

[Cite as *State v. Delaine*, 2010-Ohio-609.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 08 MA 257
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
D'LASHUN DELAINE)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Youngstown Municipal Court of Mahoning County, Ohio
Case No. 08 TRD 01

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Joseph Macejko
Youngstown City Prosecutor
Atty. John Marsh
Assistant Prosecuting Attorney
26 S. Phelps Street
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. John A. Ams
134 Westchester Drive
Youngstown, Ohio 44515

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: February 18, 2010

WAITE, J.

{¶1} Appellant D'Lashun Delaine appeals the decision of the Youngstown Municipal Court in sentencing her to a one hundred and fifty day term of imprisonment for violating the terms of her electronically monitored house arrest ("EMHA"). Because the decision of the trial court is supported by substantial evidence and Appellant's right to due process of law was not violated, the judgment of the trial court is affirmed.

{¶2} On March 11, 2008, Appellant entered a guilty plea to one count of driving under suspension, a violation of R.C. 4510.16, a misdemeanor of the first degree. At the sentencing hearing, Appellant was given the option of ninety days in jail or six months of EMHA. The trial court informed Appellant that any violation of her house arrest would result in a six-month prison term.

{¶3} Appellant's house arrest began on April 4, 2008. On April 30, 2008, Mid-American Services, the company contracted to oversee Appellant's electronic monitoring, forwarded a letter to the Youngstown City Probation Department alleging that Appellant tampered with her monitoring device. On May 1, 2008, a notice of probation violation was filed, however, there is no indication that Appellant was served with the notice until the final hearing on the probation violation.

{¶4} Appellant stipulated to probable cause for the probation violation on September 23, 2008. The final hearing was held on December 1, 2008. The state did not offer any witnesses or cross-examine any of Appellant's witnesses.

{¶5} Appellant offered the testimony of three witnesses. Karen Thigpen, Appellant's probation officer, conceded that she did not provide a copy of the notice

of probation violation to Appellant when it was issued. (Tr., p. 8.) She acknowledged that the notice was served on Appellant on September 23, 2008. (Tr., p. 6.)

{¶6} Phil Sekola of Mid-American Services offered testimony regarding the monitoring equipment and the manner in which it functions. A phone line tether and a receiver are installed in an offender's house, and the receiver reads a radio frequency transmitter that is attached to the offender's leg. (Tr., p. 10.) It is a unique coded transmitter that is married to the receiver, and all violations or tampers are sent to the receiver, which sends information via the modem to Mid-American Services' computer.

{¶7} The device is fastened to the ankle of the individual being monitored with a plastic clip. In order to remove the monitoring device, the clip must be broken. (Tr., p. 28.) Employees of Mid-American Services have a special tool designed for that purpose, but a butter knife or a flathead screwdriver can be used to break the clip. (Tr., pp. 29, 39.) Broken clips can be reassembled but they do not hold. (Tr., p. 29.)

{¶8} Appellant's device transmitted a strap tamper message on April 27, 2008. (Tr., p. 26.) Ryan Sheridan of Mid-Atlantic Services testified that he received a computer report that Appellant's monitoring device had possibly been tampered with and immediately contacted her by telephone to arrange a meeting. Sheridan saw Appellant the following morning, and asked to examine the monitoring device. He testified that the clip fell off of the device when he touched it. (Tr., p. 40.)

{¶19} Sheridan testified that he believed Appellant had tampered with the clip. (Tr., p. 40.) However, Appellant told him that in her opinion he broke the clip when he examined the monitoring device that day. (Tr., p. 46.) The actual clip from Appellant's monitoring device was discarded. It is common practice to discard clips because they are typically covered with soap and skin follicles. (Tr., pp. 40-41.)

{¶10} Appellant suffers from diabetes, and her counsel asked Sekola and Sheridan if a swollen leg coupled with the torque of sudden movement could have caused the clip to break. Both men testified that they have sometimes loosened monitoring equipment because it is cutting off the offender's circulation, but that neither of them had ever seen a clip break as a result of leg swelling. (Tr., pp. 31-32, 47-48.)

{¶11} Sekola testified that numerous times offenders have claimed that the clips accidentally broke. (Tr., p. 30.) However, he also testified that the company has monitored roofers, tree-climbers, and carpet layers who use kickers, and he was not aware of any reports from offenders employed in even the most strenuous and physically-demanding occupations complaining of broken clips.

{¶12} The trial court found that the testimony established that Appellant had tampered with the monitoring equipment and sentenced her to 150 days in jail, after crediting her with the thirty days she served under house arrest. This timely appeal followed. Appellee did not file an appellate brief.

ASSIGNMENT OF ERROR NO. 1

{¶13} “THE TRIAL COURT’S DECISION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶14} The trial court need not find evidence of a probation violation beyond a reasonable doubt; there must, however, be substantial evidence of a violation. *State v. Monac* (August 11, 2000), 7th Dist. No. 99-CO-17, *2, citing *State v. Mingua* (1974), 42 Ohio App.2d 35, paragraph two of the syllabus. If there is substantial evidence of a violation, it is within the court’s discretion to revoke probation. *Monac* at 2; *State v. Russell*, 11th Dist. No. 2008-I-142, 2009-Ohio-3147, ¶6; *State v. Chambliss*, 2d Dist. No. 08 CA 20, 2009-Ohio-1284, ¶9.

{¶15} Unless the decision amounts to an abuse of discretion, a reviewing court will not reverse the trial court’s decision. An abuse of discretion implies more than an error of law or judgment; it connotes that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (citation omitted).

{¶16} Sekola and Sheridan provided substantial evidence to support the trial court’s conclusion that Appellant tampered with the monitoring equipment. Both men testified that they were not aware of an instance where a clip accidentally broke, despite the fact that the occupations of many offenders placed considerable strain on the clips. They also testified that they have never seen a clip break due to swelling in the leg, even in instances where the monitoring device appeared to be cutting off an offender’s circulation and the devices had to be loosened.

{¶17} The only other evidence regarding the broken clip was provided by Sheridan, when he testified that he believed Appellant tampered with the device, but also stated that Appellant claimed that he broke the clip when he was examining it. With the exception of this implausible scenario provided by Appellant to Sheridan, all of the remaining evidence supports the conclusion that Appellant tampered with the monitoring device. Thus, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

{¶18} "APPELLANT WAS NOT AFFORDED THE MINIMUM DUE PROCESS REQUIREMENTS FOR A PROBATION REVOCATION PROCEEDING."

{¶19} Revocation of probation implicates two due process requirements: the first is a preliminary hearing to determine whether there is probable cause to believe that the defendant has violated the terms of his probation. *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656; *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484. In this case, Appellant conceded that probable cause existed for the probation violation and waived the initial hearing.

{¶20} The second requirement is a final hearing to determine whether probation should be revoked. *Id.* At the final revocation hearing, the state must (1) provide the probationer with written notice of the alleged violations of probation; (2) disclose the evidence against him; (3) give the probationer an opportunity to be heard in person and to present witnesses and documentary evidence; (4) allow him to confront and cross-examine adverse witnesses; (5) afford him a neutral and detached hearing body; and (6) provide the probationer with a written statement by

the factfinder as to the evidence relied upon and the reasons for revoking probation. *State v. Myers* (Jun. 21, 1996), 7th Dist. No. 95-CO-29 citing *Morrissey*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484. These requirements apply to probation revocation proceedings in municipal courts. *State v. Smith*, 7th Dist. No. 01 CA 187, 2002-Ohio 6710.

{¶21} Crim.R. 32.3 reads, in pertinent part, “[t]he 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.” We recognized in *Smith* that Crim.R. 32.3(A) is a codification of the common law. *Id.* at ¶11.

{¶22} It is important to note that Appellant did not raise a due process challenge at her hearing. Instead, she raises this issue for the first time on appeal. Failure to object to due process violations during a probation revocation waives all but plain error. *State v. Harmon*, 2d Dist. No. 2007 CA 35, 2008-Ohio-6039, ¶11. The plain error doctrine permits an appellate court to reverse the judgment of the trial court if, but for the error, the outcome of the hearing would have been otherwise. *Id.*

{¶23} There was no due process violation in this case. Although Appellant did not receive written notice of the probation violation until the day of the hearing, the record demonstrates that her counsel was provided all of the computer-generated information from Mid-American Services, and that she was able to call several witnesses in order to establish her claim that the clip accidentally broke. There is no

indication that she was prevented from calling any witnesses or advancing any argument or defense because she was not aware of the contents of the probation violation or of the hearing date. Accordingly, her second assignment of error is overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.