[Cite as *State v. Russell*, 2009-Ohio-3147.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-142**
- vs -	:	
CYNTHIA L. RUSSELL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 07 CR 000850.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Cynthia L. Russell, appeals the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court terminated Russell's community control sanctions and sentenced her to a term of eighteen months in the Ohio Reformatory for Women. For the following reasons, we affirm the decision of the trial court.

{¶2} On March 13, 2008, Russell pled guilty to one count of Theft, a felony of the fourth degree, in violation of R.C. 2913.02(A)(1). Russell was sentenced to three years of community control, subject to the general supervision and control of the Adult Probation Department. Additionally, she was sentenced to 120 days in the Lake County Jail, with credit for time served, 200 hours of community service, and ordered to pay restitution in the amount of $5,600.

{¶3} On July 2, 2008, Russell filed a Motion for Review Hearing regarding the future of her probation. On August 11, 2008, the trial court found that Russell was sentenced in the Mahoning County Common Pleas Court on June 8, 2008, to a prison term of 27 months. Further, the court held that Russell was now "unable to complete the terms of her probation and it should therefore be terminated," and thus, set the matter for hearing on the termination of probation and sentencing.

{¶4} After the hearing on the termination of probation, Russell's community control sanctions were terminated and she was sentenced to a term of 18 months in the Ohio Reformatory for Women, with credit for 45 days time served, to run concurrent with the Mahoning County Common Pleas sentence.

{¶5} Russell timely appeals and raises the following assignment of error: "The trial court abused its discretion when it revoked the defendant-appellant's community control sanctions and sentenced her to prison absent a finding that she willfully or intentionally violated a condition of community control."

{¶6} The decision to revoke probation rests within the sound discretion of the trial court. *State v. McKnight* (1983), 10 Ohio App.3d 312, 313. Unless there is an

abuse of discretion, a reviewing court will not reverse the trial court's decision. An abuse of discretion implies more than an error of law or judgment; it connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citation omitted).

{¶7} "The privilege of probation [or community control] rests upon the probationer's compliance with the probation conditions and any violation of those conditions may properly be used to revoke the privilege." *State v. Bell* (1990), 66 Ohio App.3d 52, 57. "Because a revocation hearing is not a criminal trial, the State only has to introduce evidence showing that it was more probable than not that the person on probation or community control violated the terms or conditions of the same." *State v. Willis*, 5th Dist. No. 05 CA 42, 2005-Ohio-6947, at ¶9 (citation omitted).

{¶8} In her sole assignment of error, Russell asserts "that the imposition of the prison sentence by the other county was beyond her control and that she did not willfully violate the terms of her community control." Therefore, she claims that she "cannot now be found in violation of a 'condition' she had no control over." We disagree.

{¶9} This court has previously addressed whether the showing of a willful violation was required in *State v. Stockdale,* 11th Dist. No. 96-L-172, 1997 Ohio App. LEXIS 4363. We found that "[t]here is nothing in Crim.R. 32.3 *** that mandates that the state must introduce evidence showing that the probation violation was wilful (sic)." Id. at *5; see also, *State v. Miller*, 6th Dist. No. F-05-016, 2006-Ohio-4810, at ¶15 ("There is no requirement that the state prove willfulness before the court can revoke a defendant's community control.") (citations omitted); *State v. Wolfson*, 4th Dist. No. 03CA25, 2004-Ohio-2750, at ¶12 ("the State only had to prove that Wolfson violated the

terms of her community control sanctions, not that she had a mens rea of 'willfulness,' before the court could revoke Wolfson's community control sanctions").

{¶10} In *Stockdale*, the appellant relied on two cases, which Russell also cites, *State v. Bleasdale* (1990), 69 Ohio App.3d 68, and *State v. Scott* (1982), 6 Ohio App.3d 39, "as support for the proposition that a probationer must intentionally depart from the terms of his or her probation in order for a revocation to be proper." *Stockdale*, 1997 Ohio App. LEXIS 4363, at *5.

{¶11} This court found that the appellant's reliance on the two above cases was misplaced. In both cases, the violations were due to circumstances beyond the defendants' control. "Thus, those rulings indicate that an inability to comply can not (sic) constitute grounds for revocation. This is not equivalent to requiring an intent to violate a probation term." Id. at *6. Consequently, because the appellant's "actions alone resulted in the probationary infractions," we found that the trial court did not abuse its discretion in revoking her probation. Id. at *10-*11.

{¶12} In addition to *Stockdale* and *Bleasdale,* Russell also cites to *State v. Hardy*, 5th Dist. No. 01CA15, 2002-Ohio-899, to show that a willful violation of a condition is necessary to revoke community control.

{¶13} In *Hardy*, the trial court modified the community control sanction by requiring the appellant to live at his sister's house and receive home study. However, the appellant's sister was not able to have the defendant reside in her home and the trial court found that the appellant violated his community control conditions. The appellate court found that the "appellant's placement with his sister was an expectation, not a condition." Id. at *7. Consequently, the "appellant did not violate a condition of his

community control sentence" therefore, the "trial court erred in revoking his community control and imposing a prison sentence." Id.

{¶14} In contrast to *Hardy*, *Stockdale,* and *Bleasdale*, Russell's violations were the result of actions which she had complete control over. Russell argues that the court was aware of her upcoming sentencing in Mahoning County; however, there is no indication that the trial court knew of the likelihood of imprisonment and Russell failed to provide a transcript of the original sentencing hearing. According to App.R. 9, an "appellant has the duty to provide this court with the necessary transcripts of the record below in order to demonstrate any claimed error." *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶31 (citation omitted).

{¶15} The "cases holding the state must prove a willful and wanton violation *** involve probationers' failure to pay fees *** or failure to complete a drug or alcohol rehabilitation program through no fault of the probationer." *State v. Reece*, 3rd Dist. No. 9-94-48, 1995 Ohio App. LEXIS 1665, at *3 (citations omitted).

{¶16} The instant case is distinguishable from the cases requiring proof of willfulness; therefore, the trial court did not abuse its discretion when it revoked Russell's community control sanctions absent a finding that she willfully violated a condition of community control.

{¶17} Russell's sole assignment of error is without merit.

{¶18} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, revoking Russell's community control sanctions and sentencing her to a term of eighteen months, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

TIMOTHY P. CANNON, J., concurs with Concurring Opinion.

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TIMOTHY P. CANNON, J., concurring.

{¶19} I concur with the judgment of the majority. I write to address the statutory provision that addresses the fact pattern set forth in this case. Specifically, R.C. 2929.15(A)(1) provides, in pertinent part:

{¶20} "The duration of all community control sanctions imposed upon an offender under this division shall not exceed five years. If the offender absconds or otherwise leaves the jurisdiction of the court in which the offender resides without obtaining permission from the court or the offender's probation officer to leave the jurisdiction of the court, or if the offender is confined in any institution for the commission of any offense while under a community control sanction, *the period of the community control sanction ceases to run* until the offender is brought before the court *for its further action*." (Emphasis added.)

{¶21} This applies directly to the scenario presented to the trial court for consideration. Clearly, the above statute anticipates there would be occasions such as this where the trial court would need to take some action because the offender would not be compliant with the community control sanctions due to the offender's subsequent incarceration. Also clear is that the period of community control sanction is stayed while the offender is incarcerated, at least unless and until the offender is "brought before the court." R.C. 2929.15(A)(1).

{¶22} Therefore, the question that should be addressed is: at such time when the offender is brought before the court, what are the court's options "for its further action"? I would hold that in this scenario, the trial court has broad discretion in what it feels is appropriate. This could include what the trial court did in this case, i.e. order the offender to serve part or all of the originally imposed sentence, stay the term of the community control until after the offender is released from prison in the other case, or impose some other condition compatible with the fact that the offender is incarcerated, such as continued counseling or attending AA meetings at the facility where the offender is incarcerated.