[Cite as *State v. Cardinal*, 2010-Ohio-3836.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, City of Reynoldsburg,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-623 (M.C. No. 2008 CR B 010887)
Gary Cardinal,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 17, 2010

James E. Hood, Reynoldsburg City Attorney, and *Glenn P. Willer*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Defendant-appellant, Gary Cardinal ("appellant"), appeals from a judgment entered in Franklin County Municipal Court following a probation revocation hearing, at which the trial court determined appellant had violated the conditions of his probation and, as a result, extended his period of probation and imposed new conditions. For the reasons that follow, we affirm that judgment.

{¶2} A complaint was filed against appellant in Franklin County Municipal Court on May 12, 2008. The complaint alleged appellant had violated a civil protection order

issued by the Franklin County Domestic Relations Court by contacting his ex-wife, Sharon Cardinal, via telephone on three separate dates. On September 10, 2008, appellant entered a plea of guilty to one count of violation of a civil protection order and the other two counts were dismissed. The court imposed a suspended sentence of 180 days of incarceration and placed appellant on a one-year period of probation and imposed several conditions, including a prohibition against contacting his ex-wife and two children, Lee and Kyle Cardinal.

{¶3} On February 11, 2009, appellant's probation officer, Helwa Qasem, filed a statement of violations alleging appellant had violated a condition of his probation by sending an email to his son, Lee Cardinal, on December 13, 2008.

{¶4} On May 27, 2009, a probation revocation hearing was held. The court heard sworn testimony from the probation officer, Detective Bill Early of the Reynoldsburg Police Department, and appellant's son Lee.

{¶5} Ms. Qasem testified she filed the statement of violations because she believed appellant had violated a condition of his probation by contacting his son via email. Said email was forwarded to Ms. Qasem and listed the sender's email address as garycard2007@yahoo.com. Although appellant denied sending the email, the probation officer noted the email contained a comment about appellant's ex-wife looking tired, older, and overweight, and that appellant had previously made similar comments about his ex-wife while at Ms. Qasem's office. However, because Ms. Qasem had never communicated with appellant by email or received emails from him, she could not verify that the account belonged to him.

{¶6} Detective Early testified that, upon the request of the Reynoldsburg City Prosecutor, he obtained and issued a subpoena to Yahoo in order to obtain information

about the email account. In response, he received a business records affidavit from Yahoo which indicated the email account had been opened in the name of Gary Cardinal on March 27, 2007, and contained a billing address of 1430 Cross Creek Drive, Apartment J, Columbus, Ohio. Detective Early was unable to explain the meaning of the document attached to the Yahoo affidavit, which indicated there were "0 total results" on the log-in tracker. Detective Early also acknowledged that someone other than appellant could have established the Yahoo email account and sent the email. In addition, he admitted that he did not investigate the credit card information to verify that it could be traced to appellant.

{¶7} Lee Cardinal testified that he received the email at his Miami University email account a couple of weeks before Christmas. At that time, he forwarded the email to his mother without reading it. Lee was aware that, at the time he received the email, such contact would violate an ongoing protection order. Upon reading the email later, he believed his father had sent the message, based upon the information contained within the email. For example, the email talked about his father's dog, Corgi. However, he admitted that other people, such as his mother, would also know the name of appellant's dog. Lee conceded he had no actual proof to confirm the email had been sent by his father.

{¶8} After the prosecution rested its case, counsel for appellant renewed his request for funds for an expert witness stating that "I believe that I made that request the last time we were before the court here." (Tr. 34-35.) Counsel for appellant explained he believed expert funds were necessary in order to educate the court about the "back-end" type of information contained in emails, which allows tracking to the server from which the email originated in order to establish where the email actually came from, since

appellant's violation hinged on whether or not he actually sent the email. The trial court overruled the request without further explanation. Appellant did not introduce any witnesses.

{¶9} While acknowledging that without further explanation from Yahoo, it was unclear what the "0 total results" information on the log-in tracker actually meant, and while conceding there was a possibility that someone else could have created the account and sent the email, the trial court nevertheless found there was a violation. The trial court modified appellant's sentence and extended his probation until September 10, 2013. The trial court imposed a no contact order regarding appellant's ex-wife and his younger son Kyle, but removed Lee from the no contact order. The court further ordered appellant to reimburse the Reynoldsburg City Attorney $20.42 for the costs of the investigation.

{¶10} Appellant filed a timely appeal asserting a single assignment of error for our review.

> The trial court erred in failing to appoint an expert to assist Appellant in the analysis of a critical prosecution exhibit and to address the technical issues underlying the allegations against him. This failure denied Appellant due process under the state and federal Constitutions.

{¶11} Due process and fundamental fairness require that an indigent criminal defendant be provided with "access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma* (1985), 470 U.S. 68, 77, 105 S.Ct. 1087, 1093; *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶21. In *Ake*, the United States Supreme Court determined this may include expert psychiatric assistance. While *Ake* only involved the provision of expert psychiatric assistance, it is generally recognized that due process may require that a criminal defendant be provided with other types of expert

assistance when necessary to present an adequate defense. *State v. Mason*, 82 Ohio St.3d 144, 159, 1998-Ohio-370.

{¶12} In *Mason*, at the syllabus, the Supreme Court of Ohio determined due process requires that an indigent criminal defendant be provided with state funds to obtain an expert "only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial." Furthermore, undeveloped assertions that the requested assistance would be useful are patently inadequate. *Caldwell v. Mississippi* (1985), 472 U.S. 320, 323-24, 105 S.Ct. 2633, 2637, fn. 1; *State v. Wright*, 7th Dist. No. 97 CO 35, 2001-Ohio-3423; *State v. Scott* (1987), 41 Ohio App.3d 313, 315.

{¶13} The following three factors are relevant in determining whether the provision of an expert witness is required: "(1) the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided, and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided." *Mason* at 149; See also *Ake* at 77-79, 105 S.Ct. at 1093-94. In considering these factors, the trial court must also consider the value of the expert assistance to the defendant's proper representation, as well as the availability of alternative devices that would fulfill the same functions as the expert sought. *State v. Peterson*, 7th Dist. No. 06 CO 026, 2007-Ohio-4980, ¶64, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, paragraph four of the syllabus.

{¶14} The decision to grant or deny a defendant's request for an expert witness lies within the trial court's sound discretion. *Mason* at 150; *Brady* at ¶23. "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* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶15} Due process also mandates that a probationer be given a preliminary and final revocation hearing under the same conditions as specified in *Morrissey v. Brewer* (1972), 408 U.S. 471, 488-89, 92 S.Ct. 2593, 2604, which governs parole hearings. Those minimum requirements of due process include the following: (1) written notice of the alleged violations; (2) disclosure to the probationer of the evidence against him; (3) an opportunity to be heard in person and to present witnesses as well as documentary evidence; (4) the right to confront and cross-examine adverse witnesses, unless the hearing officer finds good cause to prohibit it; (5) a "neutral and detached" hearing body; and (6) a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. See *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 786, 93 S.Ct. 1756, 1761-62.

{¶16} In his sole assignment of error, appellant contends he was denied due process as a result of the trial court's refusal to appoint an expert to assist him in addressing various technical issues regarding email tracking and in reviewing a critical prosecution exhibit. Appellant denies sending the email and argues that either someone else sent the email and caused it to appear as if it was sent from the garycard2007@yahoo.com account, and/or that someone else opened up the account in his name without his knowledge and sent the email from the account. Appellant argues he needed an expert to challenge the prosecution's assertions and to identify the source of the email.

{¶17} Appellant has provided this court with a transcript of the probation revocation hearing that occurred on May 27, 2009. During that hearing, after the prosecution rested, appellant's counsel indicated he wished to "renew my request for funds for an expert witness" and also stated "I believe that I made that request the last time we were before the court here." (Tr. 34-35.) However, we have not been provided with a transcript of what occurred during appellant's previous appearance before the court, nor do we have anything to indicate the manner in which the issue was previously addressed, appellant's basis for the request at that time, the outcome of that alleged request and/or the court's analysis, or even if it was, in fact, previously formally addressed.

{¶18} In addition, there is nothing in the record before us, such as a written motion requesting funds for an expert witness, which sheds any light on when, how, or if this issue was previously addressed. Similarly, we are without a judgment entry or even an oral ruling from the court on this issue in which the court addressed the factors to be considered. There is nothing before us to indicate how, if at all, the trial court addressed this or if it considered the applicable factors, and there is nothing indicating counsel for appellant requested such a determination. If such evidence exists, specifically, a transcript of the proceedings in which this issue was initially raised, appellant has failed to provide it for our review and we are without a way to analyze the trial court's determination. Instead, we have only been provided with counsel's asserted "renewal" of a request for funds for an expert witness, which was made during trial at the end of the prosecution's case. At that point, it was quite late in the proceedings to make such a request and given the burden of an inevitable delay, without justifiable explanation, it would not be error to deny such a request.

{¶19} Moreover, even if we were to consider appellant's "renewal" of his request for expert funds or to assume he made the same arguments at an earlier point in time, appellant has failed to demonstrate a particularized showing of a reasonable probability that the requested expert would aid in his defense and that the denial of such expert assistance resulted in an unfair hearing.

{¶20} At oral argument, appellant conceded the evidence against him, although circumstantial, was of a substantial nature and was sufficient to support a violation. However, he claimed he had no way to challenge that evidence without expert assistance and, as a result, asserts he was prejudiced by the denial. We disagree.

{¶21} We believe the hearing in this matter could not be deemed "unfair," given the availability of "alternative devices" which would fulfill the same functions as the expert assistance sought. For example, appellant could have subpoena'ed a witness from Yahoo to appear in person or to submit a supplemental business records affidavit in order to provide additional clarifying information about the Yahoo account and/or about the log-in tracker information. In addition, appellant and his counsel had access to the IP address contained within the prosecution's evidence and could have easily investigated the source of that address on their own using various online services or possibly a court-ordered subpoena. Furthermore, the prosecution's witnesses were subject to cross-examination and appellant's counsel had the opportunity to point out to the court the holes or inconsistencies in the case. In fact, the trial court acknowledged some of those, but still found a violation. See generally *Peterson*; *State v. Mathias* (May 6, 1998), 3d Dist. No. 13-97-35.

{¶22} Finally, in addition to the email evidence, we also note the prosecution presented the testimony of appellant's probation officer, who testified she had heard

appellant make similar statements like the ones contained in the email at issue. This lends additional credibility to the allegation that the email was sent by appellant. Also, the account was established nearly two years prior to the incident and the mailing address on the account matched the address for appellant maintained in the court's file.

{¶23} The record in this matter does not demonstrate why expert assistance in this area was reasonably necessary. Consequently, we find appellant has failed to make a particularized showing of a reasonable probability that the requested expert would aid in his defense and that the denial of said expert would result in an unfair proceeding. Accordingly, we find the trial court did not abuse its discretion in denying appellant's request for expert assistance. We overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.

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