

ORIGINAL

NO. 14-1174

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 101558

STATE OF OHIO

Appellant

vs.

DELTA ROSARIO

Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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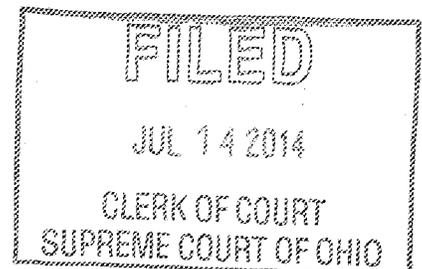
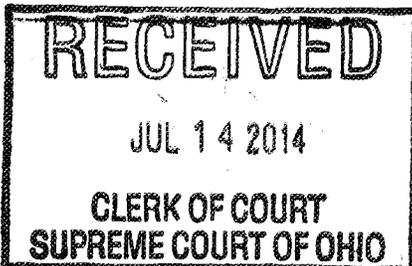


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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

The State respectfully seeks this Honorable Court's discretionary jurisdiction to resolve this issue: is the State of Ohio a party to community control sanctions violation and revocation proceedings in criminal cases and, if so, is the Prosecuting Attorney entitled to notice and an opportunity to be heard at the hearings? Alternatively, the State requests summary reversal of the Eighth District Court of Appeal's order denying the State's motion for leave to appeal. *State v. Rosario*, COA 101558, entry of July 3, 2014.

A trial court judge has held the State, as represented by the Prosecuting Attorney, is not a party to community control violation and revocation hearings. Rather, probation officers, non-lawyer court employees, are the sole representative of the State at such hearings. As such, prosecuting attorneys may not speak or otherwise provide legal representative on behalf of the State at the hearings.

The trial court established, revoked, then re-instated a blanket policy by which the Prosecuting Attorney must seek leave of court, in writing, at least two days before hearings, to represent the State at the hearings, and must provide notice of all evidence and witnesses supporting the claimed violations. Unless this procedure is followed, the Prosecuting Attorney's assistant prosecutors are barred from speaking and representing the State at the hearings.

The trial court's blanket policy ignores the Prosecuting Attorney's statutory duty "to prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." R.C. 309.08(A). Violation hearings have been held to be within the purview of "complaints, suits, and controversies." "A violation of community-control

sanctions, by virtue of a subsequent felony arrest, is certainly within the concept of 'complaints, suits, and controversies' in which the state remains an interested party." *State v. Young*, 154 Ohio App.3d 609, 798 N.E.2d 629, 2003-Ohio-4501, ¶ 7, citing *State v. Ferguson* (1991), 72 Ohio App.3d 714, 716, 595 N.E.2d 1011. The trial court's actions are in direct contradiction of the law.

The trial court's fixed rule is applicable to every future community control violation and revocation hearing in the court and may be adopted by other trial courts. Unless review is granted, the State will be foreclosed from appropriate relief in the future. The trial court's policy affects substantial rights of the State, a party to these cases, to due process of law and violates the doctrine of separation of powers. The lack of notice and an opportunity to be heard precludes the Prosecuting Attorney from providing legal representation on behalf of the State and victims and sustaining its burden of proof at hearings.

The State sought leave to appeal in this case and six others pursuant to App.R. 5(C) and the "any other decision" clause of R.C. 2945.67(A). On July 3, 2014, the Eighth District Court of Appeals denied leave to appeal in all cases.

The State respectfully submits that this Honorable Court's discretionary jurisdiction is warranted to determine whether the State is a party to community control violation and revocation proceedings and whether the Prosecuting Attorney is entitled to notice and an opportunity to provide legal representation to the State at these hearings. Leave to appeal is sought on the authority of the "any other decision" clause of R.C. 2945.67(A) and *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644. See *In Re M.M.*, 135 Ohio St.3d 375, 987 N.E.2d 652, 2013-Ohio-1495.

STATEMENT OF THE FACTS

In March, 2011, appellee Delta Rosario was convicted of Aggravated Theft and sentenced to community control sanctions. On June 17, 2014, at Rosario's second violation hearing, the trial court found Rosario in violation of sanctions and continued her on community control. At the hearing, the trial court refused to allow the assistant prosecutor to speak or represent the State, telling him to "sit down." (*State v. Rosario*, CR 547091, Tr. 3). Instead, the trial court recognized the probation officer in attendance as "representing the interest of the State of Ohio." (*State v. Rosario*, CR 547091, Tr. 3).

The State sought leave to appeal, recognizing the trial court's order is not a decision in a criminal case enumerated in R.C. 2945.67(A) from which the State had an appeal of right. The Eighth District Court of Appeals denied the State's motion for leave to appeal in this case and *State v. Collins*, COA 101557, *State v. Marks*, COA 101559 and 101561, *State v. Jenkins*, COA 101560, *State v. Harris*, COA 101562, *State v. Wiley*, COA 101563, and *State v. Scott*, 101565. The State has simultaneously filed notices of appeal and memoranda in support of jurisdiction in these cases.

The State previously sought leave to appeal the trial court's identical actions and orders in an earlier case. On March 21, 2014, the Eighth District granted the State's leave to appeal, Case Numbers 101039 and 101040, from the trial court's order of February 14, 2014 in *State v. Washington*, CR 5352968 and 542057. In *Washington*, the trial court had held the State was not entitled to notice of, or an opportunity to be heard at, community control violation or revocation hearings and found probation

officers fully represented all State interests and fulfilled all State responsibilities at these hearings.

Once the Eighth District accepted the State's appeal, the trial court abandoned its February 14, 2014 order. In the appealed cases, *State v. Washington*, CR 535298 and 542057, the trial court provided notice to the State of a pending probation violation hearing and allowed the State to participate in the hearing held February 28, 2014. Due to the trial court's abandonment of its February 14, 2014 order, the parties moved to voluntarily dismiss the appeals. On April 4, 2014, the Eighth District granted the parties' motion to dismiss the appeal.

Once the appeal was dismissed, the trial court reversed course and reinstated its February 14, 2014 policy of barring assistant prosecutors from representing the State at these proceedings.¹ The trial court went further, finding the court reporter inaccurately reflected the representation of the parties on the cover page of the February 28, 2014 transcript in *Washington* and ordered the cover page to reflect that Probation Officer Victoria Boyd, not the assistant prosecutor, represented the State at the violation hearing. (*State v. Washington*, CR 535298 and 542057, Journal Entry of April 23, 2014).

The State attempted to appeal this issue again in *Washington* however, on June 4, 2014, the Eighth District denied the State's motions for leave to appeal in Case Nos.

¹ The trial court barred an assistant prosecutor from participating at the hearing and ordered him to sit down, stating,

You're not here representing anybody. I don't know who you're representing, but you're not representing anybody. * * * * He (defense counsel) doesn't determine who the parties are, the Court does. And you're not one of the parties to this action.

(*State v. Washington*, CR 535298, 542057, Tr. 11-12, Motion hearing of April 24, 2014).

101406 and 101407. The State has sought reconsideration and en banc consideration in those cases; no decision has been issued.

On June 13, 2014, the Cuyahoga County Prosecutor filed a Petition and Complaint for Writ of Mandamus against the trial court in Case No. 2014-0993, seeking a writ of mandamus ordering the trial court to provide notice to the County Prosecutor of community control violation hearings and allow the Prosecutor to be heard as the representative of the State. The Petition remains pending before this Court.

LAW AND ARGUMENT

PROPOSITION OF LAW I: THE STATE OF OHIO IS A PARTY TO COMMUNITY CONTROL SANCTIONS VIOLATION AND REVOCATION PROCEEDINGS AND THE COUNTY PROSECUTOR, AS THE STATE'S LEGAL REPRESENTATIVE, IS ENTITLED TO NOTICE OF AND AN OPPORTUNITY TO BE HEARD AT THESE HEARINGS.

The State sought leave of court pursuant to App.R. 5(C) as the trial court's order was not a decision in a criminal case enumerated in the first clause of R.C. 2945.67(A) from which the State had an appeal of right. As leave to appeal was denied, the State respectfully seeks this Court's review of these substantive rulings under the authority of the "any other decision" clause of R.C. 2945.67(A) and *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2nd 644.

- a. The trial court's orders and actions violate R.C. 309.08 and deprive the State, a party involved, of substantial rights protected by due process.**

As demonstrated in this case and the others filed contemporaneously with this appeal, a trial court has instituted a blanket policy of refusing to recognize the State as a party to community control violation and revocation proceedings and denying the State legal representation at these hearings. The trial court's order ignores the Prosecuting

Attorney's statutory duty under R.C. 309.08 to prosecute, on behalf of the State, all complaints, suits, and controversies in which the State is a party.

R.C. 309.08 provides, in part, as follows:

309.08 Powers and duties of prosecuting attorney; organized crime task force membership; rewards for information about drug-related offenses

(A) The prosecuting attorney may inquire into the commission of crimes within the county. *The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code, and other suits, matters, and controversies that the prosecuting attorney is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals.* In conjunction with the attorney general, the prosecuting attorney shall prosecute in the supreme court cases arising in the prosecuting attorney's county, except for those cases required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code.

R.C. 309.08(A) (emphasis added).

Violation hearings have been held to be within the purview of "complaints, suits, and controversies." "A violation of community-control sanctions, by virtue of a subsequent felony arrest, is certainly within the concept of 'complaints, suits, and controversies' in which the state remains an interested party." *State v. Young*, 154 Ohio App.3d 609, 798 N.E.2d 629, 2003-Ohio-4501, ¶ 7, citing *State v. Ferguson* (1991), 72 Ohio App.3d 714, 716, 595 N.E.2d 1011. Revocation hearings remain suits in which the State is a party, and therefore Ohio's prosecutors may attend and participate. *Young, supra*. See also *Roberts v. Ross*, 680 F.Supp.1144, 1146 (S.D. Ohio 1987) (There is nothing in R.C. 2951.08 that prevents a prosecutor from seeking a warrant to arrest a probation violator because R.C. 309.08 requires that prosecutor prosecute "all complaints, suits, and controversies in which the state is a party. . .").

The State has the burden of proof at revocation hearings to establish a violation and revoke community control sanctions by “substantial” evidence. *State v. Lenard*, 8th Dist. No. 93373, 2010-Ohio-81. The trial court’s refusal to provide to the prosecuting attorney notice of the hearings and an opportunity to be heard is a violation of due process. This fixed rule precludes the State from legal representation at these hearings and an opportunity to sustain its burden of proof.

Moreover, barring prosecutors from speaking at hearings at which the State is a party unless granted leave by the court constitutes an arbitrary blanket policy, which are disfavored and have been found to be an “abdication of judicial responsibility.” *State v. Jones*, 996 N.E.2d 569, 572.

b. The trial court’s action of requiring probation officers, non-lawyer court employees, to replace assistant prosecutors, the State’s legal representatives, at community control violation, revocation hearings violates the doctrine of separation of powers.

The trial court’s insistence that probation officers are the “representatives” of the State at community control hearings ignores the basic governmental structure in which those probation officers work. “R.C. 2301.27 allows courts of common pleas to appoint probation officers, fix their salaries, and supervise their work.” *State ex rel. Hillyer v. Tuscarawas Cty. Bd. Of Commrs.*, 70 Ohio St3d 94, 100, 637 N.E.2d 311 (1994). The trial court, however, has replaced prosecutors with non-lawyer court employees to represent the State’s interests and fulfill the State’s duties at violation and revocation hearings. Further, violation and revocation hearing may become sentencing hearings. In the event community control is terminated, the defendant is sentenced immediately, with no notice to the State or victims.

The trial court's order violates the doctrine of separation of powers by supplanting the role of executive-branch prosecutors with judicial branch probation officers. Ohio's prosecutors represent the concerns of the community in any suit in which the State is a party. R.C. 309.08. "It is inherent in our theory of government 'that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved * * *.'" *State v. Hochhausler*, 76 Ohio St.3d 455, 463, 668 N.E.2d 457 (1996), quoting *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 503 N.E.2d 136 (1986), and *Fairview v. Giffie*, 73 Ohio St. 183, 187, 76 N.E. 865 (1905). "The separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 372, 2006-Ohio-1825, 858 N.E.2d 472.

The State has the burden of proof at revocation hearings to establish a violation and revoke community control sanctions by "substantial" evidence. *Lenard*, 2010-Ohio-81. By its actions, the trial court has delegated the State's evidentiary burden of proof to non-lawyer employees of the court itself. No explanation as to how court employees may constitutionally do so has been provided, as none exists.

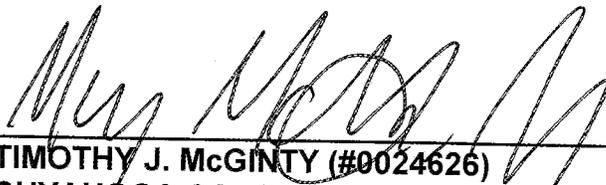
CONCLUSION

The State respectfully submits that the trial court's determination that the State, as represented by the Prosecuting Attorney, is not a party to community control violation and revocation hearings, rather, probation officers provide the State's sole legal representation, is a substantive ruling that warrants this Court's discretionary review. In the absence of review, appropriate relief in the future will be foreclosed. The State will

continue to be denied notice of these hearings and the Prosecuting Attorney will continue to be barred from providing legal representation to the State as mandated under R.C 309.08(A). The trial court's order affects substantial rights of the State, a party to this and other cases, to due process and violates the doctrine of separation of powers.

Alternatively, the State requests summary reversal of the Eighth District Court of Appeal's order denying the State's motion for leave to appeal and remand for consideration of these issues. *State v. Rosario*, COA 101558, entry of July 3, 2014.

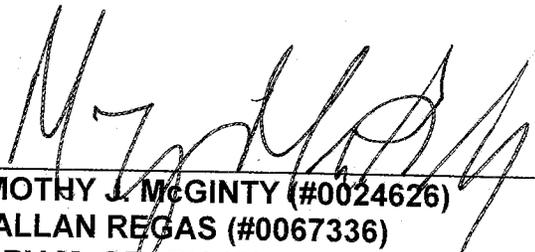
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing State of Ohio's Memorandum in Support of Jurisdiction has been sent by regular U.S. Mail or electronic filing this 11th day of July, 2014, to Thomas Rein, 526 Superior Avenue, Suite 940, Cleveland, Ohio 44114 and the Office of the State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



TIMOTHY J. MCGINTY (#0024626)
T. ALLAN REGAS (#0067336)
MARY McGRATH (#0041381)

JUL X 3 2014

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellant

COA NO.
101558

LOWER COURT NO.
CR-11-547091-A

-vs-

COMMON PLEAS COURT

DELTA ROSARIO

Appellee

MOTION NO. 476367

Date 07/03/14

Journal Entry

Sua sponte, the appeal is dismissed per entry 476033 dated July 3, 2014.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES.-COSTS TAXED

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL X 3 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Patricia A. Blackmon Deputy



Judge EILEEN A. GALLAGHER, Concur

Patricia A. Blackmon
PATRICIA A. BLACKMON
Presiding Judge

The State of Ohio, }
Cuyahoga County, } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 07-03-2014 CA 101558

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 07-03-2014

CA 101558

and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 7th day of July A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By _____ Deputy Clerk