COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2010 CR 00068**
vs.	:	**Judge McBride**
STEPHEN M. WALLACE	:	**DECISION/ENTRY**
Defendant	:	

Catherine Adams, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Christopher J. Feldhaus, assistant public defender for the defendant Stephen M. Wallace, 302 E. Main Street, Batavia, Ohio 45103.

On April 15, 2010, the defendant Stephen M. Wallace was convicted and sentenced to a three-year term of community control on five counts of trafficking in marijuana in violation of Section 2925.03(A)(1), felonies of the fifth degree. The sentencing entry was journalized on April 16, 2010.

On December 15, 2010, the term of the defendant's community control was extended to four years, and on December 2, 2013, the term of the defendant's community control was extended to five years. Both extensions of the term of community control occurred upon the finding of community control

violations. The sentencing entries were journalized respectively on December 30, 2010 and December 16, 2013.

On March 24, 2014, the Probation Department filed an affidavit which alleged that the defendant had violated four sanctions of his community control. They were:

1) Sanction #1 of the community control ordered at the time of the original sentencing which required that the defendant abide by all federal, state, and local laws. Specifically, it was alleged that the defendant was charged with possession of drugs, a felony of the fifth degree, in Hamilton County Common Pleas Court Case No. C/14/CRA/7090 and that this offense occurred while the defendant was a resident of the Talbert House Spring Grove halfway house.

2) Sanction #5 of the community control ordered at the time of the original sentencing which required that the defendant follow all of his probation officer's written and oral instructions. The alleged violation of this sanction was based entirely on the other violations which were alleged.

3) Sanction #11 of the community control which was ordered at the time of the original sentencing which required that the defendant refrain from the use of illegal drugs. Specifically, it was alleged that the defendant tested positive while at Talbert House Spring Grove for marijuana on 2/28/14 and for opiates on 3/7/14.

4) Sanction #1 of the community control which was ordered in the sentencing entry which was journalized on December 16, 2013 which required that the defendant successfully complete programming at Talbert House Spring

Grove. Specifically, it was alleged that the defendant was found in possession of heroin on 3/22/14 at Talbert House Spring Grove and was terminated from the program at Talbert House Spring Grove.

On April 9, 2014, a hearing was held on the affidavit filed by the Probation Department. At the conclusion of the hearing, the defense argued that the court was relying entirely on hearsay in proving the violations and that the court was precluded from basing its findings solely upon hearsay. The court continued the hearing in progress until April 17, 2014 in order to allow the State additional time to secure the necessary witnesses in order to be able to present non-hearsay evidence in support of the alleged violations.

On April 17, 2014, counsel for the State advised that she would not be presenting any additional evidence and that her superiors felt that the testimony of the probation officer and the night supervisor from Talbert House Spring Grove at the April 9th hearing was sufficient to provide substantial evidence as to the alleged violations.

Following the hearing on April 17, 2014, the court sent to counsel for the parties a briefing/hearing schedule providing each side an opportunity to submit written argument as to the issues in the case, including those pertaining to constitutional due process. Each side submitted a memorandum on May 5, 2014, and the defense submitted a reply memorandum on May 12, 2014.

Following the submission of the last memorandum in the case, the court took the issues in the case under advisement. Upon consideration of the record of the proceeding, the evidence presented at the hearing, the oral and written

arguments of counsel, and the applicable law, the court now renders this written decision.

EVIDENCE PRESENTED AT THE CCV HEARING

Only two witnesses were called during the hearing by the State. Probation Officer Julian Wilcoxon testified that he was informed that the defendant had been discharged from Talbert House Spring Grove and that he then went to pick him up from the Hamilton County Justice Center. He stated that the defendant told him that "a jacket was not his." He stated that the discharge from Talbert House Spring Grove constituted a violation of his instructions.

Tanashe Matabiri, the night supervisor at Talbert House Spring Grove, testified that an informant had told him that there was contraband in the facility and that it was being carried by the defendant and was in his jacket. As a result, he conducted a search with other staff of the facility, and they found what he considered to be contraband in the pocket of a brown leather jacket owned by the defendant. He called for the assistance of a deputy from the Hamilton County Sheriff's Department, who arrived and performed a drug test on the contraband which indicated positive for heroin. The defendant at that point told Matabiri that the jacket was not his, which contradicted his original statement. As a result of the contraband which had been found in the defendant's possession testing positive for heroin, the defendant was terminated from the program at Talbert House Spring Grove. Matabiri also testified that the defendant tested

positive for illegal drugs on two occasions while at Talbert House Spring Grove, although he did not perform these tests.

LEGAL ANALYSIS

As an initial matter, proof beyond a reasonable doubt is not the standard in community control revocation hearings.[1] Instead, the state must present substantial evidence that a defendant violated the terms of a community control sanction.[2]

Substantial evidence is akin to the preponderance of the evidence burden of proof applied in civil cases or as to affirmative defenses in criminal cases.[3] "Substantial evidence is considered to consist of more than a scintilla of evidence, but somewhat less than a preponderance of the evidence. [4]

Regarding the evidence that can be considered in a hearing as to a community control violation charge, the rules of evidence do not apply to either probation revocation hearings or to proceedings with respect to community control sanctions.[5] A community control revocation hearing is not a criminal trial, but rather an informal proceeding with relaxed rules of evidence and procedure.[6]

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[1] *State v. Henry*, 5th Dist. Richland No. 2007-CA-0047, 2008-Ohio-2474, ¶ 14, citing *State v. Payne*, 12th Dist. Warren No. CA2001-09-081, 2002-Ohio-1916 (Apr. 22, 2002), citing *State v. Hylton*, 75 Ohio App.3d 778, 782, 600 N.E.2d 821 (4th Dist.1991).
[2] Id., citing *Hylton* at 782.
[3] *State v. Ohly*, 166 Ohio App.3d 808, 815, 2006-Ohio-2353, 853 N.E.2d 675, ¶ 18 (6th Dist.).
[4] Id, citing *State v. Gomez*, 11th Dist. Lake No. 93-L-080, 1994 WL 102230 (Feb. 18, 1994), citing *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir.1966), fn. 7.
[5] Evid.R. 101(C)(3).
[6] *State v. Harlan*, 8th Dist. Cuyahoga No. 97269, 2012-Ohio-2492, ¶ 16, citing *Columbus v. Bickel*, 77 Ohio App.3d 26, 36, 601 N.E.2d 61 (10th Dist.1991)

Accordingly, the law allows for the admission of hearsay evidence that would not be otherwise admissible in a criminal trial.[7] However, community control violation hearings must satisfy the minimal guarantees of due process, and the admission of hearsay evidence at a probation revocation hearing can compromise the probationer's due process right to confront adverse witnesses.[8]

In this regard, community control is similar to probation in its detrimental effect on a defendant's liberty interest.[9] Revocation of probation has been held to implicate due process requirements.[10] One of those requirements that due process imposes is a final hearing to determine whether probation should be revoked.[11] At the final revocation hearing, the state must provide the following: (1) written notice of the claimed violations; (2) disclosure to the probationer of the evidence against him; (3) the opportunity for the probationer to be heard in person and to present witnesses and documentary evidence; (4) "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation): (5) a neutral and detached hearing body; and (6) a written statement by the fact finder as to the evidence relied upon and the reasons for revoking probation.[12]

In essence, a revocation hearing is an informal one, "structured to assure that the finding of a * * * violation will be based on verified facts and that the

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[7] Evid.R. 101(C)(3); *Ohly*, at ¶ 21.
[8] See *Harian* at ¶ 16, citing *Columbus v. Bickel*, at 36-37.
[9] *State v. Blakeman*, 2nd Dist. Montgomery No. 18983, 2002-Ohio-2153, 5th Dist. Richland No. 2007-CA-0047, 2008-Ohio-2474, ¶ 14.
[10] Id.
[11] *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).
[12] *Blakeman*, citing *Gagnon, supra*, at 782, citing *Morrisey v. Brewer*, 408 U.S. 471, 488, 92 S.Ct. 2593, 33 L.Ed.2d 484.

exercise of discretion will be informed by an accurate knowledge of the [defendant's] behavior."[13] As a result, the evidentiary standards are more relaxed, and evidence that bears "substantial indicia of reliability" may be admitted at the hearing without providing the defendant with the opportunity to confront and cross-examine adverse witnesses. [14] The trial court can consider any reliable and relevant evidence indicating whether the probationer has violated the terms of his community control.[15]

In this regard, in lieu of or in addition to presenting testimony of witnesses, the state may present evidence that either is non-hearsay or that falls under a hearsay exception. An example would be the introduction of business records that may contain such matters as laboratory reports.[16]

Additionally, because community control revocation proceedings are narrow, flexible inquiries, the court may consider "letters, affidavits, and other material that would not be admissible in an adversary criminal trial."[17] Similarly, a laboratory report has been held to be "sufficiently reliable to permit dispensing with the testimony of those who prepare them."[18] Also, a letter sent by a doctor from a community health center giving notice of a probationer's discharge from counseling has been held to be the type of reliable evidentiary material

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[13] *State v. Alexander*, 1st Dist. Hamilton No. C-070021, 2007-Ohio-5457, ¶ 7, citing *Morrissey* at 484.
[14] *State v. Weary*, 9th Dist. Summit No. 20139, 2001 WL 577666 (May 30, 2001), citing *State v. Carpenter*, 9th Dist. Wayne No. 2168, 1986 WL 14468 ((Dec. 17, 1986), Wayne App. No. 2168, unreported.
[15] *State v. Osborn*, 3rd Dist. Marion No. 9-05-35, 2006-Ohio-1890, ¶ 13, citing *Columbus v. Bickel*, at 36.
[16] See *Hogan v. State*, 583 So.2d 426, 427 (Fla.App.1 Dist.1991).
[17] *Weary*, citing *Morrissey, supra*, at 489, 33 L.Ed.2d at 499.
[18] Id., citing and quoting *Lodi v. Moore*, 9th Dist. Medina No. 2835-M, 1998 WL 801935.

contemplated by the United States Supreme Court in *Morrissey.*

Nevertheless, the admission of hearsay evidence at a probation revocation hearing can deny the probationer his due process right to confront and cross-examine adverse witnesses. [19] In this regard, there are several key limitations on the use of hearsay in a community control violation hearing.

First, following the language cited above from *Gagnon v. Scarpelli*, a probationer has a minimum right to confront witnesses absent some specific showing by the trial court of good cause for waiving the confrontation right.[20] The requirement of "good cause" is not intended to stand as a barrier to the logical consideration of hearsay evidence that is reliable, but does stand for the concept that the wholesale admission of hearsay in a trial court is not permitted.[21]

Applying this concept, In *State v. Miller* (1975), 42 Ohio St.2d 102, 326 N.E.2d 259, the Ohio Supreme Court held:

> "Where at a probation revocation hearing the trial court permits a probation officer who did not prepare the entries in the probation department record to testify as to the contents of that record and the probation officer who prepared the entries does not appear, there is a denial of the probationer's right to confront the witnesses against him, and, where the record does not show that the probation officer who prepared the entries was unavailable or that a specific finding was made of good cause for not allowing confrontation, there is a denial of the minimum requirements of due process of law required for probation revocation proceedings."[22]

The second limitation is that hearsay evidence cannot constitute the sole,

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[19] *State v. Dunning*, 2nd Dist. Greene No. 08CA07, 2009-Ohio-691, ¶ 10, citing *Columbus v. Bickel.*

[20] *State v. Estep*, 4th Dist. Gallia No. 03CA22, 2004-Ohio-1747, citing *State v. Alerman*, 70 Ohio App.3d 147, 150, 590 N.E.2d 836 (6th Dist.1990), citing *Columbus v. Lacy* (1988), 46 Ohio App.3d 161, 163, 546 N.E.2d 445 (10th Dist.1988).

[21] See id.

[22] See, also, *State v. Bates* (Sept. 14, 1999), 10th Franklin Dist. No 98AP-1530.

crucial evidence in support of the community control determination.[23] Hearsay evidence can be considered, but there must be other, independent, substantial evidence that exists that supports the finding of a violation.[24]

Applying these concepts to this case, it is apparent first that the state's entire basis as to the violation of sanction #1 from the entry filed on April 16, 2010, is that the defendant violated the law by possessing heroin. Although the defendant has been charged with a possession of heroin offense, he has not been convicted of this offense, and as a result, the only evidence that the defendant violated this sanction is that the substance that he was found to be in possession of at Talbert House Spring Grove was tested by the deputy sheriff and identified to be heroin. The basis for the violation of sanction #5 is that he violated the other sanctions in contradiction of the instructions provided by his probation officer. The basis for the violation of sanction #11 is that the defendant tested positive twice for illegal drugs while at Talbert House. As to sanction #1 from the entry filed on December 16, 2013, the defendant's community control cannot be revoked for failing to successfully complete the program at Talbert House Spring Grove if he was discharged for reasons not of his own making and he was prevented from completing the program through no fault of his own. That is the reason that the sanction requires that he comply with all rules and regulations of the facility. The state's sole basis, as presented through the

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[23] *State v. Wright*, 5th Dist. Stark No. 2013CA00011, citing *State v. Thompson*, 6th Dist. Wood No. WD-06-034, 2007-Ohio-2665, ¶ 44, citing *State v. Ohly*, 166 Ohio App.3d 808, 814, 853 N.E.2d 675, 2006-Ohio-2353, ¶ 21 (6th Dist.2006). See, also, *Carter v. State*, 82 So.3d 993 (Fla.App.1 Dist.2011)

[24] See *Dunning*, supra, at ¶ 12.

testimony of the night supervisor at Talbert House Spring Grove, for his discharge from this facility was his possession of heroin.

Thus, the essence of the four violations is that the defendant tested positive twice for illegal drugs while he was at Talbert House Spring Grove and was in possession of heroin shortly before his discharge from the facility. Without substantial evidence as to these violations, there is no basis for revoking the defendant community control.

The only evidence of the failed drug tests at Talbert House Spring Grove is the hearsay testimony of Mr. Matabiri that there are computerized records at Talbert House that show that the defendant tested positive twice on drug tests. There was no testimony from the person who allegedly performed these tests as to the methodology, performance, and results of the testing. In the absence of this testimony, the state also did not present any business records that would demonstrate how and when the tests were performed or what the results were. There is no basis for even knowing who performed the tests or whether the person who performed each test was qualified to perform a drug test. The state maintains in its memorandum that Matabiri was "around for the test results," but being "around" drug testing does not make the testing reliable. There is no basis whatsoever upon which the court may assess the reliability of this evidence.

The state cites *State v. Koch*, 12th Dist. Warren No. CA2006-02-015, 2006-Ohio-6702 as supporting its view that Matabiri could testify to the results of the drug testing in his facility, but unfortunately, the state does not accurately state the pertinent facts in *Koch*. According to the state in its memorandum, the

director of a batterers intervention program was permitted to testify without any personal knowledge to the absence of a probationer at classes in that program. However, contrary to the state's recitation of the facts, the director in fact testified that he discussed the probationer's absences directly with the probationer, and clearly the director had personal knowledge as to the violation itself. Moreover, his testimony as to absences of someone from attending classes in his program is markedly different from Matabiri testifying to drug test results of which he has no personal knowledge and concerning which he has no personal expertise.

The only evidence of the possession of heroin is that Mr. Matabiri found a substance in the defendant's locker that appeared to constitute contraband, that a deputy sheriff was dispatched to the scene, and that the deputy sheriff tested the drug and determined that it was heroin. There was no testimony that Mr. Matabiri was qualified to know what the substance was of his own knowledge. He testified that the deputy sheriff informed him that the substance was heroin, but the deputy sheriff was not called as a witness. As with the drug testing in the facility, the state did not present any business records that may have been created with regard to this testing. It is unknown as to what methodology this deputy used in testing the heroin or whether he was even qualified to perform such testing.[25] The state points out in its memorandum that Matabiri was "present" for the drug testing. Presumably, the state is suggesting that the fact that Matabiri was in close proximity to where the testing was performed makes him qualified to testify to the results of the testing, but there is no evidence that

[25] See *Carter v. State*, 82 So.3d 993, 996 (Fla.App.1 Dist.2011); *Starling v. State*, 110 So.3d 542, 543 (Fla.App.1 Dist.2013)

Matabiri has any passing knowledge, much less expertise, as to drug testing. In fairness, all that Matabiri could testify to was what the deputy sheriff told him regarding the results.

With regard to Matabiri's testimony as to the results of the drug test administered by the deputy, the state cites *State v. McCants*, 1st Dist. Hamilton Dist. No. C-120725, 2013-Ohio-2646, as supporting the notion that there is no due process violation involved with regard to Matabiri's testimony as to this test that allegedly resulted in a finding of heroin. In *McCants*, a laboratory result from the coroner's office indicating that the substance found in that case was marijuana was admitted into evidence, and the court noted that the police officer who had recovered the substance testified that he recognized the substance based on his experience as marijuana. These facts are in significant contrast to the facts of this case in which Matabiri has no knowledge as to the identity of the substance other than what the deputy told him and there has been no laboratory report or other documentation of the testing introduced into evidence.

The core issues in this case are: 1) Did the defendant consume any illegal drugs while he was a resident of Talbert House? and 2) Was the substance which was found in the defendant's jacket pocket heroin? On these core issues, the state's case is based entirely on hearsay.

Moreover, the state has not established good cause for its use of hearsay testimony on these core issues rather than presenting testimony from the necessary witnesses, or alternatively, presenting sufficient documentation which would have at least described the manner in which the testing was done and the

results of the testing. In this regard, the court continued the hearing in progress from April 9th to April 17th in order to give the state an opportunity to call the persons who performed the drug tests as witnesses and/or to present other evidence which would have shown the manner and results of the testing. The state's counsel, however, expressly declined this opportunity and simply stated that the prosecution believed it had already submitted substantial evidence on the issues involved. No other reason was provided for the state's reliance on hearsay on the core issues in the case, and there has not been any good cause suggested, much less established, for the reliance on hearsay.

The state has the burden to prove by substantial evidence that the defendant violated the sanctions of his community control. Hearsay is admissible in community control violation hearings, but the admission of hearsay which denies a defendant the right to confrontation must be based on good cause. Furthermore, hearsay cannot be the sole basis for revocation.

The hearsay which has been introduced in this case by the state without good cause is the sole basis for upon which the court can find that the defendant tested positive twice for illegal drugs and was in possession of heroin. As a result, procedural due process precludes this court from finding a violation of the community control sanctions based on this hearsay evidence. The court finds that the state failed to present sufficient, competent evidence necessary to prove the alleged violations, and judgment shall be rendered in favor of the defendant on the community control violation charge as set forth in the affidavit filed by the Probation Department.

IT IS SO ORDERED.

DATED: 6-12-14

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 11th day of June 2014 to Catherine Adams, assistant prosecuting attorney, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, and to Christopher J. Feldhaus, 302 E. Main Street, Batavia, Ohio 45103.

Administrative Assistant to Judge McBride