

[Cite as *State v. Richard*, 2016-Ohio-8562.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 15 MA 0186
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
SAMUEL RICHARD	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Youngstown Municipal Court of Mahoning County, Ohio Case No. 14 TRD 3253
---------------------------	--

JUDGMENT:	Affirmed.
-----------	-----------

APPEARANCES:

For Plaintiff-Appellee:	Atty. Dana Lantz City Prosecutor Atty. Jeffrey Moliterno Assistant Prosecuting Attorney 26 S. Phelps St., Fourth Floor Youngstown, Ohio 44503
-------------------------	--

For Defendant-Appellant:	Atty. Michael O. Kivlighan 3685 Stutz Dr., Suite 100 Canfield, Ohio 44406
--------------------------	---

JUDGES:

Hon. Cheryl L. Waite  
Hon. Mary DeGenaro  
Hon. Carol Ann Robb

Dated: December 27, 2016

[Cite as *State v. Richard*, 2016-Ohio-8562.]  
WAITE, J.

{¶1} Appellant Samuel Richard appeals the revocation of his probation by Youngstown Municipal Court. Based upon the following, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

{¶2} On November 21, 2014, Appellant was sentenced to one year of probation on an unclassified misdemeanor conviction for driving under suspension and for a violation entailing having a loud noise emanate from a motor vehicle, a first degree misdemeanor. On August 13, 2015, a notification of possible probation violation was issued along with a *capias* for Appellant's arrest. The notice indicated that Appellant had violated a condition of his community control, which was to obey all federal, state, and local laws, after he was convicted on another charge of driving under suspension.

{¶3} A probable cause hearing was held on August 31, 2015. At the hearing, counsel for Appellant informed the court that Appellant was prepared to stipulate to probable cause and requested a full probation violation hearing. On September 22, 2015, a full probation violation hearing was held. At the hearing, Appellant's counsel made an oral motion to continue the hearing, which was overruled by the trial court. Appellant was sentenced to 180 days of imprisonment for the driving under suspension and loud music offenses with credit for time served, and his probation was terminated. Appellant filed the instant appeal.

#### ASSIGNMENT OF ERROR

THE TRIAL COURT VIOLATED MR. RICHARD'S DUE PROCESS RIGHTS BY FAILING TO GIVE HIM THE OPPORTUNITY TO PRESENT EVIDENCE OR CHALLENGE THE ALLEGATIONS AGAINST HIM.

{¶4} In his sole assignment of error Appellant argues that the trial court erred in failing to give him an opportunity to present evidence at the probation violation hearing before terminating his probation and sentencing him to imprisonment.

{¶5} Revocation of probation raises two due process requirements. First, the trial court must conduct an initial hearing to determine whether there is probable cause to believe that defendant violated the terms of his probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Second, the court must hold a final hearing to determine whether probation should be revoked. *State v. Brown*, 7th Dist. No. 10 MA 34, 2010-Ohio-6603, ¶ 12. The purpose of such a hearing is to inquire into whether the probationer's conduct comported with the terms of his court-ordered probation.

{¶6} It also should be noted that, "[w]ith respect to a community control violation for failure to obey the law, \* \* \* whether a defendant is actually convicted of an offense is immaterial, if the trial court examines the evidence and concludes that appellant failed to obey federal, state, or local laws." *State v. Kincer*, 12th Dist. No. CA2005-07-059, 2006-Ohio-2249, ¶ 8, fn. 2. The standard of evidence required to revoke probation is not beyond a reasonable doubt but, "merely evidence of a substantial nature showing that the probationer has breached a term or condition of

his probation.” *State v. Walker*, 7th Dist. No. 93-J-48, 1995 WL 447663, \*4 (July 26, 1995), citing *State v. Mingua*, 42 Ohio App.2d 35, 40, 327 N.E.2d 791 (10th Dist.1974).

{¶7} Moreover, a hearing on revocation is not subject to the rules of evidence. Evid.R. 101(C)(3). The decision to revoke probation is within the sound discretion of the trial court. Therefore, a trial court’s decision to terminate probation is reviewed utilizing an abuse of discretion standard. *State v. Scott*, 6 Ohio App.3d 39, 41, 452 N.E.2d 517 (2d Dist.1982). An abuse of discretion “connotes more than error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶8} Appellant argues the trial court terminated his probation without allowing him to present evidence regarding the charges against him. On August 13, 2015, a notification of possible probation violation was issued along with a capias for Appellant’s arrest. The notice reflected that Appellant had violated a condition of his community control which was to obey all federal, state, and local laws, by being convicted on another charge of driving under suspension.

{¶9} The requisite two hearings were held in this case. At the first, on August 31, 2015, Appellant stipulated to probable cause. Appellant’s counsel stated:

Good-morning, Your Honor. Mr. Richard is approaching. This matter is appointed to Attorney Michael Kivligan. Attorney John Ams standing in for the record. This is a probable cause hearing I understand for today. I have spoken with Mr. Richard extensively about this matter and at this

time he is prepared to stipulate to probable cause and ask that this matter be set for full probation violation hearing.

(8/31/15 Tr., p. 3.)

**{¶10}** The matter was set for a final hearing to determine whether Appellant's probation should be revoked. At the hearing, the trial court noted that Appellant had pleaded no contest and was convicted of another charge of driving under suspension. The court noted:

State versus Samuel Richard. We are set for a final probation violation hearing today. Mr. Richard was convicted of driving under suspension and violating the City's loud music ordinance. He was placed on basic probation for a period of a year, financial sanctions were imposed as well. He was supposed to stay out of trouble and he didn't do that because he got a new driving under suspension. Apparently, there is other stuff going on as well.

(9/22/15 Tr., p. 3.) Appellant's counsel made an oral motion for a continuance so that Appellant could attend a court hearing that day in another matter related to an additional felony charge. The trial court overruled that motion and proceeded to sentence Appellant to 180 days of imprisonment and revoke his probation.

**{¶11}** Appellant's due process argument fails for two reasons. First, Appellant's assignment of error involves an alleged due process violation that was never objected-to at the hearing. It is well settled that a failure to object to due process violations at a probation revocation proceeding waives all but plain error.

*State v. Harmon*, 2d Dist. No. 2007 CA 35, 2008-Ohio-6039. Pursuant to Crim.R. 52, only plain errors or defects affecting substantial rights, and not harmless errors, may be raised on appeal when those errors were not brought to the trial court's attention. Thus, Appellant's assignment of error will be reviewed only for plain error.

{¶12} Appellant argues that he was denied due process at his probation revocation hearing because there was no opportunity to present evidence or to challenge the allegations. The record does not support the position that the trial court denied Appellant that right. The record reflects that as a condition of Appellant's probation he was to abide by all laws and ordinances during the term of his probation. The notification of possible probation violation issued on August 13, 2015, allows that on August 3, 2015, Appellant was convicted for driving under suspension in Case No. 15 TRD 2132, a clear violation of the terms of his probation. That information was before the court to consider and the record demonstrates that the court did consider it in the determination of a probation violation.

{¶13} For all of the foregoing reasons, this Court finds there was no error or defect in the probation revocation proceedings that would impact Appellant's due process rights. Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.