

[Cite as *State v. Boyd*, 2009-Ohio-4108.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22084
v.	:	T.C. NO. 2002 CR 4229
	:	
ALLEN BOYD	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 14th day of August, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Allen D. Boyd, filed March 16, 2007. On December 23, 2002, Boyd was indicted on two counts of unauthorized use of a motor vehicle. Boyd pled guilty to one count of the indictment and the other count was dismissed on May 27, 2003. Boyd was

sentenced to five years of community control sanctions. A revocation notice was filed on January 11, 2007. The hearing was held on February 15, 2007, and the trial court revoked Boyd's community control sanctions and imposed a one-year prison term. This appeal on the revocation hearing followed.

{¶ 2} The relevant events giving rise to this matter began on January 11, 2007 when a notice of revocation hearing was filed. The notice alleged four rule violations of the terms of community control. The revocation notice alleged that Boyd violated Rule numbers 1 (refraining from violation of any law); 3 (requirement to notify his Probation Officer of any change of residence immediately after the change); 5 (requirement to report at such time and place as directed by his probation officer); and 10 (failure to complete Project Cure Residential Treatment as ordered by the trial court).

{¶ 3} The trial court held an evidentiary hearing on February 15, 2007. During the hearing, the state called Dawn Schwartz, Boyd's probation officer. Schwartz testified that Boyd went AWOL from the Project Cure Residential Treatment program in July 2005 and did not report until December of 2006. Schwartz further testified that as part of his community control sanctions, Boyd was required to report weekly to her. After Schwartz's testimony, Boyd took the stand in his own defense. Boyd testified that he was told by Schwartz that if he paid his court costs and restitution for the original offense, reported in, and passed his drug tests, she would ask the judge to terminate Boyd's probation. He further maintained that he went AWOL from the treatment program because his mother had a heart attack in Georgia. On cross examination, Boyd admitted to being

arrested on December 20, 2006 for obstructing official business. Furthermore, Boyd admitted that he did not notify Schwartz of his whereabouts with the exception of a single phone call in September 2006. He also admitted that he did not receive permission to leave the state of Ohio. Finally, Boyd admitted to going AWOL from Project Cure in July 2005.

{¶ 4} At the conclusion of the testimony, the trial court found Boyd violated the terms of community control. After this pronouncement, Boyd said, “I would also like to bring to the attention of the court that I feel it was not fair as far as counsel because I have a lisp and furthermore, we have a conflict of interest anyway because I filed disciplinary counsel. We got a case back in case number 1995-CR-4033. Mr. Lewis you should not even be representing me.” The court responded that such information should have been brought to the court’s attention before the hearing. Boyd’s counsel, Michael Lewis, stated on the record that he was not aware of any disciplinary action and would have removed himself from the case had Boyd brought it to his attention. Thereafter, the trial court sentenced Boyd to a prison sentence of twelve months.

{¶ 5} On appeal, Boyd asserts two assignments of error. The first assignment of error is as follows:

{¶ 6} “THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO INQUIRE AS TO THE BASIS OF APPELLANT’S REQUEST FOR NEW APPOINTED COUNSEL.”

{¶ 7} Boyd was represented by a public defender at the revocation hearing. Boyd argues that the trial court failed to inquire as to the validity of the allegations

made by him when he orally moved for new appointed counsel.

{¶ 8} It is the duty of the trial court to inquire whether a defendant's objection regarding appointed counsel was "an arbitrary failure to go forward or a legitimate claim of inadequate representation." *State v. Deal* (1969), 17 Ohio St.2d 17, 20. In other words, the trial court must inquire into the complaint and make the inquiry part of the record. *Id.* at 19. The defendant must announce grounds for appointment of new counsel that are sufficiently specific to trigger further investigation. *State v. Cowans*, 87 Ohio St.3d 68, 72, 1999-Ohio-250. Failure by a trial court to inquire about a defendant's timely request for new counsel amounts to denial of effective assistance of counsel. *State v. Simons* (Nov. 22, 2000), Champaign App. No. 99CA5, at *2, *citing State v. Carter* (1998), 128 Ohio App. 3d 419, 422-423.

{¶ 9} However, "the mere claim of a 'conflict of interest,' without more, is not a sufficiently specific allegation to trigger the duty to investigate further." *Simons*, at *2. Furthermore, "the refusal to replace an appointed attorney is not an abuse of discretion when the request is *made at the last minute* prior to trial and adequate reasons for the request are not set out in the record." *State v. Harper* (1988), 47 Ohio App.3d 109, 113. (emphasis added)

{¶ 10} In the case before us, there is no indication in the record, that Boyd objected to representation by the public defender prior to the revocation hearing. Only upon learning that his community control sanctions would be revoked, Boyd asserted: "I would also like to bring to the attention of the court that I feel it was not fair as far as counsel because . . . we have a conflict of interest anyway because I

filed disciplinary counsel. We got a case back in case number 1995-CR-4033. Mr. Lewis you should not even be representing me.” Boyd’s assertion after the decision had been rendered was not timely. Furthermore, Boyd did not elaborate on the alleged grievance he had filed against his attorney, Mr. Lewis. There are statements on the record indicating that Mr. Lewis was completely unaware of any past disciplinary action filed against him by Boyd. Mr. Lewis stated on the record that had he been made aware of such actions, he would have sought removal from the case. In fact, there is nothing in the record that indicates any breakdown in communication between Boyd and Mr. Lewis, nor does the record support an irreconcilable conflict which would support a meritorious ineffective assistance of counsel claim. Nothing about Mr. Lewis’ representation was deficient in any respect.

{¶ 11} Because Boyd waited until an unfavorable ruling before disclosing the alleged conflict of interest, and did not sufficiently articulate specific grounds for appointment of new counsel, his first assignment of error is overruled.

{¶ 12} Boyd asserts as his second assignment of error:

{¶ 13} “APPELLANT’S COUNSEL WAS INEFFECTIVE DURING THE REVOCATION HEARING BECAUSE HE FAILED TO INTRODUCE THE PROPER EVIDENCE REGARDING THE PAYMENT OF RESTITUTION.”

{¶ 14} Boyd argues that his counsel was ineffective during the revocation hearing because he failed to question Schwartz about the question of restitution. However, the issue of restitution was raised by Boyd during his own testimony at the revocation hearing. The trial court found irrelevant the issue of restitution in

the revocation hearing. We agree.

{¶ 15} The notice of revocation, as indicated earlier, alleged four rule violations of a five-year community control sanctions sentence entered by the trial court on August 5, 2003. None of the rule violations were based on a failure to make restitution payments. After the hearing, the trial court found violations of rules 3, 5, and 10 resulting in revocation. There is nothing in the record notice that suggests restitution was even an issue in dispute at the revocation hearing. Thus, restitution is wholly irrelevant to the cause for imprisonment, and Boyd's second assignment of error is overruled.

{¶ 16} Accordingly, the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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