[Cite as *State v. Conn*, 2011-Ohio-5865.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0067**
- vs -	:	
SHAWNA A. CONN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2009 CR 0625.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender, and *Melissa M. Prendergast,* Assistant State Public Defender, 250 East Broad Street, #1400, Columbus, OH 43215 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Shawna A. Conn, appeals from the Judgment Entry of the Portage County Court of Common Pleas, in which the trial court terminated Conn's community control sanctions and sentenced her to a term of eighteen months in prison. The issues to be decided by this court are whether the state must prove a probation violation was willful in order for probation to be revoked and whether counsel

is ineffective by failing to request a continuance. For the following reasons, we affirm the decision of the court below.

{¶2} On October 9, 2009, Conn was indicted on one count of Gross Sexual Imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4), for having sexual contact with a child under the age of thirteen.

{¶3} Following a competency evaluation, in which Conn was found to be competent to stand trial, a plea hearing was held on January 4, 2010. At this hearing, both sides stipulated to the finding of competency and the report, which indicates that Conn is capable of understanding legal proceedings and assisting in her own defense. Conn entered a plea of guilty, pursuant to Crim.R. 11 plea negotiations, to an amended count one of the indictment, Gross Sexual Imposition, a felony of the fourth degree, in violation of R.C. 2907.05(A)(1). Conn's counsel noted during this hearing that he would not argue bond since, "at this point in time, because of the presence of children in the household, there is nowhere for her to go." Counsel stated that, prior to sentencing, he would attempt to find an appropriate place for Conn to live. The trial court entered a Judgment Entry on January 6, 2010, finding Conn had entered a knowing and voluntary plea of guilty to the charge of Gross Sexual Imposition. The court ordered that a presentence investigation be completed prior to sentencing.

{¶4} On March 15, 2010, the trial court held a sentencing hearing in this matter. During the hearing, Conn's counsel expressed concern that Conn has "mental retardation that *** effect[s] her ability to function in an everyday world," she functions at a ten or eleven year old level, and has a limited support system. He also explained that Conn did not have a place to live, because her parents and foster parents have children

living in their homes. Counsel attempted to find an in-house treatment facility, and found a group home in Twinsburg, but that home could not take Conn due to limited bed availability and Conn's lack of funds. Counsel stated that Ron and Rose Poling, friends of Conn's family, were willing to allow Conn to live in their home.

{¶5} The trial court sentenced Conn to serve 180 days in jail, with credit for 205 days served. Conn was placed on intensive probation for one year and general probation for four additional years. Conn was found to be a Tier II sex offender. The court also informed Conn that if she violated the terms of her probation, she would "go to prison for eighteen months." At the conclusion of the hearing, the court stated that "[i]f the Polling family at any time is unable to take care of [Conn], then we're going to have to make other arrangements and may have to do further incarceration or possibly find a group home through Coleman [Professional Services] or whatever we can find."

{¶6} On March 17, 2010, the trial court issued a Judgment Entry, reflecting the foregoing sentence. The Entry also stated, regarding probation, that Conn "shall abide by all standard rules" and also must adhere to other listed conditions, including that she must not be alone with any child under the age of eighteen, and that she "shall reside with the Poling family and be placed on house arrest for six months except for probation, medical and counseling." The Judgment Entry also stated that the court notified Conn that if she violates the terms of community control, she "will serve a specific prison term of eighteen months."

{¶7} On June 10, 2010, the Portage County Adult Probation Department filed a Request to Modify/Revoke Probation, asserting that Conn "failed to maintain a residence pursuant to Sex Offender Registration Requirements."

{¶8} A hearing was scheduled for the Request to Modify on June 21, 2010. Initially, the trial court stated that "there have been several problems with this particular case, not as a result of the Defendant's behavior but more residency issues." Conn's counsel then stated that he needed to have more evaluations completed to find a housing situation for Conn and requested a continuance of the hearing for thirty days. The court granted this continuance and the hearing was rescheduled for July 26, 2010.

{¶9} At the July 26 hearing, the court noted that "[t]here has been some difficulty placing the Defendant because of her specific needs into a particularized housing." Conn's counsel explained that "the people she was living with were evicted from their home and that dispossessed [Conn]." The court stated that "[t]here is just nowhere to place the Defendant." During this hearing, a letter written by Conn to the trial judge was presented. The letter, in pertinent part, stated: "I am done with all of this. I would just like to go to prison and do my time. *** I don't really want to go to prison but I will do what I have to do. I thank you for trying to find me a place's (sic) so you didn[']t have to send me to prison, but I would like to get this off my back. I know you wanted me to get help that[']s why you are not sending me to prison but just send me so it will be done and over with. I want to move on with my life. ***" Conn's counsel stated that he had reviewed the letter written by Conn and that the defense would "stand on that." The State recommended putting Conn in prison. Conn was given the opportunity to make a statement and did not wish to address the court. The court found that "because of our inability [to] find proper placement for the Defendant with her particularized needs, it is the only option of this Court to sentence the Defendant to the Ohio Department of Corrections for a period of eighteen months." In a July 29, 2010

Judgment Entry, the trial court found the request to revoke probation well-taken and held that "local community control is no longer sufficient, therefore a more restrictive sanction is necessary." The court ordered that Conn be sentenced to eighteen months in prison to be served for the offense of Gross Sexual Imposition, with credit for 255 days served.

{¶10} Conn timely appeals and asserts the following assignments of error:

{¶11} "[1.] Shawna Conn's rights to due process and equal protection were violated when the trial court revoked her community control and sentenced her to eighteen months in prison solely because Ms. Conn was indigent and dispossessed. (July 29, 2010 Judgment Entry; Status Conf. T.p. 4); Fourteenth Amendment to the United States Constitution.

{¶12} "[2.] Trial counsel provided ineffective assistance of counsel, in violation of the Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution. (Status Conf. T.p. 4); *Strickland v. Washington* (1984), 466 U.S. 668."

{¶13} Generally, the decision to revoke community control is evaluated under an abuse of discretion standard. *State v. Russell*, 11th Dist. No. 2008-L-142, 2009-Ohio-3147, at ¶6, citing *State v. McKnight* (1983), 10 Ohio App.3d 312, 313.

{¶14} Conn concedes that plain error is the applicable standard in this case, as trial counsel failed to object to the revocation of Conn's community control. Failure to object to due process violations during a probation revocation hearing waives all but plain error. *State v. Sallaz*, 11th Dist. No. 2003-T-0009, 2004-Ohio-3508, at ¶40. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). An alleged error constitutes plain

error only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶108 (citations omitted).

{¶15} In her first assignment of error, Conn argues that her due process and equal protection rights were violated by the revocation of her community control. Specifically, Conn asserts that it was unfair to revoke community control, as she did not willfully violate the terms of her probation and was unable to secure appropriate housing due to her indigence and developmental disability.

{¶16} "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. Since "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." *Russell*, 2009-Ohio-3147, at ¶7 (citation omitted).

{¶17} Conn does not argue that the State failed to prove she violated the terms of her probation or that she was not given a fair hearing. She instead argues only that the violation of probation was not willful.

{¶18} Generally, the state is not required to show that a probation violation is willful. *Russell*, 2009-Ohio-3147, at ¶9; *State v. Stockdale*, 11th Dist. No. 96-L-172, 1997 Ohio App. LEXIS 4363, at *5 ("[t]here is nothing in Crim.R. 32.3 *** that mandates that the state must introduce evidence showing that the probation violation was willful"); *State v. Miller*, 6th Dist. No. F-05-016, 2006-Ohio-4810, at ¶15 ("[t]here is no

requirement that the state prove willfulness before the court can revoke a defendant's community control") (citations omitted).

{¶19} Conn asserts that in certain cases, such as those involving the payment of fees and restitution, the State must prove a willful violation of probation. She cites several cases to support this proposition and asserts that it is applicable in the current case. See *Bearden v. Georgia* (1983) 461 U.S. 660; *State v. Dockery*, 187 Ohio App.3d 798, 2010-Ohio-2365; *State v. Walden* (1988), 54 Ohio App.3d 160; *State v. Scott* (1982), 6 Ohio App.3d 39.

{¶20} The cases cited by Conn stand for the proposition that a trial court may not revoke a defendant's probation for failure to pay a fine or make restitution absent evidence and findings that the defendant was somehow responsible for the failure. See *Walden*, 54 Ohio App.3d at 164. Each of these cases deals solely with situations in which the defendant violated his probation by failing to pay a required fine or restitution. They do not deal with facts such as those in the present case, where the defendant has failed to follow conditions related to her living situation. Although Conn attempts to compare the two situations, stating that her lack of resources precluded her from obtaining housing in accordance with the conditions of her probation, she fails to provide case law to support this argument.

{¶21} While Conn relies on the aforementioned cases, including *Bearden*, we note that the situation in this case is different, as there are additional considerations beyond just the payment of a fine. Conn violated a term of her probation that required her to live with the Poling family and in a household with no children. This term was intended to protect the safety of children and prevent the occurrence of future crimes.

The *Bearden* court recognized that a probationer's lack of fault or willfulness would not prevent revocation of probation in situations that pose a "threat to the safety or welfare of society." 461 U.S. at 668, fn. 9. In the current situation, the safety of the community is involved, as Conn's failure to follow conditions related to her housing may place children at risk. Therefore, this case is distinguishable from those cited by Conn, requiring proof of willfulness in cases involving failure to pay a fine. Although the conditions regarding housing may have been difficult to comply with, they serve a different purpose than paying a fine.

{¶22} We also note that in *Bearden*, the court found that, in cases where a defendant cannot pay, the trial court must seek alternative means of punishment. However, if the trial court determines alternative means are not adequate, then imprisonment may still be allowed, even for the failure to pay a fine. 461 U.S. at 668, 672; *Dockery*, 2010-Ohio-2365, at ¶15. In the present case, the record shows that alternative options were considered, as efforts were made on several occasions to find different housing situations. Conn herself recognized these efforts in her letter, and thanked the court for attempting to find her housing options. The trial court stated that it had no other options and found that community control was not sufficient. Based on the foregoing, we cannot find that the trial court committed plain error when revoking Conn's community control.

{¶23} The first assignment of error is without merit.

{¶24} In her second assignment of error, Conn argues that trial counsel was ineffective by failing to object to the court's decision to send Conn to prison for eighteen

months and by failing to request a continuance to further investigate residential placement options for Conn.

{¶25} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's performance was reasonable considering all the circumstances. *** Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 688-689. "There is a strong presumption that the attorney's performance was reasonable." *State v. Gotel*, 11th Dist. No. 2006-L- 015, 2007-Ohio-888, at ¶10.

{¶26} If a deficiency in counsel's performance is found, the appellant must then show that prejudice resulted. *State v. Swick*, 11th Dist. No. 97-L-254, 2001-Ohio-8831, 2001 Ohio App. LEXIS 5857, at *5. "To warrant reversal, 'the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Stojetz*, 84 Ohio St.3d 452, 457, 1999- Ohio-464, citing *Strickland*, 466 U.S. at 694.

{¶27} Conn asserts that her trial counsel was ineffective by failing to request a second continuance during the probation revocation hearing, in order to further investigate residential placement options. The record reflects that counsel attempted to find alternate placement options for Conn on several different occasions. First, during

the plea hearing, counsel noted that Conn did not have a place to go, but stated that, prior to sentencing, he would attempt to find a place for her to live. At sentencing, counsel noted that he had checked with family members and friends to find a housing option for Conn. He stated that he had also tried to place Conn in a residential treatment facility but was unsuccessful due to financial concerns and a lack of available beds. In addition, on June 21, 2010, trial counsel requested a continuance of the revocation hearing, in order to continue looking for a suitable housing situation. Although ultimately unsuccessful, Conn's counsel made several attempts to locate appropriate housing.

{¶28} In addition, Conn expressed that she did not wish for counsel or the court to continue searching for housing. She wrote a letter to the court, dated July 25, 2010, which stated several times that she did not want to continue looking for placement options, but instead wanted to go to jail and "do my time." Conn's counsel indicated at the revocation hearing that the defense was standing on the statements made in the letter. By doing so, counsel was simply following his client's wishes. "Generally, an attorney does not render ineffective assistance by deferring to a client's wishes." *State v. Reine*, 4th Dist. No. 06CA3102, 2007-Ohio-7221, at ¶43; *State v. McNeill*, 83 Ohio St.3d 438, 451, 1998-Ohio-293 ("[i]t is not ineffective assistance for counsel to accede to a client's wishes after advising the client of counsel's contrary opinion"). Conn's counsel was not ineffective when he followed his client's wishes to stop looking for additional placement options.

{¶29} Conn is also unable to show that she suffered prejudice as a result of counsel's actions. We cannot presume that, had trial counsel requested a second

continuance, the circumstances would have changed or the result of the proceedings would have been different. Counsel had been unable to find a placement prior to the second hearing and may not have been able to find one even had he taken more time to do so. In light of the foregoing, we cannot find that counsel was ineffective or that Conn was prejudiced by her counsel's actions.

{¶30} The second assignment of error is without merit.

{¶31} Based on the foregoing, the Judgment Entry of the Portage County Court of Common Pleas, revoking Conn's community control sanctions and sentencing her to a term of eighteen months in prison, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.