

[Cite as *State v. Harper*, 2011-Ohio-991.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-05-036
- vs -	:	<u>OPINION</u> 3/7/2011
GREGORY LLOYD HARPER, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 07CR00439

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

Louis Rubenstein, 125 East Court Street, Cincinnati, Ohio 45202, for defendant-appellant

POWELL, P.J.

{¶1} When an order to complete treatment while on community control was unsuccessful, the Clermont County Common Pleas Court sent Gregory Lloyd Harper, Jr. to prison for 18 months. Harper appealed, claiming his community control violation was contrary to the evidence, his prison sentence was unsupported by the record, and his trial counsel was ineffective for being unprepared and failing to ask

for a continuance. We affirm the decision of the trial court because the community control violation and sentence were proper and his trial counsel was not ineffective.

{¶12} The trial court imposed community control sanctions in 2007 for Harper's felony domestic violence conviction. He was notified at his original sentencing hearing that he would be sentenced to 18 months in prison if he violated community control. Harper violated his community control on several occasions over the next two years. He was continued on community control each time. In December 2009, Harper was ordered to complete a treatment program at River City Correctional Institution as part of his community control.

{¶13} River City discharged Harper one week after he was admitted to the facility, and as a result, a new community control violation was filed against him. It was alleged that Harper failed to follow the rules of River City, failed to participate in and successfully complete the River City programming, and failed to follow the instructions of his probation officer to abide by the rules of River City.

{¶14} Harper received leave of court to file this delayed appeal of his community control violation and sentence. Harper presents three assignments of error for our review. We will discuss the assignments and arguments as they are presented in the body of the brief.

{¶15} Harper argues in his first assignment of error that the manifest weight of the evidence does not support the finding that he violated his community control. Harper denies that he acted inappropriately at River City. He argues that his conduct at the facility was "misconstrued," he was "targeted for failure," and the trial court lost its way in resolving the conflicts in testimony.

{¶16} A community control violation hearing is not a criminal trial, and

therefore, the state does not have to establish a violation with proof beyond a reasonable doubt. *State v. Payne*, Warren App. No. CA2001-09-081, 2002-Ohio-1916 at *3. Rather, the state must present substantial evidence that the defendant violated the terms of his community control. *State v. Sears*, Butler App. No. CA2006-04-080, 2007-Ohio-1364, ¶4. The trial court must consider the credibility of the witnesses when making this determination. *Id.* The decision whether to revoke an offender's community control sanction is left to the sound discretion of the trial court. *Payne* at *3.

{¶7} The following paragraphs summarize the testimony presented at the violation hearing. Probation officer William Epeards testified that he acted as liaison with River City. Epeards said he was discussing the rules for placement at River City with Harper and others when Harper said he didn't belong at River City, that he really wasn't supposed to be going. Harper told Epeards that he was "just here on fines and costs, but they sent me down here."

{¶8} According to Epeards, Harper told him he heard that River City would not accept him because of the expensive medication he was prescribed. Epeards indicated that Harper initially failed to sign a release for River City to receive information regarding the medication because his relatives told him not to sign anything, but the release was subsequently signed by Harper.

{¶9} Epeards stated that he and several River City staff members met with Harper on Harper's second day at River City. According to Epeards, Harper was told that everyone was "on board" to provide the necessary medication and to help Harper complete the program. However, Harper later told the trial court that he was "upset" about the medication issue and believed from staff members' comments that

River City would discharge him solely because the medication was too expensive to provide.

{¶10} Epeards testified that the discharge summary from River City indicated that Harper was discharged because he was aggressive, verbally abusive with staff, and "aggravated at a high anger point." Epeards said the report stated that Harper slammed an office door at the facility. We note that it is not clear whether the discharge summary was admitted into the record, and it was not provided to this court.

{¶11} Harper denied he behaved in any manner Epeards described. He stated that he was "uncomfortable" at times at River City, but he said he responded by withdrawing or keeping his mouth shut. Harper testified that he told Epeards he was concerned about the medication issue and Epeards "kind of got smart with me," so Harper "backed down because [Epeards] kind of brushed me off." Harper also indicated that his medication should have been sent with him, but wasn't brought by Epeards until the next day. Harper said Epeards called him on his second day at River City and was "yelling, and irate, and he threatened me that I was going to go to prison" if Harper didn't find a way to get his medication brought to him.

{¶12} Harper said any allegation that he did not cooperate during his week at River City was untrue and he didn't believe his River City case manager would have said such things. Harper said other people at River City approached him when they noticed he was withdrawn. He said, "[I]t was upsetting, because it was the staff that my situation had been with. It wasn't an inmate, which you know I expected problems from an inmate and not from staff."

{¶13} Harper said he was careful to follow the chain of command at River City

when he was "uncomfortable" and wanted to speak with his case manager about it. Harper estimated that he followed the "process" and went through the chain of command to speak with his case manager probably four or five times during the week he was at River City.

{¶14} Harper acknowledged that he slammed an office door, but said it was an accident. He said he was talking to a staff member who did "the same thing that Mr. Epeards did to me." Harper explained that he and the staff member were having a conversation when the staff member told Harper he was being uncooperative. "I didn't feel comfortable with speaking with him. And I let him know that. And he asked me to leave his office." Harper said he didn't mean to slam the door and apologized for it.

{¶15} Having reviewed the record, it appears that Harper himself provided a glimpse into the problems he had working the program at River City. Harper denies being aggressive or what was described as disruptive. However, Harper acknowledged that he was upset about the medication issue. He seemed to attribute most of his conflicts to that issue, even though the probation officer said Harper was told his second day at River City that the medication issue was settled. Harper acknowledged withdrawing from uncomfortable situations with staff and admitted he was described as uncooperative, but denied being uncooperative. He said he followed the protocol necessary to talk with his case manager about "uncomfortable" staff encounters on four or five occasions that week. Harper admitted during one encounter with a certain staff member that he was asked to leave the office and he accidentally slammed the door.

{¶16} The trial court noted that Harper didn't want to go to River City and

made it clear at the previous violation hearing that he wanted to go to a Salvation Army program. The trial court said Harper was "trying to drive the bus." The trial court said it made clear to Harper and his counsel, the same attorney for both violations, that it was River City for treatment or Harper was going to prison. The trial court stated on the record that it believed Harper was uncooperative, and he had been uncooperative [with the court].

{¶17} Having reviewed the record, we find there was substantial evidence presented that Harper did not successfully participate in and complete the River City programming and did not follow his probation officer's instructions to abide by River City rules. The trial court did not err in finding a violation. Harper's first assignment of error is overruled.

{¶18} Harper argues in his second assignment of error that the trial court failed to consider mitigating or extenuating circumstances when it revoked Harper's community control and sentenced him to prison. Specifically, Harper argues that the trial court failed to take into consideration in fashioning a "more appropriate sentence," the fact that he was under stress, but still "able to maintain his cool" and participate in treatment.

{¶19} The penalty for a community control violation is the revocation of community control and the imposition of the sentence the trial court informed the defendant it would impose. Cf. *State v. Caulley*, Warren App. No. CA2006-01-004, 2007-Ohio-220, ¶13.

{¶20} The trial court made several efforts to fashion an appropriate sentence for Harper before it implemented the 18-month prison term it told him it would impose if his community control was revoked. The record shows the trial court considered

the appropriate sentencing factors at the original sentencing and chose a sentence within the applicable range for the felony offense. See R.C. 2929.11; R.C. 2929.13; R.C. 2929.14(A); R.C. 2929.15. The record indicates the trial court was well aware of Harper's circumstances and it chose to implement the promised term. Finding no error, Harper's second assignment of error is overruled.

{¶21} Harper asserts in his third assignment of error that his trial counsel was ineffective because she was unprepared and failed to move for a continuance of the hearing.

{¶22} The first inquiry in an ineffective assistance of counsel claim is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to the appellant, and, secondly, whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 687-694, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142.

{¶23} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142. The prejudice prong of the analysis requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at paragraph three of the syllabus. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if a better strategy had been available. See *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171; *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶90.

{¶24} According to the record, Harper was permitted to read the River City

discharge summary while he was testifying on cross-examination. At that point, his trial counsel voiced the objection that she was unable to cross-examine the River City case manager about his comments in the discharge summary. The trial court responded that the hearing was continued for several days at trial counsel's request and if she wanted any River City staff members to testify, she could have subpoenaed them.

{¶25} Later, after informing the court that she had no additional witnesses, Harper's trial counsel told the court that she really was not prepared for the hearing. She said she believed the hearing involved the necessity of transporting Harper to another facility, not a community control violation hearing. The trial court asked counsel why she did not bring this to its attention before the hearing, because it would have given a "brief continuance." Harper's counsel acknowledged that it was her misunderstanding and proceeded to present closing arguments on her client's behalf.

{¶26} We note that trial counsel waited until most of the testimony was presented to raise any objection in the record and did not ask for additional time to call the River City case manager as a witness. While trial counsel's statements seem to indicate she was caught flat-footed, it may have been a tactical move not to ask for a continuance to call the case manager into court to explain the discharge summary.

{¶27} Irrespective of whether any trial tactic was the basis for trial counsel's conduct, both the United States and Ohio Supreme Courts have held that a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, quoting *Strickland* at 697.

{¶28} After reviewing the record, we conclude Harper fails to demonstrate that his trial counsel's performance during the violation hearing was so deficient that he was prejudiced. Even if counsel had been granted a continuance and was able to bring in additional witnesses, Harper fails to demonstrate a reasonable probability that the result of the hearing would have been different. In other words, Harper failed to show that the trial court would not have found a violation and would not have revoked his community control. See *State v. Sallaz*, Trumbull App. No. 2003-T-0009, 2004-Ohio-3508, ¶32-34. Harper's third assignment of error is overruled.

{¶29} The state of Ohio included at the end of its brief a single "cross assignment of error," which requests dismissal of Harper's appeal. We will consider this assignment of error pursuant to App.R. 3(C)(2), which states that a person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross-appeal.

{¶30} The state argues that this court lacks jurisdiction because a delayed appeal under App.R. 5(A) does not apply to sentences imposed after a community control violation because it does not involve a criminal proceeding. We disagree.

{¶31} The pertinent portion of App.R. 5(A) states that delayed appeals may be taken with leave of court in three classes of cases: criminal proceedings, delinquency proceedings, and serious youthful offender proceedings. The state claims that "community control violations are not criminal proceedings and need not be proved beyond a reasonable doubt." *State v. Walton*, Lorain App. No. 09CA009558, 2009-Ohio-6703, ¶13.

{¶32} However, the state cites no authority that specifically rejects an App.R.

5(A) delayed appeal for a sentence imposed on a community control violation and courts have allowed delayed appeals in that context.

{¶33} We are mindful that cases such as *Walton* have stated that community control violations are not criminal proceedings in the context of the quantum of evidence required for the finding. But, we are also mindful that Evid.R. 101(C), states that the rules of evidence, other than with respect to privileges, do not apply to "[m]iscellaneous criminal proceedings," and under Evid.R. 101 (C)(3), those miscellaneous criminal proceedings are: "[p]roceedings for extradition or rendition of fugitives; sentencing; granting or revoking probation; proceedings with respect to community control sanctions; issuance of warrants for arrest, criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise."

{¶34} While we could belabor the point of whether community control violation proceedings are "criminal proceedings" within the context of a delayed appeal, we decline to do so, and overrule the state's cross-assignment of error.

{¶35} Judgment affirmed.

YOUNG and HENDRICKSON, JJ., concur.