[Cite as *State v. Tobin*, 2012-Ohio-1968.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-776 (M.C. No. 10 CRB 22147)
v.	:	No. 11AP-777 (M.C. No. 10 CRB 26810)
Oswald J. Tobin,	:	
		(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 3, 2012

Richard C. Pfeiffer, Jr., City Attorney, and *Orly Ahroni*, for appellee.

William S. Ireland, for appellant.

APPEALS from the Franklin County Municipal Court.

SADLER, J.

{¶ 1} Appellant, Oswald J. Tobin, appeals from a judgment of the Franklin County Municipal Court sentencing him to community control. For the following reasons, we affirm.

{¶ 2} In November 2010, appellant pleaded guilty to two counts of violation of a protection order, both first-degree misdemeanors. At sentencing, the trial court imposed a suspended 180-day jail term with three days of jail-time credit and sentenced appellant to a three-year period of community control. The conditions of community control required appellant to attend alcohol counseling, undergo a general assessment, refrain

from consuming alcohol, participate in random urine screens, stay away from the victim, avoid further acts of violence, and pay court costs.

{¶ 3} Appellant now appeals from the trial court's judgment, advancing the following assignment of error for our consideration:

> THE AP[P]ELLANT'S SENTENCE WAS CONTRARY TO LAW, CONSTITUTED AN ABUSE OF DISCRETION AND VIOLATED THE APPELLANT'S RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AND 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION.

{¶ 4} Appellant's sole assignment of error challenges the condition of community control prohibiting him from consuming alcohol. Without disputing the remaining components of his sentence, appellant argues that the no-consumption condition was contrary to law, an abuse of discretion, and a violation of his protection against cruel and unusual punishment under the state and federal constitutions. We disagree.

{¶ 5} A trial court has broad discretion to impose misdemeanor community control sanctions, and we must affirm such a decision absent an abuse of discretion. *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, ¶ 10 (reviewing felony community control sanctions); *State v. Preston-Glenn*, 10th Dist. No. 09AP-92, 2009-Ohio-6771, ¶ 40 (misdemeanor community control sanctions). " 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). Thus, to the extent appellant relies on a contrary to law standard of review, any such reliance is misplaced.

{¶ 6} When sentencing a misdemeanor offender to community control, the trial court may impose a combination of residential sanctions, non-residential sanctions, financial sanctions, and any other conditions the court considers appropriate. R.C. 2929.25(A)(1)(a) and (b). R.C. 2929.27 delineates specific non-residential sanctions and also allows the trial court to "impose any other sanction that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding purposes and principles of misdemeanor sentencing." R.C.

2929.27(C).[1] The "overriding purposes" of misdemeanor sentencing are protection of the public and punishment of the offender. R.C. 2929.21(A). To achieve those purposes, the court must consider "the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public." *Id*.

{¶ 7} Despite the trial court's broad discretion, the conditions of community control cannot be so overbroad as to impinge on the offender's liberty, and they must be reasonably related to the purposes of community control. *Talty* at ¶ 13, citing *State v. Jones*, 49 Ohio St.3d 51, 52 (1990). In addition to the statutorily described goals in R.C. 2929.21(A), the goals have historically included "rehabilitation, administering justice, and ensuring good behavior." *Talty* at ¶ 16. To determine whether a condition achieves these goals, courts must consider whether the condition (1) reasonably relates to rehabilitating the offender, (2) has some relationship to the offense, and (3) relates to future criminality and serves the ends of community control. *Id.* at ¶ 12, citing *Jones* at 53.

{¶ 8} Based on this three-step analysis, appellant argues that the condition prohibiting alcohol consumption was unrelated to the purposes of community control because the record did not reveal that alcohol was used during the offenses or that he had a history of alcohol abuse. We disagree. At the sentencing hearing, the state detailed appellant's criminal history, which dated back to 1995 and included a 2006 conviction for operating a vehicle while intoxicated, convictions for negligent assault and menacing, two convictions for disorderly conduct (one of which was reduced from a domestic violence charge), and three dismissed domestic violence charges. According to the state, much of the behavior underlying these offenses was "fueled by alcohol" requiring the need for counseling, random urine screens, and a no-consumption order. (Tr. 9.) Additionally, the victim impact statement described the offenses as occurring during a pattern of stalking "especially" when alcohol was involved. (Impact Statement, 3.) Based on her fear that the stalking would continue, the victim requested that appellant's sentence include, "at the very minimum," alcohol counseling. (Impact Statement, 1.)

[1] The language in R.C. 2929.27(C) is identical to that in former R.C. 2929.27(B), the applicable law at the time of sentencing. *See* 2011 H 5 (effective September 23, 2011).

{¶ 9} Under the three-step analysis described above, we find that the no-consumption condition achieves the goals of community control. First, the condition reasonably relates to rehabilitation as it attempts to treat the alcohol problem identified at the sentencing hearing. Second, the condition has "some relationship" to appellant's protection order violations. The victim impact statement indicated that alcohol was involved in appellant's stalking efforts, and the state described much of appellant's criminal behavior as being "fueled by alcohol." (Tr. 9.) Although appellant's counsel disputed the existence of appellant's OVI conviction, stating that appellant was deployed for military service in 2006, the state countered that the arresting agency was the United States Army at Fort Belfoir and that the record contained "very specific information about [appellant]." (Tr. 14.) Third, the condition relates to future criminality and serves the ends of community control given the established connection between alcohol and appellant's risk of recidivism. By prohibiting the consumption of alcohol, the condition aimed to rehabilitate appellant and protect the public from future crime. Under these circumstances, we hold that the trial court's sentence did not constitute an abuse of discretion.

{¶ 10} Appellant also claims that the condition violated his protection against cruel and unusual punishment as guaranteed by the Eighth Amendment of the United States Constitution and the Ohio Constitution, Article I, Section 9. However, because appellant did not raise this constitutional challenge in the trial court, he failed to preserve the issue for appellate review. *State v. Awan*, 22 Ohio St.3d 120 (1986), holding limited by *In re M.D.*, 38 Ohio St.3d 149 (1988) (constitutional arguments not raised at trial are generally deemed waived).

{¶ 11} Nevertheless, even if appellant's challenge were preserved for review, nothing about appellant's misdemeanor community control sanction rises to the level of cruel and unusual punishment. " '[A]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.' " *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶ 21, quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69 (1964). " '[C]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.' " *State v. Weitbrecht*, 86 Ohio St.3d 368,

371 (1999), quoting *McDougle* at 70. Furthermore, the penalty must be " 'so greatly disproportionate to the offense as to shock the sense of justice of the community.' " *Hairston* at ¶ 14, quoting *Weitbrecht* at 371.

{¶ 12} In non-capital cases, successful challenges to the proportionality of a sentence are " 'exceedingly rare.' " *Graham v. Florida*, __ U.S. __, __, 130 S.Ct. 2011 (2010), quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). Courts use a three-part analysis to assess whether a sentence is disproportionate to the offense:

> First, we look to the gravity of the offense and the harshness of the penalty. * * * Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. * * * Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.

Weitbrecht at 371, quoting *Solem v. Helm*, 463 U.S. 277, 290-91 (1983). Analysis of the second and third prongs of this test occurs only in rare cases where a threshold comparison of the crime committed and the sentence imposed leads to the inference that they are grossly disproportionate. *State v. Patrick*, 10th Dist. No. 10AP-26, 2011-Ohio-1592, ¶ 38, citing *Weitbrecht* at 373, fn. 4.

{¶ 13} Other than his conclusory statement that "the punishment does not fit the crime" (appellant's brief, 4), appellant does not engage in any threshold comparison of his offenses and the challenged condition of his community control. As explained above, appellant's sentence was reasonably related to his offense and to the goals of community control. Moreover, the condition fell within the statutory range available for both of his first-degree misdemeanor offenses. Each offense was subject to a maximum 180-day jail term and a maximum $1,000 fine. *See* R.C. 2919.27(B)(2), 2929.24(A)(1), and 2929.28(A)(2)(a)(i). In suspending the jail term, the trial court had considerable discretion to prohibit the consumption of alcohol as a condition of community control. *See* R.C. 2929.25 and 2929.27. Given "the broad authority that legislatures possess in determining the types and limits of punishments for crimes," we find nothing about appellant's sentence to constitute cruel and unusual punishment. *Weitbrecht* at 373.

{¶ 14} Accordingly, appellant's assignment of error is overruled. Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
