

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

STATE OF OHIO,	:	CASE NO. CA2014-09-115
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- vs -	:	3/16/2015
	:	
KERRY PICKETT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CR25482

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Thomas G. Eagle Co., L.P.A., Thomas G. Eagle, 3386 North State Route 123, Lebanon, Ohio 45036, for defendant-appellant

S. POWELL, J.

{¶ 1} Defendant-appellant, Kerry Pickett, appeals from the decision of the Warren County Court of Common Pleas continuing his community control sanctions for an additional two years after finding he violated his community control by failing to pay his restitution order in full. For the reasons outlined below, we affirm.

{¶ 2} On June 22, 2009, Pickett pled guilty to one count of identity fraud in violation

of R.C. 2913.49(B)(2), a second-degree felony. The charge stemmed from allegations that on July 11, 2008, Pickett, along with his accomplice, an exotic dancer at a local strip club, obtained a \$150,000 line of credit from First Financial Bank by fraudulently using the identity of Pickett's then wife, Susan Pickett, without her consent. As a result of his guilty plea, the trial court sentenced Pickett to four years in prison and ordered him to pay \$150,000 in restitution to First Financial Bank.

{¶ 3} On March 17, 2011, Pickett filed a motion for judicial release, which the trial court granted. Thereafter, on August 9, 2011, the trial court held a hearing on the conditions for Pickett's judicial release, agreeing to modify Pickett's sentence to three years of community control. Pickett's modified sentence also included a specific provision as part of his community control sanctions that required him to pay \$150,000 in restitution "as previously ordered." After modifying his sentence, Pickett signed a form document that contained additional rules and conditions of his community control sanctions, including several so-called "Special Conditions," wherein Pickett agreed to pay his restitution order "in accordance with a payment plan established by [his] Probation Officer."

{¶ 4} On July 8, 2014, the trial court scheduled a review hearing on Pickett's community control sanctions. Approximately one week later, on July 17, 2014, Pickett filed a memorandum with the trial court requesting his community control sanctions be terminated. As part of this memorandum, Pickett argued his community control sanctions should be terminated "as he has complied with the terms and conditions of probation with one exception of the balance owed to [First Financial Bank] in restitution."

{¶ 5} On July 24, 2014, the trial court held the previously scheduled review hearing, during which time the parties conducted an in chambers discussion regarding the continuation of Pickett's community control sanctions. The parties' in chambers discussion was not recorded or transcribed as part of the record before this court, nor did Pickett file a

statement of the evidence or proceedings pursuant to App.R. 9(C) regarding the parties' in chambers discussion.

{¶ 6} Following the parties' in chambers discussion, Pickett's probation officer, Jason Parsons, testified that although he had not had any problems with Pickett while he was on community control, and even though Pickett had made the required \$100 monthly payments towards his restitution order in accordance with the established payment plan, Pickett had not paid his restitution order in full. Pickett, who was represented by counsel, also testified that he had not paid his restitution order in full, specifically stating that he had only "been paying the hundred dollars that was part of [his] agreement when [he] got released." Thereafter, when asked if he had made any efforts to repay "any of the money that [he] stole," other than because he was required as part of his community control, Pickett testified that he had not.

{¶ 7} On August 5, 2014, the trial court issued a decision denying Pickett's request to terminate his community control sanctions, opting instead to continue Pickett's community control for an additional two years. In so holding, although not explicit, the trial court found Pickett had violated the terms of his community control sanctions due to his "failure to pay his restitution obligation in full." Pickett now appeals from the trial court's decision to continue his community control sanctions for an additional two years, raising one assignment of error for review.

{¶ 8} THE TRIAL COURT ERRED IN EXTENDING THE APPELLANT'S COMMUNITY CONTROL SANCTIONS.

{¶ 9} In his single assignment of error, Pickett argues the trial court erred by continuing his community control sanctions for an additional two years. We disagree.

{¶ 10} Initially, Pickett argues the trial court erred by continuing his community control sanctions because there was never any motion filed by the state or his probation officer requesting such an extension. The trial court, however, specifically stated on the record that

such a motion had been made. As the trial court stated, "[w]e're here today to review this matter and the motion to extend community service." The state also made reference on the record that extending Pickett's community control sanctions was at the "probation departments [sic] request," and that "somebody in chambers" had made a statement about extending Pickett's community control sanctions during the parties' prior in chambers discussion.

{¶ 11} After a thorough review of the record properly before this court, it is clear that Pickett never objected to the statements made by the trial court and the state, nor did he refute the veracity of these statements in any way. In fact, Pickett himself testified as to the impact continuing his community control sanctions would have on his ability to travel. In turn, contrary to Pickett's claim otherwise, we find the trial court did not order a "sua sponte extension" of his community control sanctions like that found improper by the Second District Court of Appeals in *State v. Potts*, 2d Dist. Montgomery No. 21824, 2007-Ohio-6695 and the Eighth District Court of Appeals in *State v. Flekel*, 8th Dist. Cuyahoga Nos. 80337 and 80338, 2002-Ohio-2963. The fact that the trial court's docket does not contain reference to any motion to continue Pickett's community control sanctions is of little consequence since Crim.R. 47 permits a trial court to accept motions made orally. In addition, based on the language of R.C. 2929.15(A)(2)(a), the probation department is merely required to "report" a community control violation, without any reference to further court filings. Therefore, Pickett's first argument is without merit.

{¶ 12} Next, Pickett argues the trial court erred by extending his community control sanctions because he did not receive any notice that his community control could be continued. However, as noted above, the trial court explicitly stated on the record that a motion to extend Pickett's community control sanctions had been made. Pickett did not object to the trial court's consideration of the extension of his community control on the basis

of a lack of notice or otherwise, nor did Pickett request a continuance. Instead, presumably aware that his community control sanctions could be continued, Pickett testified as to the impact of extending his community control would have on his ability to travel. Therefore, we find Pickett's claim that he lacked notice and was unaware that his community control sanctions could be continued is simply not supported by the record. Accordingly, Pickett's second argument is also without merit.

{¶ 13} Finally, Pickett argues the trial court erred by extending his community control sanctions when he had not committed a community control violation. In order to establish a community control violation, "the state must present substantial evidence that the defendant violated the terms of his community control." *State v. Harper*, 12th Dist. Clermont No. CA2010-05-036, 2011-Ohio-991, ¶ 6. "Substantial evidence has been defined as being more than a scintilla of evidence, but less than a preponderance." *State v. McCants*, 1st Dist. Hamilton No. C-120725, 2013-Ohio-2646, ¶ 11. Once a violation has been established, R.C. 2929.15(B)(1)(a) permits the sentencing court to impose upon the violator, among other things, "[a] longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit" as specified in R.C. 2929.15(A).

{¶ 14} The trial court specifically ordered Pickett to pay restitution of \$150,000 as part of his community control sanctions imposed in its modified sentencing entry. Pickett, however, only paid \$3,400 towards the trial court's restitution order. This falls well short – \$146,600 to be exact – of the total restitution Pickett was specifically ordered to pay. Pickett's probation officer, Jason Parsons, testified that Pickett's failure to pay his restitution order in full constituted a violation of his community control sanctions. Pickett himself even indicated as part of his memorandum filed in support of terminating his community control sanctions that his failure to pay the restitution order in full constituted a community control violation. Again, as Pickett stated in his July 17, 2014 memorandum, "he has complied with

the terms and conditions of probation *with one exception of the balance owed to [First Financial Bank] in restitution.*" (Emphasis added.) The record also makes clear that Pickett had no intentions to continue to pay any amount towards his restitution order once his community control sanctions expired.

{¶ 15} It is well-established that the trial court is in the best position to interpret and construe its own orders. In turn, although not explicit in its ruling, we find the trial court did not err by finding Pickett violated his community control sanctions imposed as part of its modified sentencing entry. Therefore, based on the facts and circumstances of this case, because the record contains substantial evidence that Pickett violated the terms of his community control by failing to pay his restitution order in full, the trial court was authorized to extend Pickett's community control for an additional two years.

{¶ 16} Nevertheless, Pickett argues the trial court erred by finding he had violated his community control sanctions since he had complied with the payment plan established by his probation officer. However, although his community control sanctions included "Special Conditions" wherein he agreed to pay restitution "in accordance with a payment plan established by [his] Probation Officer," it is the trial court, not the probation department, that has the authority to determine how much restitution should be paid. In other words, simply because Pickett's probation officer established a monthly payment plan requiring Pickett to pay \$100 a month towards his restitution obligation, that payment plan should not be construed as a substitute for the trial court's previous order that specifically required him to pay \$150,000 in restitution to First Financial Bank as part of his community control sanctions imposed by the trial court's modified sentencing entry.

{¶ 17} Pickett also argues the trial court's decision to continue his community control sanctions was improper because the trial court was unable to "violate Pickett solely for not being able to pay full restitution, at least not without a showing he failed to make a good faith

effort to do so or despite having greater resources to do so." In support of this claim, Pickett cites to R.C. 2974.14. However, "[t]he purpose of enacting this statute and its predecessor, R.C. 2947.20, was to provide the courts with a mechanism for collecting fines from offenders who refuse to pay." *State v. Chambers*, 12th Dist. Butler No. CA2003-05-137, 2003-Ohio-5991, ¶ 18. In turn, contrary to Pickett's claim otherwise, R.C. 2947.14 applies only to the satisfaction of fines, not restitution. Therefore, as this matter deals with the trial court's order of restitution, not a fine, we find R.C. 2947.14 does not apply to the facts of the case at bar.

{¶ 18} Pickett further cites to the United States Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064 (1983), a case in which a probationer was imprisoned solely because he could not pay a fine and restitution. In *Bearden*, the probationer had borrowed money from his parents to make his first two payments. *Id.* at 662. Yet, with no income or assets, and having been unable to find work, the probationer was unsuccessful in making his additional payments and, consequently, was imprisoned. *Id.* at 673. The Supreme Court remanded the case to the lower court, finding that a probationer could not be imprisoned for failing to pay a fine when the lower court had failed to inquire into the reasons for the failure to pay. *Id.* at 674. In so finding, the Supreme Court held:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment.

Id. at 672.

{¶ 19} The Supreme Court's decision in *Bearden*, however, is limited and "stands only for the proposition that the court cannot *imprison* a probationer for failure to make required

payments unless the probationer failed to make bona fide efforts to pay and alternatives to imprisonment are inadequate in a particular situation." (Emphasis added.) *State v. Bell*, 264 Or.App. 230, 233, 331 P.3d 1062 (2014). Therefore, as this case does not present a situation in which the state sought to imprison Pickett for his failure to pay his restitution order in full, nor is this a case in which the trial court actually did imprison Pickett for such failure, we find the Supreme Court's decision in *Bearden* distinguishable from the facts here.

{¶ 20} After carefully considering all of the arguments advanced herein, we find no error in the trial court's decision continuing Pickett's community control sanctions for an additional two years after finding he violated his community control by failing to pay his restitution order in full. Simply stated, based on the facts and circumstances here, and in light of the trial court's specific order made part of its modified sentencing entry, Pickett's failure to satisfy his restitution order in full constituted a violation of his community control sanctions. Therefore, pursuant to R.C. 2929.15(B)(1)(a), we find the trial court was authorized to continue Pickett's community control sanctions for an additional two years. Pickett's single assignment of error is overruled.

{¶ 21} Judgment affirmed.

M. POWELL, P.J., and HENDRICKSON, J., concur.