

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	William B. Hoffman, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2008 CA 00238
	:	
	:	
DENNIS CARPENTER	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING: Criminal Appeal from Stark County
Court of Common Pleas Case No.
2003 CR 1339

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 31, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Appellant, Dennis Carpenter, appeals a judgment of the Stark County Common Pleas Court revoking his community control and sentencing him to 22 months incarceration. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On January 4, 2004, appellant pleaded guilty to two counts of forgery (R.C. 2913.31(A)(3)) and two counts of receiving stolen property (R.C. 2913.51(A)). On February 25, 2004, the court sentenced appellant to two years of community control. The terms of his community control included numerous conditions, including that he pay restitution in the amount of \$1982.71 and court costs. The sentencing entry recites that violation of any condition of the terms of community control shall lead to a more restrictive sanction, a longer sanction or a prison term of up to 22 months.

{¶3} Appellant owed \$1675.36 in court costs and restitution as of February 10, 2006. On its own motion, the court extended appellant's community control:

{¶4} "Upon information from the Probation Department that the defendant owes an outstanding balance of \$1,675.36 toward restitution and court costs, the Court, on its own Motion, hereby extends the community control of defendant, Dennis Carpenter, an additional two years with a maximum expiration date of February 12, 2008." Judgment Entry, February 10, 2006.

{¶5} Appellant continued to make payments toward restitution and to report to Officer Brian Shurtz of the Adult Parole Authority. In February of 2007, appellant failed to report. He telephoned Shurtz in March and advised that he was ill. Shurtz told appellant to report in April. Before appellant's report date in April, he was arrested in

Columbiana County on charges of domestic violence and possession of a firearm. Based on these charges, Shurtz filed a motion to revoke appellant's community control.

{¶6} The case proceeded to an evidentiary hearing. At the hearing, appellant argued that he had finished paying restitution and Shurtz had agreed to file a motion to terminate his community control when he finished paying restitution. However, Shurtz had not yet filed to terminate appellant's community control when he was arrested in Columbiana County because appellant owed a small amount of court costs and had failed to report in February and March. The court found appellant had violated the terms of his community control and sentenced him to 11 months incarceration for each count of forgery and 11 months incarceration for each count of receiving stolen property, with the sentences for counts one and three to be served consecutive to each other but concurrent with counts two and four, for a total of 22 months. The sentence was to be served consecutive to the sentence imposed in Columbiana Case Number 2007CR00118 for a total sentence of 46 months. Appellant assigns a single error on appeal¹:

{¶7} "THE TRIAL COURT DID NOT HAVE JURISDICTION TO FIND THAT THE DEFENDANT WAS A PROBATION VIOLATOR."

{¶8} Appellant argues that because he did not receive notice and a hearing prior to the court's extension of his community control, the February 10, 2006, judgment did not validly extend his community control and the court, therefore, did not have jurisdiction to revoke his community control and sentence him to prison. Appellee argues that appellant waived this issue by failing to appeal the February 10, 2006, order

¹ Appellant filed a pro se brief on October 31, 2008, which was stricken by this Court on December 15, 2008.

and by failing to raise this issue in the trial court by way of a motion to dismiss for want of jurisdiction.

{¶9} The cases appellant relies on to support his argument are inapposite to the instant case. In *State v. Fairbank*, Wood App. Nos. WD-06-015, WD-06-016, 2006-Ohio-6180, the court entered the order extending community control after the original period of community control had expired. Therefore, the court was without jurisdiction at the time it entered judgment extending community control. *Id.* at ¶15.

{¶10} In the instant case, the court had jurisdiction over the case at the time the court entered judgment extending community control because appellant's original period of community control would not expire until February 25, 2006, and the court entered judgment on February 10, 2006.

{¶11} In *State v. Flekel*, (June 13, 2002), Cuyahoga App. Nos. 80337, 80338, unreported, the sole reason for extending the defendant's probation and for issuing a *capias* to revoke his probation was failure to pay his monthly supervision fees, which pursuant to R.C. 2951.021 is not a proper basis for revocation. *Id.* at ¶23. Further, there was nothing in the record in *Flekel* to indicate that the defendant was notified that his probation had been extended. *Id.* at ¶24.

{¶12} In the instant case, appellant does not dispute the fact that under R.C. 2929.15 and R.C. 2929.18, the court may impose financial sanctions as a condition of community control. Further, R.C. 2929.15(B) gives the trial court the ability to extend a period of community control for violation of the conditions of community control. Appellant's testimony at the hearing reflects that he knew his community control had been extended, and he continued to make payments and report to his probation officer

with a belief that when he had finished paying his restitution, his probation officer would seek to have the court terminate his community control.

{¶13} Appellant argues that the facts in his case are identical to those in *State v. Stollings* (May 11, 2001) Greene App. No. 2000-CA-86, unreported. In *Stollings*, the court of appeals held that the trial court erred in extending the defendant's community control without providing the minimum due process rights of notice, a hearing and a right to counsel. *Id.* at 7. However, in *Stollings*, the defendant had filed a delayed appeal from the original order extending community control. In the instant case, appellant attempts to challenge the order extending his community control by way of appeal from a later order revoking his community control.

{¶14} The question of subject matter jurisdiction is so basic that it can be raised at any stage before the trial court or any appellate court, or even collaterally in subsequent and separate proceedings. *State v. Williams* (1988), 53 Ohio App.3d 1, 4, 557 N.E.2d 818. Therefore, if the court was without subject matter jurisdiction at the time it entered the February 10, 2006, order extending community control, appellant may properly raise the issue in the instant appeal.

{¶15} Appellant's claim of failure to provide him with notice and a hearing is not an attack on the subject matter jurisdiction of the court. Assuming arguendo that appellant had filed a timely appeal from the judgment extending his community control and we had accepted his argument that he was entitled to notice and a hearing, his remedy would have been a remand for a hearing, not dismissal for want of subject matter jurisdiction. See *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L. Ed. 2d 656 (because respondent was not afforded a hearing, the revocation of his

probation did not meet due process standards and on remand, the court should allow the state the opportunity to conduct a hearing).

{¶16} Appellant's claim that the court erred in extending his community control without notice and a hearing is either a claim that the court lacked personal jurisdiction over him at the time it extended community control, or violated his procedural due process rights in the extension of community control. By failing to appeal the order extending community control, failing to move to dismiss the motion to revoke his probation for want of jurisdiction and submitting himself to the jurisdiction of the court over his person by accepting the extension of community control and complying with its terms for more than a year before the motion to revoke was filed, appellant has waived any error in the court's failure to give him notice and a hearing at the time of the February 10, 2006, extension of community control.

{¶17} The assignment of error is overruled.

{¶18} The judgment of the Stark County Common Pleas Court is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

JUDGES

