

[Cite as *State v. Breckenridge*, 2011-Ohio-1493.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-652
 : (C.P.C. No. 04CR10-6851)
 :
 Sheila Breckenridge, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on March 29, 2011

Michael DeWine, Attorney General, *Jordan Finegold*, and *Brian Peters*, for appellee.

The Law Office of Bryan M. Griffith, LLC, and *Bryan M. Griffith*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Sheila Breckenridge, filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas revoking her community control and sentencing her to a period of six months of incarceration.

{¶2} Appellant was indicted on three counts of Medicaid fraud, each a fifth-degree felony, and one count of fraud, also a fifth-degree felony. After a jury trial,

appellant was convicted on all four counts. The court sentenced appellant to three years of community control and ordered appellant to pay \$20,564.70 in restitution, \$15,814.14 in investigative costs, a \$1,000 fine, and court costs. We affirmed the conviction on appeal. *State v. Breckenridge*, 10th Dist. No. 05AP-868, 2006-Ohio-5038.

{¶3} On June 24, 2008, the Franklin County Probation Department filed a request for revocation of community control due to appellant's failure to make consistent payments toward the court costs, fine, and restitution. The court held a resentencing hearing, after which the period of appellant's community control was extended to five years. We affirmed on appeal. *State v. Breckenridge*, 10th Dist. No. 09AP-95, 2009-Ohio-3620.

{¶4} On March 9, 2010, the Franklin County Probation Department filed another request for revocation of community control. The basis for the request was that appellant had failed to make consistent payments toward the court costs, fine, and restitution. The court held a hearing on the request for revocation. At the hearing, the court heard testimony from appellant's probation officer, Courtney Washington. Washington testified that during the five-year period since her conviction, appellant had not been employed and had paid \$5,565 toward the balance, with an unpaid balance of \$34,738.34. Washington testified that appellant was supposed to make payments of approximately \$1,500 per month in order to complete repayment, but had instead made monthly payments in amounts varying from \$50 to \$100. Washington further testified that appellant had failed to make any payments in December 2009 and February and March 2010.

{¶5} The court found that appellant had failed to make consistent payments toward the court costs, fine, and restitution, and further found that appellant had remained voluntarily unemployed during her term of community control in order to avoid paying the amounts ordered. The court then scheduled the matter for a mitigation hearing.

{¶6} At the mitigation hearing, the state offered evidence obtained by Special Agent Joe Joseph, an investigator for the Ohio Attorney General's office. Joseph stated that appellant had been employed during the period of her community control. From March 2006 to August 2008, appellant had been employed by Lifesaver Health Care, for which she had been paid \$89,591.05. From February 2009 to May 2009, appellant had been employed by Affordable Home Health Care, for which she had been paid \$5,470. Joseph also stated that from June 2006 through the date of the hearing, appellant had a contract with the Red Cross to teach CPR classes, for which she would have been paid by the students.

{¶7} Appellant admitted that she had been employed during the periods identified by Joseph. Appellant stated that she had not informed the probation department of any of the jobs because she was afraid that she would be fired if the probation department contacted any of her employers. Appellant also stated that she had been able to raise \$15,000 from family and friends that she could pay toward the balance she owed.

{¶8} The trial court found that the evidence regarding appellant's employment showed that appellant was attempting to avoid her responsibility to pay the amount ordered by the court. The court also noted as further evidence for its decision that

appellant had been referred by the probation department to an employment workshop, but had been terminated from that program when she failed to attend the workshop. Finally, the court noted that appellant's offer to pay \$15,000 toward the ordered restitution, as well as her avoidance of an earlier community control revocation proceeding by making a payment of \$1,200, showed that appellant did have financial resources available and further supported the court's conclusion that appellant was attempting to manipulate the system. The court sentenced appellant to a period of six months of incarceration and waived payment of the fine and court costs.

{¶9} Appellant filed this appeal, asserting two assignments of error:

Assignment of Error No. 1

THE REVOCATION OF DEFENDANT'S COMMUNITY CONTROL AND SENTENCING HER TO CONFINEMENT FOR SIX MONTHS BECAUSE SHE FAILED TO PAY SUFFICIENT RESTITUTION, WAS AN ABUSE OF DISCRETION BY THE COURT.

Assignment of Error No. 2

THE REVOCATION OF DEFENDANT'S COMMUNITY CONTROL AND SENTENCING HER TO CONFINEMENT FOR SIX MONTHS BECAUSE SHE PURSUED AN APPEAL OF HER CONVICTION WAS AN ABUSE OF DISCRETION AND DENIED DEFENDANT DUE PROCESS CONTRARY TO THE UNITED STATES SUPREME COURT'S HOLDING IN *NORTH CAROLINA V. PEARCE* [(1969), 395 U.S. 711, 89 S.Ct. 2072], AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶10} At oral argument, there was some discussion regarding whether this appeal is moot because appellant has already completed serving her six-month period of incarceration. In some cases, an appeal may be moot where the appeal seeks

reversal of a trial court's sentence, the appealing defendant has completed that sentence, and no collateral disability arising from the defendant's conviction exists. See *Columbus v. Duff*, 10th Dist. No. 04AP-901, 2005-Ohio-2299. However, an appeal is not moot even if the defendant has completed her sentence when the underlying conviction is for a felony offense. *State v. Kirkland* (Sept. 21, 1999), 10th Dist. No. 98AP-1304. Thus, appellant's appeal is not moot.

{¶11} A trial court's decision to revoke a defendant's community control is reviewed for an abuse of discretion. *State v. Lewis*, 2d Dist. No. 23505, 2010-Ohio-3652. An abuse of discretion connotes more than a simple error in judgment; rather, it signifies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶12} We have recognized that a trial court can revoke a defendant's community control for failure to make restitution ordered as a condition for the community control. *State v. Conway*, 10th Dist. No. 05AP-358, 2006-Ohio-288. However, a court cannot revoke community control for failure to pay restitution where there is no evidence that the defendant had the ability to pay the restitution. *Id.* In those instances, there must be evidence that the failure to pay or to obtain employment was willful or intentional. *Id.*, citing *Bearden v. Georgia* (1983), 461 U.S. 660, 103 S.Ct. 2064.

{¶13} In this case, appellant failed to disclose to the court that she had been employed during her period of community control, even after her probation officer testified during the initial revocation hearing that she had been unemployed for the entire period. In addition, appellant's offer to pay \$15,000 toward the restitution showed that appellant did have financial resources available to her. We cannot say the trial

court abused its discretion in concluding that these facts showed a willful or intentional failure to pay restitution on appellant's part.

{¶14} Thus, appellant's first assignment of error is overruled.

{¶15} Appellant also argues that comments made by the trial court during the initial revocation hearing show that the trial court was punishing her for pursuing appeals of her criminal convictions. During the revocation hearing, the trial court stated, "As best as the Court can tell, I mean, since the time Ms. Breckenridge was placed on community control, her biggest issue and concern has been appealing the jury verdict, which she has a right to do, but has pretty much put most of her efforts in kind of contesting this Court's jurisdiction as well as the jury verdict." (May 3, 2010 Tr. 30.) Appellant argues that this comment shows that the trial court's finding that she violated community control and its imposition of a six-month period of incarceration were taken to punish her for exercising her rights to appeal, and thus constituted a violation of her due process rights. See *N. Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072.

{¶16} We note that the trial court made this comment prior to being presented evidence during the mitigation hearing regarding appellant's failure to disclose her employment and prior to appellant's offer to pay \$15,000 toward the restitution amount, which were the reasons cited by the trial court for its decision to impose the six-month term of incarceration. Furthermore, it appears that the court's comment was an expression of frustration with what the court believed at the time was appellant's lack of employment during the preceding five years, rather than an expression of intent to punish appellant for exercising her rights of appeal. Thus, nothing in the record supports appellant's contention that the trial court revoked her community control and

imposed the six-month sentence for the improper purpose of punishing appellant for exercising her due process rights.

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

{¶18} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.
