

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140585
Plaintiff-Appellee,	:	TRIAL NO. B-1400683
vs.	:	
NIKO ALLIE,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Niko Allie pleaded guilty to tampering with evidence in violation of R.C. 2921.12(A)(1), and was convicted and sentenced to three years' community control. Less than two months after he was sentenced, Allie was cited for three community control violations: (1) Allie has been indicted on a new felonious assault charge in the case numbered B-1404266; (2) Allie had failed to keep his probation officer notified of his current residence; and (3) Allie had failed to pay \$263 in court costs and \$900 in probation fees.

The trial court conducted a probable cause hearing and a subsequent final revocation hearing regarding these violations. The felonious assault charge was discussed minimally, with the prosecutor providing some of the facts related to the crime and witnesses who placed the defendant at the scene. The trial court focused more on Allie's failure to notify his probation officer of his current residence and his failure to pay the court costs and probation fees.

Allie's probation officer testified that he was unable to verify that Allie resided at either of two addresses in Allie's file, one on Rockdale Ave. and the other on Greenwood Ave. The probation officer had gone to the address on Rockdale initially looking for a different probationer, Michael Heard. Heard, who lived at the residence with his mother, told the probation officer that Allie "sometimes" stayed there, but he was not there at that time. The officer then went to the Greenwood address provided in the presentence investigation report, where Allie's mother told the probation officer that Allie did not and was not permitted to live at that residence.

Allie testified that he did not live at the Greenwood address, but lived at the Rockdale address. He testified that his personal belongings, including his clothing and toothbrush, were at the Rockdale address. The probation officer admitted that he did not search the Rockdale residence for Allie's belongings.

Allie's probation officer also testified that Allie owed court costs and probation fees. Allie then testified that he had submitted employment applications at Frisch's, Kroger, and Burger King, but had not secured employment. There was no further discussion of Allie's employment or reasons for failing to pay the court costs and probation fees.

After listening to testimony from Allie and from his probation officer at the revocation hearing, the trial court found Allie guilty of violating his community control and stated that "[Allie] didn't make any payments and basically I think * * * he gave the probation department one address and he is not there and he stays occasionally at another address." The trial court terminated Allie's community control and imposed three years' imprisonment. Allie timely appealed.

Allie asserts two assignments of error relating to his due process rights. In his first assignment of error, Allie contends that he was denied due process when the

trial court failed to advise him, with particularity, of the evidence relied on and the reasons for finding him guilty of violating the terms of his community control. This argument is without merit.

Certain minimum requirements of due process under the Fourteenth Amendment apply at community control revocation proceedings, which are comprised of a preliminary hearing and a final revocation hearing that includes a written statement by the factfinder as to the evidence relied on and reasons for revoking community control. *See State v. Thompson*, 1st Dist. Hamilton Nos. C-140746 and C-140747, 2015-Ohio-2836, ¶ 6; *State v. King*, 1st Dist. Hamilton No. C-010330, 2002 Ohio App. LEXIS 367, *6-7 (Feb. 1, 2002); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), paragraph one of the syllabus; *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), paragraph three of the syllabus. Although the Supreme Court of Ohio has expressed a preference for written findings in revocation proceedings, this court has determined that a written statement by the factfinder may be an announced statement that is transcribed for the record. *See State v. Delaney*, 11 Ohio St.3d 231, 235, 465 N.E.2d 72 (1984); *State v. Wright*, 1st Dist. Hamilton No. C-940999, 1995 Ohio App. LEXIS 5191, *4-5 (Nov. 29, 1995) (oral statements of the court and the provisions of the judgment entry constitute sufficient notice to the defendant of the reasons for revocation); *State v. Nichols*, 48 Ohio App.2d 330, 333, 357 N.E.2d 417 (1st Dist.1976).

In this case, the trial court announced at the final revocation hearing the reasons for revoking Allie's community control: Allie had provided the probation department with a wrong address and an address that he stayed at sometimes, and had not paid any of the court costs or probation fees. The court commented further

regarding the address issue, noting that Allie did not show up for his presentence investigation report interview. The court then terminated Allie's community control.

The trial court made these statements in the presence of the defendant and they were transcribed for the record. Additionally, in its entry, the trial court stated, "upon consideration of the evidence produced at the hearing, the Court finds that the defendant violated the conditions of community control." Therefore, the trial court provided facts and reasons for terminating Allie's community control, and did not deny Allie his due process rights. *See State v. Meyers*, 1st Dist. Hamilton No. C-790747, 1980 Ohio App. LEXIS 10205, *3-4 (Oct. 8, 1980); *Nichols* at 333. Allie's first assignment of error is overruled.

In Allie's second assignment of error, he argues that the trial court abused its discretion when it found him guilty of violating the terms of his community control. Allie specifically argues that there was insufficient evidence to demonstrate that he violated the terms of his community control. We disagree.

A community control revocation hearing is "structured to assure that the findings of a * * * [community-control] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the * * * [probationer's] behavior." *State v. Dockery*, 187 Ohio App.3d 798, 2010-Ohio-2365, 933 N.E.2d 1155, ¶ 10 (1st Dist.), quoting *Brewer*, 408 U.S. at 484, 92 S.Ct. 2593, 33 L.Ed.2d 484. "A trial court cannot revoke community control without first making a finding supported by substantial evidence that the defendant has not complied with his community-control conditions." *Dockery* at ¶ 10; *see State v. Osume*, 1st Dist. Hamilton No. C-140390, 2015-Ohio-3850, ¶ 9. Substantial evidence is more than a scintilla of evidence, but less than a preponderance. *Osume* at ¶ 9.

Once the trial court has determined that the defendant has violated the terms of his community control, it then has the discretion to revoke the defendant's

community control. R.C. 2929.15(B); *Dockery* at ¶ 13. We will not disturb the trial court's decision absent an abuse of discretion. *Dockery* at ¶ 13.

Although the probation officer noted the felonious assault as a basis for a violation, the fact that Allie was indicted for felonious assault while on community control cannot be a basis for terminating his community control. The rule stipulated that Allie was to “obey all laws” and “that a conviction, while on [community control], of a new traffic/criminal offense may result in violation” of his community control. Here, he was indicted for felonious assault, but not convicted. Nevertheless, the trial court did not rely upon the indictment as grounds for termination. The trial court based its revocation of Allie's community control on a finding that Allie had failed to notify his probation officer of his current address and had failed to pay his court costs and probation fees.

Regarding Allie's failure to notify his probation officer of his current address, the trial court heard conflicting testimony from Allie and his probation officer. However, trial court ultimately found that Allie had provided an address that he “stayed at sometimes.” Therefore, the trial court's finding that Allie had violated the terms of his community control was supported by substantial evidence, and will not be disturbed on appeal. *See State v. Bowden*, 1st Dist. Hamilton No. C-140462, 2015-Ohio-3740, ¶ 13.

The trial court also found that Allie failed to pay his court costs and probation fees. In order to revoke community control solely for nonpayment of financial obligations, the trial court must inquire into the reason for a defendant's failure to pay the financial obligation, as the failure must have been willful and not a result of indigence. *See Dockery*, 187 Ohio App.3d 798, 2010-Ohio-2365, 933 N.E.2d 1155, at ¶ 14; *State v. Rudin*, 1st Dist. Hamilton No. C-110747, 2012-Ohio-2643, ¶ 8-9; *Bearden v. Georgia*, 461 U.S. 660, 672-673, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

OHIO FIRST DISTRICT COURT OF APPEALS

If the defendant “willfully refused or failed to make sufficient bona fide efforts legally to acquire the resources to pay,” then the sentencing court may revoke the defendant’s community control and imprison the defendant in accordance with law. *Rudin* at ¶ 8-9; *Bearden* at 672-673. However, if the defendant made bona fide efforts to acquire the resources to pay the financial obligation, then the court must consider alternative punishments to imprisonment. *Id.*

In this case, the only discussion of Allie’s financial obligations was that he was having difficulties finding a job. The record is silent as to the whether Allie’s failure to pay the court costs and probation fees was willful or that he failed to make a bona fide effort. The trial court did not have substantial evidence to conclude that Allie had violated his probation by failing to pay. *See Dockery* at ¶ 17.

We hold that the trial court had sufficient evidence to conclude that Allie had violated the terms of his community control because he failed to notify his probation officer of his current residence, and that the trial court did not abuse its discretion in terminating Allie’s community control. Therefore, we overrule Allie’s second assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

FISCHER, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the court’s journal on March 2, 2016
per order of the court _____.

Presiding Judge