determinations for purposes of the revocation. *Shirley v. Kruse*, Green App. No. 2006-CA-12, 2007-Ohio-193. Finally, contrary to Jackson's assertions, the record makes clear that the revocation of community control was not based solely on the felonious assault allegations but on the cumulative violations Jackson committed as enumerated by the trial court. There being no abuse of discretion, the judgment of the trial court is affirmed.

. . . . . .

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

Copies mailed to:

Emily E. Sluk
Kristine E. Comunale
Hon. Mary Katherine Huffman