

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon: Sheila G. Farmer, P.J.
	:	Hon: W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00081
WILLIAM E. SCHENK	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2008-CR-1039

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 19, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, J.

{¶1} Defendant-appellant William E. Schenk appeals a judgment of the Court of Common Pleas of Stark County, Ohio, which revoked his judicial release and imposed the sentence he had received after being found guilty of menacing by stalking in violation of R.C. 2903.211; possession of criminal tools in violation of R.C. 2923.24 and criminal mischief in violation of R.C. 2909.07. Appellant assigns a single error:

{¶2} “I. THE TRIAL COURT COMMITTED ERROR IN REVOKING APPELLANT’S JUDICIAL RELEASE BASED ON THE EVIDENCE PRESENTED.”

{¶3} Appellant pled guilty to the charges and was sentenced to an aggregate term of thirty months in prison, along with a fine of \$1,000.00 and restitution to the victim in the amount of \$500.00. The court also ordered post-release control.

{¶4} On October 10, 2008, appellant filed a motion for judicial release. The court heard the matter on November 10, 2008, and on November 12, 2008 granted judicial release and ordered appellant be placed under intensive supervised probation. Appellant was released from the Stark County Jail on November 13, 2008.

{¶5} Appellant’s probation officer was Shelly Wolf. On November 13, Wolf met with appellant in the waiting room of the Stark County Jail, along with appellant’s two sons. Wolf testified that after she introduced herself, appellant said to her, “I guess I need to leave the bitch alone.” Wolf responded that he did indeed need to leave the victim alone and could have no contact with her or her family by phone, letter, or any other manner. Wolf informed appellant he would be on house arrest for sixty days starting that afternoon. Wolf testified she told him except in a medical emergency,

under no conditions was he to leave the house until she had an opportunity to meet with him to go over the written rules. She testified the rules had not yet been prepared.

{¶6} Wolf testified appellant asked her how he would go about bailing someone out of jail, and Wolf replied he was not to bond anyone out. She informed appellant under the rules of his probation he should have no contact with any felony offenders without his probation officer's approval. Wolf testified she told appellant the persons he met in prison or in jail were not his friends. Appellant responded he was a good judge of character. At some later time, Wolf learned appellant gave a check to the girlfriend of John McKinney, a man who was being held in the Stark County Jail on felony charges. The girlfriend used the money to post McKinney's bond.

{¶7} Wolf testified she also told appellant not to leave the house for grocery shopping because his family had stocked his food pantry for him. Wolf gave him her business card and he was fitted for an ankle bracelet to begin serving his house arrest.

{¶8} The next day, appellant left his home without permission at 9:56 a.m. and did not return until 3:56 p.m. He gave Wolf no notice of his whereabouts. Wolf was alarmed about appellant's continuous absence because she feared for the victim he had menaced and stalked. After checking with her supervisor, Wolf issued an absconding order. Appellant was taken into custody on November 16, 2008.

{¶9} At the evidentiary hearing, appellant testified he is 79 years old and suffers from prostate cancer. Because of his incarceration, he had not received treatment in over six months, so the day after his release from jail he went to the doctor for a flu shot and then had laboratory blood testing done at the Gabrail Cancer Center in

Canton. Thereafter he traveled around the Belden Village area looking for the office of Dr. Devies, stating he believed he was under court order to do so.

{¶10} On his way back home, appellant went grocery shopping because he wanted green beans, potatoes and a stalk of celery. Then he went to WalMart for a small ham. Appellant testified he believed he was permitted to go to the grocery store once a week.

{¶11} Appellant testified he would have preferred to get the probation rules in writing so he could read and remember them. He did not knowingly and intentionally violate the rules of his probation, and did only what he felt he was permitted to do. He testified if the judge put him back on probation, he would follow the rules.

{¶12} On cross, appellant testified Wolf had given him permission to go see the doctor that day, and her earlier testimony was a lie. He testified he and Wolf had no discussion of anyone being bonded out, but admitted he gave the girlfriend of a man he met in jail a check for \$1500.00. He stated what she did with it was her business. Appellant denied having any contact with any felons.

{¶13} Appellant cites *Morrissey v. Brewer* (1972), 408 U.S. 471 as setting out the minimum due process requirements in probation revocation proceedings. They are:

{¶14} (1) Written notice of the claimed violations of the conditions of parole;

{¶15} (2) Disclosure of the evidence against the parolee;

{¶16} (3) An opportunity to be heard in person and to present witnesses and documentary evidence;

{¶17} (4) The right to confront and cross-examine adverse witnesses;

{¶18} (5) Review by a neutral and detached hearing body such as a traditional parole board, who need not be judicial officers or lawyers; and

{¶19} (6) Findings of fact as to the evidence relied on and the reasons the parole was revoked.

{¶20} In *Gagnon v. Scarpelli* (1973), 411 U.S. 778, at 782, 93 S.Ct. 1756, 36 L.Ed.2d 656, the United States Supreme Court held ‘* * * a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer* * * *.’

{¶21} Appellant concedes the decision to revoke a person’s probation for an alleged violation is within the sound discretion of the trial court. *State v. McKnight* (1983), 10 Ohio App. 3d 312 at 313. This court may find an abuse of discretion only if the court acted unreasonably, arbitrarily, or unconscionably. *State v. Adams* (1980), 62 Ohio St. 2d 151.

{¶22} Appellant asserts he was not given sufficient notification of the rules and regulations of probation. He concedes the trial court read the basic terms and conditions of his release on the record, but he was never given any written instructions. Appellant asserts he was never explicitly informed that if he broke the rules, it could lead to a violation of his probation.

{¶23} Appellant also asserts the only evidence against him at either the probable cause hearing or the evidentiary hearing was the testimony of the probation officer, and her testimony regarding the check to bond out another jail inmate was hearsay.

{¶24} The State responds a revocation hearing is not a full-blown criminal trial, and the State need only to introduce evidence sufficient to show it is more probable

than not that the person on probation or community control violated the terms or conditions of his or her release. We agree probation revocation hearings are not subject to the rules of evidence, although admission of hearsay evidence can be construed as reversible error if it constitutes the sole, crucial evidence in support of the probation violation determination. *State v. Thompson*, Wood App. No. WD-06-034, 2007-Ohio-2665, ¶ 44, citing *State v. Ohly*, 166 Ohio App.3d 808, 853 N.E.2d 675, 2006-Ohio-2353. *State v. Redick* Fairfield App. No. 08CA73, 2009-Ohio-3850.

{¶25} We have reviewed the record, and we find the trial court did not abuse its discretion in revoking appellant's probation and imposing the remainder of the prison term. The assignment of error is overruled.

{¶26} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By Gwin, J.,
Farmer, P.J., and
Edwards, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

WSG:clw 1002

