[Cite as *State v. Davis*, 2017-Ohio-8873.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105299

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL L. DAVIS

DEFENDANT-APPELLANT

JUDGMENT:
VACATED IN PART; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-606233-A

BEFORE: Kilbane, P.J., Boyle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: December 7, 2017

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Michael L. Davis ("Davis"), appeals from his three-year sentence following the trial court's finding that he violated the terms of his community control sanctions. Because of errors in the trial court's sentencing entries of August 25 and December 6, 2016, we must remand the matter for correction of a clerical error in the August 25, 2016 entry, and we vacate the December 6, 2016 entry and remand for a resentencing hearing.

{¶2} In May 2016, Davis was charged with attempted murder, domestic violence, and two counts of felonious assault.[1] Pursuant to a plea agreement, Davis pled guilty to an amended count of felonious assault (Count 3), with the forfeiture specification, and domestic violence (Count 4).[2] The remaining counts (Counts 1 and 2) were nolled. In August 2016, the trial court sentenced Davis to:

> the Cuyahoga County Jail for a term of 6 month(s).
> CT.2 [Davis] sentenced to 6 months.
> Execution of sentence suspended. The court finds that community control sanction will adequately protect the public and will not demean the seriousness of the offense. It is therefore ordered that [Davis] is sentenced to two years of community control on each count[.]
>
> * * *
> Violation of the terms and conditions may result in more restrictive sanctions, or a prison term of 2 year(s) as approved by law.

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[1]The attempted murder and felonious assault counts each carried a forfeiture of a weapon, notice of prior conviction, and a repeat violent offender specification.

[2]The notice of prior conviction and repeat violent offender specifications were deleted.

> [Davis] ordered to be placed into the Nancy McDonnell CBCF program for a period of 6 months[.]

{¶3} In December 2016, Davis returned to the trial court before a visiting judge for a hearing on alleged violations of his community control sanctions for: (1) being absent from CBCF without permission for a total of 33 hours; and (2) aiding and abetting other people in harassing Davis's ex-girlfriend (who was not the victim in the underlying case). Relevant to this appeal, the following evidence was adduced at the hearing.

{¶4} Beniah James ("James") is Davis's former girlfriend. James advised the court that she has been receiving threatening text messages, at the direction of Davis, from people she does not know personally. She never provided them with her phone number. She stated that these messages threatened to hurt her and her children, including statements that they were "going to rape my daughter, which is my oldest, kidnap my kids on the bus, shoot me and my boyfriend[.]" James had reported these incidents to the police. James explained that she believed Davis was the source of these threatening messages because one of the individuals indicated to her that Davis directed the individual to make the phone call, and in exchange, Davis would provide that person with cigarettes. James also explained the text messages were sent from people who know Davis because "they had sent messages saying [Davis] gave them my number, my address." She stated that appellant has called her himself on at least one occasion and that she received a threatening text message approximately four hours thereafter.

{¶5} On his behalf, Davis denied any involvement with the harassment.

{¶6} At the conclusion of the hearing, the trial court found Davis in violation for "making threatening phone calls." The visiting judge terminated Davis's community control sanctions and sentenced him to "the Lorain Correctional Institution for a term of 3 year(s)."

{¶7} Davis now appeals, raising the following three assignments of error for review:

Assignment of Error One

> The trial court erred when it imposed a three-year sentence for a violation of community control when, at sentencing, [Davis] was advised that a violation of community control was punishable by two years of imprisonment.

Assignment of Error Two

> There was insufficient evidence that [Davis] was involved in making threatening phone calls.

Assignment of Error Three

> The trial court's failure to hear sworn testimony requires a new community control sanctions violation hearing.

Sentence

{¶8} In the first assignment of error, Davis argues that his sentence must be vacated and the case remanded for resentencing because the trial court could not impose a three-year prison term for a community control violation when he was previously ordered to a two-year prison sentence for a violation. The state of Ohio agrees that Davis could not be sentenced to three years in prison for a violation. Both Davis and the state rely on *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837. In *Brooks*, the Ohio Supreme Court held that

> a trial court sentencing an offender to a community control sanction must, at the time of the sentencing, notify the offender of the specific prison term that may be imposed for a violation of the conditions of the sanction, as a prerequisite to imposing a prison term on the offender for a subsequent violation.

Id. at paragraph two of the syllabus.

{¶9} Here, Davis was advised of a specific prison term for a community control violation, but the trial court later sentenced him to a different prison term. The record reveals that Davis was ordered, in August 2016, to a prison term of "2 year(s)" in the event he violated the terms of his community control. When he was found to be in violation of community control in December 2016, the trial court, through a visiting judge, issued a prison sentence of "3 year(s)." This part of Davis's sentence is contrary to law. Because the three-year term was imposed in error, we must vacate this sentence and remand the matter for resentencing on Davis's community control violation in compliance with the trial court's August 25, 2016 entry.

{¶10} We also note the clerical error in the August 25, 2016 sentencing entry. The entry states "CT.2 [Davis] sentenced to 6 months." However, the entry additionally acknowledges that "Count(s) 1, 2 was/were nolled." On remand, the trial court shall correct this clerical error to accurately reflect that the sentence, as imposed at the sentencing hearing for Count 3, is six months at the CBCF and two years of community control sanction, and the sentence for Count 4 is a suspended sentence of six months in jail and two years of community control sanction.

{¶11} Accordingly, the first assignment of error is sustained.

Community Control Violation Hearing

{¶12} In the second and third assignments of error, Davis argues there was insufficient evidence to find that he was involved in making threatening phone calls, and the trial court's "failure to hear sworn testimony" requires a new violation hearing.

{¶13} With respect to a community control revocation hearing, this court has previously stated that:

> A community control sanction revocation hearing is not a criminal trial. Rather, it is "'an informal hearing structured to assure that the finding of a * * * [community control] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the * * * [individual's] behavior.'" *State v. Hylton*, 75 Ohio App.3d 778, 781, 600 N.E.2d 821 (4th Dist.1991), quoting *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). _ _Further, the rules of

> evidence do not apply to community control sanction proceedings. Evid.R. 101(C)(3).

State v. Fonte, 8th Dist. Cuyahoga No. 98144, 2013-Ohio-98, ¶ 6.

{¶14} Additionally, because a community control revocation hearing is not a criminal trial,

> the State is not required to establish a violation of the terms of community control "beyond a reasonable doubt." *State v. Hayes*, Cuyahoga App. No. 87642, 2006-Ohio-5924, ¶ 11, citing *State v. Payne*, Warren App. No. CA2001-09-081, 2002-Ohio-1916; [*Hylton*]. Instead, the quantum of evidence required to establish a violation and to revoke a community control sanction must be "substantial." *Hylton* at 782. In a community control violation hearing, the trial court must consider the credibility of the witnesses and make a determination based on substantial evidence. *Hayes* at ¶ 11, citing *State v. Miller*, Franklin App. No. 03AP-1004, 2004-Ohio-1007. A trial court's decision finding a violation of community control will not be disturbed on appeal absent an abuse of discretion. *Hayes* at ¶ 11.

State v. Lenard, 8th Dist. Cuyahoga No. 93373, 2010-Ohio-81, ¶ 14, *discretionary appeal not allowed*, 125 Ohio St.3d 1441, 2010-Ohio-2212, 927 N.E.2d 12. "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, citing *State v. Middlebrooks*, 5th Dist. Tuscarawas No. 2010 AP 08 0026, 2011-Ohio-4534.

{¶15} Davis complains there was no substantial evidence that he was an aider and abetter in the harassment because James had no firsthand knowledge that he gave her number to others. A review of the transcript, however, reveals that James's statements allowed the trial court to conclude that Davis made threatening phone calls to her. James

stated that she did not know the individuals who harassed her. These individuals sent her messages saying that Davis gave them her number and address. One of these individuals indicated that Davis gave them cigarettes in exchange for harassing her. The trial court was in the best position to assess the credibility of Davis and James and found James more credible.

{¶16} Based on the foregoing, the trial court did not abuse its discretion when it found that Davis violated his sanctions by making threatening phone calls.

{¶17} Davis, relying on *State v. Bailey*, 7th Dist. Mahoning No. 11-MA-3, 2012-Ohio-1694, also argues that he is entitled to a new community control violation hearing because the court did not hear sworn testimony.

{¶18} In *Bailey*, the defendant-Bailey argued that his due process rights were violated at his community control revocation hearing when the trial court did not hear sworn testimony. In addressing Bailey's argument, the court stated that:

> "Revocation of probation implicates two due process requirements. The trial court is first required to conduct a preliminary hearing to determine whether there is probable cause to believe that the defendant has violated the terms of his probation. *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656; *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484. * * *
>
> Secondly, the court is required to hold a final hearing to determine whether probation should be revoked. At the final revocation hearing, the state must: (1) provide the probationer with written notice of the alleged violations of probation; (2) disclose the evidence against him; (3) give the probationer an opportunity to be heard in person and to present witnesses and documentary evidence; (4) allow him to confront and cross-examine adverse witnesses; (5) afford him a neutral and detached hearing body; and (6) provide the probationer with a written statement by the factfinder as to the evidence relied upon and the reasons for revoking probation. *State v.*

> *Myers* (June 21, 1996), 7th Dist. No. 95-CO-29, 1996 Ohio App. LEXIS 2608, citing *Morrissey*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484."

Id. at ¶ 11, quoting *State v. Brown*, 7th Dist. Mahoning No. 10 MA 34, 2010-Ohio-6603, ¶ 14-15.

{¶19} The *Bailey* court then reviewed the alleged error under a plain error standard of review because Bailey did not object during the hearing. *Id.* at ¶ 13. The court stated:

> The unsworn testimony during the revocation hearing violates Evid.R. 603, which mandates that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."
>
> Non-compliance with Evid.R. 603 was addressed by the court in *State v. Norman*, 137 Ohio App.3d 184, 137 Ohio App.3d 184, 738 N.E.2d 403 (1st Dist.1999) in the context of an ineffective assistance of counsel claim. There the defendant argued that he was denied constitutionally effective representation because trial counsel failed to object to a witness' unsworn testimony. The First District concluded that while it was error for unsworn testimony to be admitted as evidence, the error was not prejudicial because counsel was able to effectively cross-examine the witness. *Id.* at 198.
>
> Importantly, the court in *Norman* noted that an error pursuant to Evid.R. 603 may be waived: "Evid.R. 603, R.C. 2317.30, and Section 7, Article I of the Ohio Constitution all require that a witness be administered an oath before testifying. While it is error for unsworn testimony to be admitted as evidence, such error is waived by failing to bring it to the court's attention. This is because the failure to administer an oath can easily be corrected at the time; an attorney may not fail to object and then cite the lack of an oath as error." *Norman* at 198.

Id. at ¶ 21-23.

{¶20} The *Bailey* court reasoned that, based on the totality of the circumstances, Bailey was given an opportunity to present his side of the story and confront the probation

officer if he had chosen to do so. *Id.* at ¶ 24. As a result, the court concluded that the outcome of the proceeding would not clearly have been otherwise but for the error, and rejected Bailey's argument. *Id.* *See also State v. Fonte*, 8th Dist. Cuyahoga No. 98144, 2013-Ohio-98, ¶ 10, citing *State v. Rose*, 8th Dist. Cuyahoga No. 70984, 1997 Ohio App. LEXIS 1072 (Mar. 20, 1997) ("This court has previously held that the failure to object to the unsworn testimony of a probation officer at a violation hearing waives any error regarding the trial court's determination."); *see also State v. Osume*, 1st Dist. Hamilton No. C-140390, 2015-Ohio-3850.

{¶21} Similarly, in the instant case, Davis has failed to demonstrate that the outcome of the proceeding would have been different but for the error. A review of the record reveals that Davis never objected to the unsworn testimony of the witnesses during the community control violation hearing. Additionally, Davis was provided with an opportunity to present his side of the story and attempt to dispute the allegations made by the state's witnesses. Thus, no manifest miscarriage of justice occurred, which would have mandated reversal of the revocation findings.

{¶22} The second and third assignments of error are overruled.

{¶23} Accordingly, we remand the matter for the trial court to enter a nunc pro tunc entry clarifying the clerical error in the August 25, 2016 entry, and we vacate the sentence in the December 6, 2016 entry and remand for resentencing for the court to impose the two-year prison sentence for Davis's community control violation.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR