

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-08-166
 :
 - vs - : OPINION
 : 9/10/2012
 :
 ANTHONY STURGILL, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-02-0381

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamdawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Charles Conliff, 5145 Pleasant Avenue, Suite 18, P.O. Box 18424, Fairfield, Ohio 45018-0424, for defendant-appellant

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Anthony Sturgill, appeals the decision of the Butler County Court of Common Pleas revoking his community control and imposing a prison term. We affirm the decision of the trial court.

{¶ 2} On June 1, 2007, appellant pled guilty to two counts of nonsupport of dependents, felonies of the fifth degree, in violation of R.C. 2919.21(A)(2). Appellant

received a sentence of five years of community control and was ordered to attend and successfully complete Felony Nonsupport Court, pay arrearages to the custodial mother in the amount of \$6,787, and pay his child support as ordered by the Child Support Enforcement Agency. Appellant was also informed that a violation of his sentence would lead to a more restrictive sanction, a longer sanction, or a prison term of 12 months on each count to run consecutive.

{¶ 3} A few months later, on September 5, 2007, appellant was indicted on one count of domestic violence, a felony of the fourth degree, in violation of R.C. 2919.25(A). Appellant entered a plea of guilty on December 12, 2007, and was subsequently sentenced to five years of community control and ordered to pay a \$500 fine. Appellant was also informed that a violation of his sentence would lead to a more restrictive sanction, a longer sanction, or a prison term of 18 months. It was determined that appellant's community control for his nonsupport convictions would not be violated by this new conviction, as the domestic violence incident had occurred prior to appellant's nonsupport sentencing.

{¶ 4} In June of 2011, the state filed a notice of community control violation in both the nonsupport and domestic violence cases. Specifically, the state alleged that appellant had violated rules six, seven, and twelve of his community control conditions. Rule six states:

I will not purchase, possess, own, use or have under my control any firearms, ammunition, dangerous ordnance or weapons, including chemical agents, electronic devices used to immobilize, pyrotechnics and/or explosive devices.

Rule seven states:

I will not possess, use, purchase, or have under my control any narcotic drug or other controlled substance or illegal drugs, including any instrument, device or other object used to administer drugs or to prepare them for administration, unless it is lawfully prescribed for me by a licensed physician.

Rule twelve states:

I agree to pay or comply with all financial obligations, including timely full payment of child support, as ordered by any court.

{¶ 5} The allegations of the state were that, during a search of offender's residence, probation officers found ammunition and drug paraphernalia in appellant's bedroom. The state further alleged that defendant had failed to pay his child support as ordered.

{¶ 6} A violation hearing was held on July 12, 2011, addressing all three alleged violations. As to the violations of rules six and seven, testimony revealed that two probation officers had visited appellant's residence in the evening hours of March 25, 2011. During a sweep of the residence, the officers discovered a box of 9mm ammunition sitting on a shelf in appellant's bedroom and three crack pipes in an open safe on the floor of appellant's bedroom closet.

{¶ 7} As to the violation of rule twelve, appellant testified that he had been current on his child support payments until suffering a medical condition which required back surgery in March 2010. After the surgery, appellant gave his probation officer at the time, Jeanna Jacobs, a note from his doctor which stated that appellant would be unable to work for as long as nine months after the surgery. At the time of the violation hearing, appellant testified that he would never be able to return to work. Additional testimony at the hearing revealed that appellant's last child support payment was paid in February 2011 and that, between March 2010 and February 2011, no child support payments were paid.

{¶ 8} At the conclusion of the hearing, the trial court determined that appellant had violated all three rules of his community control conditions. Thus, the trial court revoked appellant's community control and imposed a prison term of 12 months for both counts in the nonsupport conviction, to be served consecutively, and a prison term of 18 months for the sole count in the domestic violence conviction, to be served consecutively to the nonsupport conviction, for a total of 42 months in prison. In written entries summarizing the trial court's

ruling, the trial court further stated that, in making its decision, it had "considered the record, oral statements, any victim impact statement, presentence report prepared and Probation violation Report, as well as the principles and purposes of sentencing under [R.C.] 2929.11, and has balanced the seriousness and recidivism factors [of R.C.] 2929.12."

{¶ 9} Appellant now appeals the trial court's judgments, raising two assignments of error.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY REVOKING HIS COMMUNITY CONTROL SANCTION ON THE GROUNDS THAT HE DIDN'T PAY CHILD SUPPORT.

{¶ 12} In this first assignment of error, appellant contends that the trial court erred in revoking appellant's community control by finding that he failed to pay his child support. Specifically, appellant argues that he had been paying his child support regularly until he suffered a disabling medical condition that prevented him from working. In making this argument, appellant "concedes that sufficient grounds existed" to find that he violated rules six and seven of his community control conditions. Thus, he only argues that the trial court should not have found a violation of rule twelve of his community control conditions.

{¶ 13} "The privilege of [community control] rests upon the probationer's compliance with the [community control] conditions and any violation of those conditions may properly be used to revoke the privilege." *State v. Simpson*, 12th Dist. No. CA2000-12-251, 2002-Ohio-1909, ¶ 23; *State v. Bell*, 66 Ohio App.3d 52, 57 (5th Dist.1990). "An appellate court cannot reverse a trial court's decision to revoke [community control] absent an abuse of discretion." *Simpson* at ¶ 18, citing *State v. Theisin*, 167 Ohio St. 119, 124-25 (1957). "An abuse of discretion connotes that the trial court's attitude in reaching its decision was unreasonable, arbitrary, or unconscionable." *Id.*

{¶ 14} In support of his argument, appellant cites the United States Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064 (1983), for the proposition that a trial court may not revoke community control solely because a probationer is unable to pay his fines or restitution.

{¶ 15} *Bearden* addressed the case of a probationer who was imprisoned solely because he could not pay a fine and restitution. *Id.* at 663. The probationer had borrowed money from his parents to make his first two payments. *Id.* at 662. However, 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.

{¶ 16} We find the case at hand distinguishable from *Bearden*. First, appellant's community control was not revoked solely because he failed to make his child support payments, but also because appellant violated rules six and seven of his community control conditions by having ammunition and drug paraphernalia in his residence. These violations are uncontested by appellant and have no relation to appellant's financial status. The trial court could have imposed the same prison term upon appellant for only the violations of rules

six and seven. Thus, the trial court's revocation of appellant's community control was not based solely on his indigency status but, instead, upon the violation of multiple community control conditions. See *State v. Roberts*, 10th Dist. No. 09AP-816, 2010-Ohio-1326; *State v. Estep*, 4th Dist. No. 03CA22, 2004-Ohio-1747; *State v. Toler*, 154 Ohio App.3d 590, 2003-Ohio-5129 (3rd Dist.).

{¶ 17} Second, the trial court did make an inquiry into the reasons for appellant's failure to pay his support. Appellant and his probation officer, Kristie Taylor, testified as to appellant's back injury and the necessary surgery which prevented him from working. Taylor testified that appellant had informed her and his former probation officer, Jeanna Jacobs, that the back surgery would prevent him from working and that he was worried about his finances. Taylor also testified regarding a note from appellant's doctor indicating that he would be unable to work for as long as nine months after the surgery. Thus, the trial court satisfied the first requirement of *Bearden* to inquire into the reasons why appellant failed to pay his child support.

{¶ 18} Finally, this case is distinguishable from *Bearden* because the trial court determined that appellant failed to make sufficient bona fide efforts legally to acquire the resources to pay his child support. Although not explicitly stated, the trial court found that appellant failed to "go back to the juvenile court to attempt in any way to revise his child support order." In addition, appellant presented no evidence at the hearing that he made any effort, bona fide or otherwise, to pay his child support. Instead, appellant only informed his probation officers that he would not be able to pay his support due to his back injury. Merely providing a reason why one will not pay his child support is not akin to making a bona fide effort to pay said support.

{¶ 19} Furthermore, even if the doctor's note was evidence that appellant did not willfully refuse to pay his child support, the note only indicates that appellant would not be

able to work for up to nine months after the surgery. Appellant's surgery occurred in March 2010. Therefore, appellant should have been able to return to work, and return to making child support payments, in December 2010. Appellant made one child support payment in February 2011. Thus, appellant's note does not explain appellant's failure to make payments for December 2010, January 2011, and April through June 2011, when the state filed its notice of community control violation.

{¶ 20} Based upon the evidence presented at the hearing, the trial court's statement regarding appellant's failure to contact the juvenile court to discuss his child support can reasonably be interpreted as a finding that appellant failed to make bona fide efforts to acquire the resources to pay his support. Thus, the trial court's ruling satisfied the second requirement of *Bearden*.

{¶ 21} As the trial court's decision is distinguishable from *Bearden*, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in finding that appellant had violated rule twelve of his community control conditions by failing to pay child support. Therefore, appellant's first assignment of error is overruled.

{¶ 22} Assignment of Error No. 2:

{¶ 23} THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE BY IMPOSING A PRISON TERM.

{¶ 24} In his second assignment of error, appellant contends that the trial court erred in not considering the felony sentencing guidelines set forth in R.C. 2929.11 and R.C. 2929.12 when imposing a prison term.

{¶ 25} In determining what sentence to impose after the violation of community control sanctions, the trial court "must consider all relevant facts when sanctioning the violation and must select sanctions which are commensurate with the seriousness of the violation and which adequately protect the public from future crime by the offender." *State v. Catron*, 12th

Dist. No. CA2001-03-040, 2001 WL 1567238, *1 (Dec. 10, 2001), citing R.C. 2929.11(A). In reviewing a trial court's sentencing decision, an appellate court must apply a two-step approach. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. First, the appellate court must "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* "If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id.* As noted above, an abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.* at ¶ 19, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶ 26} With regard to the first prong of the *Kasich* test, appellant concedes that his sentence was within the statutory range. Instead, appellant essentially argues that the trial court failed to consider the factors set forth in R.C. 2929.11 and R.C. 2929.12. As pointed out by appellant, the trial court did not state during the hearing that it had considered R.C. 2929.11 or R.C. 2929.12. However, it is well-settled that a trial court speaks through its journal entries. *State v. Workman*, 12th Dist. No. CA2009-07-039, 2010-Ohio-1011. In this case, the trial court filed two entries in relation to appellant's nonsupport case and domestic violence case and, in both, the trial court stated that it had "considered * * * the principles and purposes of sentencing under [R.C.] 2929.11, and has balanced the seriousness and recidivism factors [of R.C.] 2929.12." The trial court also stated that it had reviewed the record, oral statements, presentence report and probation violation report. Thus, the trial court clearly reviewed and considered the felony sentencing guidelines before imposing its sentence. *See State v. Grundy*, 12th Dist. No. CA2011-09-099, 2012-Ohio-3133, ¶ 52. Therefore, the first prong of the *Kasich* test is satisfied.

{¶ 27} With regard to the second prong of the *Kasich* test, we find that the trial court did not abuse its discretion in revoking appellant's community control and imposing a prison

term. Evidence was presented at the hearing that the ammunition and crack pipes were located in appellant's bedroom, that appellant had agreed to take the ammunition to sell it, and that appellant kept the crack pipes, not for his own use, but for the use of others when they visited his residence. Indeed, appellant concedes that sufficient evidence was presented at the hearing to find that appellant violated his community control by possessing or controlling the ammunition and drug paraphernalia. Additionally, evidence was presented that appellant failed to pay his child support for over a year and could only explain the failure for a period of nine months. Thus, as a sentencing court may impose a longer sanction, a more restrictive sanction, or a specific prison term upon the finding of a community control violation, we cannot say that the trial court abused its discretion in revoking appellant's community control and imposing a prison term. *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, ¶ 6.

{¶ 28} Accordingly, appellant's second assignment of error is overruled.

{¶ 29} Judgment affirmed.

RINGLAND and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.