

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

STATE OF OHIO,	:	CASE NO. CA2017-03-037
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
- vs -	:	9/25/2017
	:	
LINDSAY SCHWAB,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 16CR32272

David P. Fornshell, Warren County Prosecuting Attorney, Kirsten Brandt, 520 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Stephan D. Madden, 810 Sycamore Street, 6th Floor, Cincinnati, Ohio 45202, for defendant-appellant

S. POWELL, P.J.

{¶ 1} Defendant-appellant, Lindsay Schwab, appeals from the decision of the Warren County Court of Common Pleas terminating her intervention in lieu of conviction ("ILC") after she was found guilty of violating the same by testing positive for Oxycodone and cocaine. For the reasons outlined below, we affirm.

{¶ 2} On August 29, 2016, the Warren County Grand Jury returned an indictment

charging Schwab with one count of theft of drugs in violation of R.C. 2913.02(A)(1), a fourth-degree felony, and one count of aggravated possession of drugs in violation of R.C. 2925.11(A), a fifth-degree felony. The charges arose after Schwab was observed on surveillance video stealing hydrocodone out of an unlocked vehicle on June 3, 2016. Schwab entered a plea of not guilty and was released on her own recognizance.

{¶ 3} On October 25, 2016, Schwab filed a motion with the trial court requesting ILC in accordance with R.C. 2951.041. Pursuant to that statute, if an offender is charged with a crime, and the trial court has reason to believe that drug or alcohol use was a factor leading to the commission of that crime, "the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction." R.C. 2951.041(A)(1). After filing her motion, the trial court ordered Schwab to submit to an assessment to determine her eligibility for ILC and, if she was deemed eligible, the appropriate intervention plan.

{¶ 4} On November 17, 2016, the trial court held a hearing on Schwab's motion for ILC. At this hearing, the trial court determined Schwab was eligible for ILC and granted Schwab's request for ILC. Schwab then entered a guilty plea to both charges then pending, which the trial court accepted, and placed Schwab on ILC. As part of the terms and conditions of her ILC, it is undisputed that Schwab was ordered to "abstain from the use of illegal drugs and alcohol and to submit to regular random testing for drug and alcohol use" for a period of three years.

{¶ 5} On January 27, 2017, Schwab's probation officer filed a report alleging Schwab had violated the terms and conditions of her ILC by testing positive for Oxycodone and cocaine. After receiving this report, the trial court scheduled the matter for a hearing on March 9, 2017.

{¶ 6} At the March 9, 2017 hearing, Schwab's probation officer testified Schwab had tested positive for Oxycodone and cocaine after being placed on ILC, but that Schwab

denied purposefully using either drug. Instead, Schwab's probation officer testified Schwab told her she thought she was taking prescription Ibuprofen she had gotten from a friend, a person Schwab claimed "was not truthful with her about what the pill was and it ended up being Oxycodone." As it relates to her positive test for cocaine, Schwab's probation officer testified Schwab told her "she may have held some of it in her hand while cleaning someone else's apartment, but never anything more than that, no – no further explanation than that."

{¶ 7} Schwab also testified at the March 9, 2017 hearing. Specifically, Schwab testified she would take responsibility for testing positive for Oxycodone, but claimed she thought the pill she took was prescription Ibuprofen for pain in her lower back. In regards to the positive test for cocaine, Schwab testified she had not used or even touched cocaine in approximately 15 years. As Schwab testified:

[T]he only explanation that I could even think that it would be in my system was going and helping who I thought was a friend out, cleaning her house, that has a drug problem and touching everything in sight in her house to help her, once, sometimes twice a week, and if it got in my system, it got in my system. But I have not touched cocaine in 15 years.

{¶ 8} Following this testimony, the trial court found Schwab guilty of violating the terms and conditions of her ILC and reinstated her prior guilty plea. The trial court then sentenced Schwab to three years of community control with the condition that she successfully complete outpatient drug and alcohol treatment. Schwab was also ordered to pay restitution in the amount of \$114 plus court costs. Schwab now appeals, raising a single assignment of error for review.

{¶ 9} THE TRIAL COURT ERRED WHEN IT TERMINATED DEFENDANT-APPELLANT'S INTERVENTION STATUS.

{¶ 10} In her single assignment of error, Schwab argues the trial court erred by terminating her ILC after she tested positive for Oxycodone and cocaine. We disagree.

{¶ 11} Schwab initially argues that this court should reconsider our decision in *State v. Davis*, 12th Dist. Warren Nos. CA2013-12-129 and CA2013-12-130, 2014-Ohio-2122, wherein this court determined a trial court does not have the authority to exercise any discretion to continue an offender on ILC after the offender is found to have violated the terms and conditions of the same. Specifically, this court stated:

[P]ursuant to the clear and unambiguous language of R.C. 2951.041(F), because [appellant] admitted to violating the terms and conditions of his ILC, the trial court was required to enter a finding of guilty and "impose an appropriate sanction under Chapter 2929 of the Revised Code."

Id. at ¶ 12.

{¶ 12} Schwab urges this court to reconsider our decision in *Davis* and instead give the trial court "the discretion to make appropriate decisions – particularly in cases such as the instant case, where the trial court would have preferred not to have had to terminate intervention status." We decline Schwab's invitation to reconsider our decision in *Davis* and instead continue to adhere to the plain, clear, and unambiguous language found in R.C. 2951.041(F), language we previously found "clearly and unambiguously conveys" the legislative intent that the trial court must sentence an offender who is found to have violated the terms and conditions of ILC to an appropriate sanction under R.C. Chapter 2929. *Id.* at ¶ 10. Any modification to the ILC statute must come from the General Assembly, not from this court for it is well-established that this court may not add or delete words when construing a statute.¹ *State v. Braden*, 12th Dist. Preble No. CA2013-12-012, 2014-Ohio-3385, ¶ 21, citing *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, ¶ 25. Schwab's claim otherwise is without merit.

1. It should be noted, legislation is currently pending before the General Assembly that would modify the ILC statute to allow the trial court to either continue an offender on ILC *or* enter a finding of guilty and impose an appropriate sanction under R.C. Chapter 2929 after an offender has been found in violation of the terms and conditions of the same.

{¶ 13} Schwab next argues the state provided insufficient evidence that she purposefully violated the terms and conditions of her ILC. Schwab, however, has not provided any authority to support her claim that she could only be found guilty of violating the terms and conditions of her ILC upon the state demonstrating she did so purposefully. Moreover, even if the state was required to prove Schwab acted purposefully, the trial court clearly found Schwab's explanation as to what caused her two failed drug tests lacked credibility. As the trier of fact is in the best position to judge the credibility of the witnesses, "we will not disturb the trial court's finding in regard to which version of events was credible, and which was not." *State v. Bonner*, 12th Dist. Butler No. CA2012-09-195, 2013-Ohio-3670, ¶ 13. Therefore, because the state provided sufficient evidence which, if believed by the trier of fact, established that Schwab violated the terms and conditions of her ILC by testing positive for, at the very least, Oxycodone, the trial court did not err by finding Schwab guilty of violating the terms and conditions of her ILC, terminating the same, and reinstating her guilty plea. Schwab's claim otherwise is again without merit.

{¶ 14} In light of the foregoing, having found no merit to any of the arguments raised by Schwab herein, Schwab's single assignment of error is overruled.

{¶ 15} Judgment affirmed.

PIPER and M. POWELL, JJ., concur.