

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	Case No. 2014-1174
Appellant	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
DELTA ROSARIO	:	
Appellee	:	

MERIT BRIEF OF APPELLEE DELTA ROSARIO

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INTRODUCTION

The Cuyahoga County Prosecutor has filed the instant appeal as a means of challenging Cuyahoga County Common Pleas Judge John Sutula's standing order, issued to manage his busy docket of CCS violation hearings. This case does not serve as an appropriate vehicle for the Prosecutor's legal challenge for several reasons. First, the appeal was not taken from a community control violation hearing—rather it was taken from a status hearing at which no violation was alleged or found. Second, Ms. Rosario's probation had already terminated prior to that status hearing by operation of law. Third, even if Rosario's probation had not already terminated, the trial court terminated it at the status hearing and no stay was ever sought or obtained by the County Prosecutor. Accordingly, there is no longer a live controversy that need be resolved by this Court. And, finally, for the reasons expressed in Rosario's motion to dismiss, the County Prosecutor's appeal is taken from the Court of Appeals' decision *not* to grant the County Prosecutor leave to appeal and is not taken from a decision on the merits. For all these reasons, this Court should dismiss the instant case as improvidently allowed.

However, if this Court chooses to address the merits of the County Prosecutor's argument, it should affirm the trial court's decision. The County Prosecutor takes issue with Judge Sutula's standing order because it requires the County Prosecutor to provide notice to the Court and the defendant if the Prosecutor wants to be heard at a CCS violation hearing. The County Prosecutor has refused to comply with Judge Sutula's standing order because, in his view, he has a statutory right to be heard at a CCS violation hearing. Because the County Prosecutor has no such right and because the trial court was simply applying a

reasonable order designed to fairly and efficiently manage its docket, this Court should affirm the decision of the trial court.

For 14 years, Judge Sutula, like his colleagues on the bench, has presided over probation or CCS violation hearings where the prosecutor had no role and generally did not appear, and the probation department presented evidence regarding the alleged violation. Cuyahoga County Common Pleas Court's practice is consistent with the traditional manner in which probation violation hearings have been handled. *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 789, 93 S.Ct. 1756 (1973) (explaining that, traditionally, at probation violation proceedings "the State is represented, *not by a prosecutor*, but by a parole [or probation] officer.") (emphasis added). Last year, the County Prosecutor (a former judge familiar with the customary practices of the Cuyahoga County Common Pleas Court) decided, for the first time, that he had a statutory right to be heard at every CCS violation hearing. He chose to force the issue in a case, *State v. Washington*, CR-10-542057, where the victim of the CCS violation was one of the County Prosecutor's own family members.

Because the County Prosecutor is now seeking to be directly involved in some, though certainly not all, CCS violation hearings, Judge Sutula issued a standing order to govern the County Prosecutor's participation at such hearings.

Judge Sutula's standing order acknowledges that the County Prosecutor is entitled to attend every CCS violation hearing and has a right to "bring to the attention of this Court or the Probation Department acts that may be a probation violation." And, despite the fact that the County Prosecutor has no explicit right to be heard at a CCS violation hearing, Judge Sutula's standing order indulges his participation so long as the County Prosecutor follows some basic steps to ensure that the defendant has proper notice:

In the event that the Prosecutor's Office desires to speak at a hearing, it may only do so with leave of Court. A Request for Leave to be Heard shall be filed no later than 2 days before the scheduled probation revocation hearing and shall include any evidence and witnesses supporting the claimed violation. Case specific statements as to the violation shall be set forth in detail in a brief attached to the request. The Request for Leave to be Heard shall be served on the Probation Department, Counsel for the Defendant, and the Defendant, should the Defendant wish to proceed pro se, at least 2 days prior to the hearing.

The County Prosecutor, and his assistants, made no attempt to comply with Judge Sutula's standing order in this case. Instead, the County Prosecutor chose to ignore Judge Sutula's order and challenge it on direct appeal.¹ The County Prosecutor's position is that he should not have to comply with Judge Sutula's order. He maintains that he has a right to be heard by virtue of his general powers under R.C. 309.08 to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." He fails to recognize that the instant case did not involve a community control violation hearing.

However, even if this case did involve a community control violation hearing, the County Prosecutor's position is simply wrong. His flawed argument reflects, among other things: 1) A fundamental misunderstanding of the nature of CCS violation hearings; and 2) His failure to consider the General Assembly's decision to afford the County Prosecutor the right to be heard at initial sentencing hearings, see R.C. 2929.19 and Crim. R. 32.2, and not afford any such rights at CCS violation hearings, see R.C. 2929.15 and Crim. R. 32.3.

A criminal defendant placed on CCS is under the exclusive authority of the trial court judge. And it is the trial court judge's responsibility, along with the probation

¹ The County Prosecutor took these steps after filing an affidavit of prejudice in this Court in the *Washington* case (which became moot after Judge Sutula voluntarily recused himself) and after filing a writ of mandamus in this Court, *State ex rel. McGinty v. Sutula*,

department, to supervise those defendants and decide whether there have been any violations of the CCS conditions. Of course, if any of the defendant's violations constitute new criminal offenses, the County Prosecutor may, and generally does, separately prosecute them.

The County Prosecutor does not, however, have any statutory role in CCS violation hearings. While R.C. 2929.19 and Crim. R. 32(A)(2) explicitly afford the County Prosecutor the right to speak at initial sentencing hearings, R.C. 2929.15 and Crim. R. 32.3 does not provide similar rights to the County Prosecutor for CCS violation hearings. Moreover, the General Assembly's decision to assign responsibility for CCS violation hearings to County Probation Departments and/or the Adult Parole Authority, rather than the County Prosecutor, is perfectly consistent with historical practice and does not violate the separation of powers doctrine. Indeed, that legislative decision is no different than assigning responsibility for conducting parole or PRC violation hearings to the Adult Parole Authority without the involvement of the County Prosecutor. The County Prosecutor's due process argument is particularly misguided because the State and Federal Due Process Clauses provide protections to *citizens* from actions taken by the Government and has no role in disputes between governmental entities. The State has "no right of due process from itself." *State v. Mayo*, 8th Dist. No. 80216, 2002 WL 853547, ¶ 12, n.1.

Because the County Prosecutor does not have an absolute right to be heard at CCS violation hearings, this Court should affirm the trial court's decision. Judge Sutula's standing order is reasonable, protects criminal defendants' due process rights, affords the

County Prosecutor an opportunity to be heard, and is entirely consistent with the statutory framework established by the General Assembly for CCS violation hearings.

STATEMENT OF THE CASE AND FACTS

On February 18, 2011, Delta Rosario pled guilty to a single count of theft, a felony of the fifth degree. On March 24, 2011, the trial court sentenced Ms. Rosario to 36 months of CCS with the following conditions: 1) 150 hours of community work service; 2) random drug testing; 3) obtain/maintain verifiable employment; 4) obtain GED, and 5) a prohibition on entering Target. There is no indication in the record that the County Prosecutor, or one of his assistants, chose to exercise his right to be present or be heard at the initial sentencing hearing.

On January 23, 2012, the trial court found Ms. Rosario to be in violation of the conditions of CCS due to a new misdemeanor case. (Tr. at 4). The trial court continued Ms. Rosario on CCS with the condition of 20 additional hours of community work service. There is no indication in the record that the County Prosecutor, or one of his assistants, appeared at this CCS violation hearing.

Having been sentenced to 36 months (3 years) of CCS on March 24, 2011, Ms. Rosario's term of community control sanctions was completed on March 24, 2014.

On April 2, 2014, the trial court issued an order, "at the request of the probation department," purporting to extend Rosario's term of CCS until June 24, 2014. The trial court lacked any authority to issue such an order because Rosario's term of CCS had already expired. Moreover, the order was issued without holding a hearing or finding any violation to justify such an extension.

On June 24, 2014, the trial court held a status hearing to "determine if [Ms.

Rosario] can be complete with her court.” (Tr. at 4). The probation officer explained that Rosario had “complied with almost all of her community control conditions.” (Tr. at 3). She consistently reported, was compliant with her mental health treatment, has paid \$485 in court costs and fees, and is enrolled in GED classes. (Tr. at 4). The probation officer did not allege any violation of community control sanctions. Ms. Rosario’s counsel asked the court to terminate community control sanctions and indicated that she was willing to sign a cognovit note to address the remaining \$322 in court costs. (Tr. at 4). The trial court stated that “we’ll terminate your community control” once Rosario signed a cognovit note. (Tr. at 5). Although the journal entry indicated that the trial court found Rosario to be in violation of the conditions of CCS, the transcript makes clear that was not the case. No CCS violation was alleged, let alone found by the trial court.

Despite the fact that this was a status hearing and not a CCS violation hearing, an assistant county prosecutor appeared at the June 11, 2014 hearing and asserted an alleged “right to be present and participate in all probation violation hearings.” (Tr. at 3). Judge Sutula responded, “for all the reasons I’ve already said [in] all the other cases, please sit down.” (Tr. at 3). And, the prosecutor did not proffer for the record anything that he wished to say at the status hearing.

Recognizing that it had no appeal of right, the County Prosecutor sought leave to appeal, in the Eighth District Court of Appeals, from the trial court’s June 11, 2014 status hearing. The Eighth District denied leave and dismissed the County Prosecutor’s appeal. The County Prosecutor then filed an appeal with this Court, which this Court accepted. The County Prosecutor filed his merit brief on January 20, 2015 raising a single proposition of law. Ms. Rosario’s response brief follows.

LAW AND ARGUMENT

I. The instant appeal should be dismissed as improvidently allowed.

With his appeal in this case, the County Prosecutor has asked this Court to determine the rights and/or obligations, if any, of a County Prosecutor at a community control violation hearing and the validity of a trial court order governing its docket of community control violation hearings. Whether or not that is an issue worthy of this Court's consideration as a general matter, this is not the right case to decide this issue for several reasons.

First, Delta Rosario's community control sanctions actually terminated as a matter of law several months before the hearing that is the subject of the County Prosecutor's appeal. The trial court placed Ms. Rosario on 36 months of community control sanctions. That 36-month period expired on March 24, 2014. Although the trial court issued an order *after* March 24, 2014 purportedly extending probation, it lacked jurisdiction or authority to do so. Thus, the subsequent proceedings, including the June 2014 hearing upon which this appeal is predicated, were conducted without any legal authority and were void.

Even if the trial court had jurisdiction to conduct proceedings on June 11, 2014, the trial court did *not* hold a community control *violation* hearing. Although the journal entry refers to a violation having been found, a review of the transcript makes clear that is not the case. There was no violation alleged. Ms. Rosario did not admit to any violation. And there was no violation found. The trial court simply wanted to hold a status hearing because, it believed, Ms. Rosario's community control sanctions were about to expire.

Because the June 11th hearing was not a community control violation hearing, the County Prosecutor's argument is totally misplaced in this case.

Moreover, even if this Court were to construe the June 11, 2014 as a community violation hearing over which the trial court had authority to proceed, the County Prosecutor did not seek or obtain a stay of the trial court's ruling. Ms. Rosario's sentence is now complete and therefore the issue is moot. Courts have consistently held that sentencing appeals, taken by the defendant, are rendered moot by the completion of the sentence. *See e.g. State v. Gruttadauria*, 8th Dist. No. 90384, 2008-Ohio-3152, ¶ 6; *State v. Smith*, 11th App. No. 2000-L-195, 2002-Ohio-1330, *2. The same rule should be applied here.

Finally, even if this case were not moot, this Court should still dismiss the appeal as improvidently allowed for all the reasons set forth in Ms. Rosario's January 28, 2015 amended motion to dismiss. Simply put, the County Prosecutor's appeal in this case is taken from the Eighth District's discretionary decision not to hear his appeal and not from a substantive ruling addressing the merits of its proposition of law. Despite the fact that there was no substantive ruling from the Eighth District to review, the State urged this Court to accept the appeal because it raised a recurring dispute between a Cuyahoga Common Pleas Judge and the Cuyahoga County Prosecutor regarding the County Prosecutor's role at a CCS violation hearing. *After* this Court accepted the instant case, the Eighth District exercised its discretion and accepted two appeals by the County Prosecutor raising, according to the State, "the identical issue as presented" in *Rosario*. (State's Merit. Br. at 5) (citing *State v. Heinz*, 8th Dist. No. 102178, accepted 11/21/14, and *State v. Wheeler*, 8th Dist. No. 102182 and 102183, accepted 12/11/14). Given that the substance of the issue will

be resolved by the Eighth District in *Heinz* and *Wheeler*, this Court's resources are no longer well spent on this case.

II. This Court should reject the County Prosecutor's sole proposition of law.

With his sole proposition of law, the County Prosecutor maintains that he has a right to be heard at CCS violation hearings and that the trial court's failure to recognize that right violated R.C. 309.08(A), the State of Ohio's purported Due Process rights, and the separation of powers doctrine. The County Prosecutor is wrong on all accounts.

A. *CCS violation hearings are governed by 2929.15, and do not require the presence or participation of the County Prosecutor.*

The issue in this case is whether the County Prosecutor has the statutory obligation and/or right to represent the State's interests at CCS violation hearings. In its brief, the County Prosecutor exclusively relies on the generic grant of authority, pursuant to R.C. 309.08, to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." The County Prosecutor's argument fails to recognize, however, that CCS violation hearings are fundamentally different from the prosecution of the original case and are governed by an entirely separate statutory provision, R.C. 2929.15; and by Criminal Rule 32.3, neither of which contemplates the County Prosecutor's involvement. Ohio's statutory framework is consistent with historical practice which treats probation violation hearings very differently from formal criminal trials:

In a [probation] revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.

Gagnon v. Scarpelli, 411 U.S. at 789.

When a trial court imposes a sentence of CCS under R.C. 2929.15, it establishes the conditions of the community control sanctions and the parameters of the defendant's supervision. R.C. 2929.15(A)(1). The trial court then places the defendant "under the general control and supervision of the department of probation in the county." R.C. 2929.15(A)(2)(a). The department of probation "*serves the court* for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer."² *Id.* (emphasis added). If a criminal defendant is required to serve a residential, non-residential, or financial sanction as a part of CCS, and violates that sanction, the "public or private person or entity that operates or administers the sanction or the program shall report [any] violation directly to the sentencing court" or the probation department. R.C. 2929.15(A)(2)(b). A criminal defendant's supervision on CCS is entirely within the province of the trial court. The county prosecutor has no role in that supervision and the statute provides for no notice to the prosecutor of any alleged violations.

R.C. 2929.15 likewise does not contemplate any involvement by the prosecutor at the violation hearing. Indeed, the statute does not mention the county prosecutor at all. It simply provides authority to the trial court, upon finding a violation, to impose one of several penalties. R.C. 2929.15(B)(1). And unlike R.C. 2929.19(A) which governs initial sentencing hearings and specifically affords the prosecutor the right to be heard at the initial sentencing hearing, R.C. 2929.15 does not afford the prosecutor such a right.

² For counties without probation departments, the adult parole authority fills the role of

This same distinction is recognized by the criminal rules. In the criminal rule applicable to the initial sentencing hearing, the court is required to “[a]fford the prosecuting attorney an opportunity to speak.” Crim. R. 32(A)(2). Conversely, Criminal Rule 32.3, which applies to CCS violation hearings, does *not* afford the prosecuting attorney any right to be heard.

This Court need not go beyond the plain language of R.C. 2929.15 to determine that the prosecutor has no statutory right to be heard at CCS violation hearings. However, if it finds some ambiguity in the statute, several rules of statutory construction lead to the same conclusion. As an initial matter, it is “the duty of the court to give effect to words used, not to delete words used or insert words not used.” *Cline v. Ohio Bur. Motor Vehicles*, 61 Ohio St. 3d 93, 97, 573 N.E.2d 77 (1991). To find that the State had a right to be heard at a CCS violation hearing, this Court would need to insert words not used by the General Assembly and fashion a role for the County Prosecutor that was never envisioned by the General Assembly. Moreover, the General Assembly clearly understands how to enact a statute to afford the County Prosecutor the right to be heard, respectively. Indeed, it has done so in R.C. 2929.19 and in R.C. 2929.20, where it gave the County Prosecutor the right to be heard at the initial sentencing hearing and at a judicial release hearing, respectively. The General Assembly did not elect to afford the County Prosecutor a statutory right to be heard at a CCS violation hearing. This Court should not view that as a mere oversight. On the contrary, statutory language:

[M]ust be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.

the probation department. R.C. 2929.15(A)(2)(a).

D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health (2002), 96 Ohio St. 3d 250, 257 (quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.* (1917), 95 Ohio St. 367, 372-73); see also *East Ohio Gas Co. v. Public Utilities Comm'n* (1988), 39 Ohio St. 3d. 295, 299. In order to accept the County Prosecutor's contention that he has a right to be heard at CCS violation hearings despite the General Assembly's choice not to explicitly afford him such a right, this Court would render meaningless statutory language which gives the prosecutor the right to be heard in some proceedings but not others. Under the County Prosecutor's logic, he has an automatic right to be heard at any proceeding captioned "State versus" by virtue of its general powers under R.C. 309.08. Such an interpretation would render meaningless any further attempt by the General Assembly to carve out specific roles for different government agencies depending on the nature of the proceeding.

In short, the General Assembly has established a clear process for CCS violations that involve the probation department and the trial court—not the county prosecutor. According to the process, the probation department presents evidence to the trial court of any violation and the trial court makes a determination whether a violation occurred and, if so, what penalty to impose. There is nothing in the statute that affords the County Prosecutor any particular right to be heard or otherwise involved in a CCS violation hearing. And, given that R.C. 2929.15 does not provide an automatic role for the county prosecutor at CCS violation hearings, it is certainly within the trial court's authority to require the county prosecutor to notify the Court if he would like to be heard at the CCS violation hearing.

B. The general provision dealing with the powers of the prosecuting attorney, R.C. 309.08, does not provide the county prosecutor a role in CCS violation hearings.

Eschewing the more specific statutory provision dealing with CCS violation hearings, the County Prosecutor relies exclusively on R.C. 309.08, the general legislative grant of his authority, as a basis for a statutory right to participate in CCS violation hearings. The County Prosecutor's reliance on R.C. 309.08 is misplaced.

Despite the fact the County Prosecutor and/or his assistants are rarely present for CCS violation hearings, the County Prosecutor's brief in this case makes the extraordinary claim that the County Prosecutor has the statutory obligation to participate in these hearings based on the generic statutory mandate to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." In making such an argument the County Prosecutor fails to appreciate that CCS violation hearings, much like parole or PRC violation hearings, do not fall within the ambit of R.C. 309.08. With R.C. 2967.15, the General Assembly afforded exclusive authority to the Adult Parole Authority to determine whether a parolee violated the conditions of his or her parole and what sanction, if any, should be imposed. Similarly, with R.C. 2967.28, the General Assembly has provided the Adult Parole Authority with the exclusive authority to adjudicate PRC violations and determine appropriate sanctions.³ And finally, with R.C. 2929.15, the General Assembly has afforded authority to the trial courts to adjudicate CCS violations, with the assistance of the probation department, and determine appropriate sanctions. The common thread in all three types of post-

³ There is one limited exception when the Adult Parole Authority may not be involved in a PRC violation: If an individual on PRC is convicted of a new felony offense, the trial court handling that new felony offense can also terminate PRC for the prior offense and impose sanctions for the violation. See R.C. 2929.141.

conviction supervision is that the General Assembly has selected the appropriate State entity to handle the supervision and any violation hearings and that entity is *not* the County Prosecutor.

In an attempt to buttress its argument, the County Prosecutor relies on a single court of appeals' case, *State v. Young*, 154 Ohio App. 3d 609, 798 N.E.2d 629, 2003-Ohio-4501, for the proposition that “[probation] violation hearings have been held to be within the purview of ‘complaints, suits, and controversies’” under R.C. 309.08. (County Prosecutor’s Br. at 4). *Young* does not hold, as maintained by the County Prosecutor, that “Ohio’s prosecutors may attend and participate” in probation violation hearings. Rather, it stands for a much more limited proposition; namely that “nothing prevents the prosecutor” from reporting probation violations and seeking an arrest warrant based on “a subsequent felony arrest.” 154 Ohio App. 3d at 631-32. The Court, in *Young*, did not conclude that the County Prosecutor has a right to participate in the violation hearing itself and did not hold that the County Prosecutor had any role at such proceedings. Judge Sutula’s standing order is entirely consistent with *Young* as he specifically states that the County Prosecutor may “bring to the attention of the Court or the Probation Department acts that may be a probation violation.”

Ultimately, the General Assembly’s *general* grant of authority to the County Prosecutor to prosecute criminal cases under R.C. 309.08 must yield to the General Assembly’s *specific* grant of authority to the probation department to handle probation violation hearings. If this Court were to accept the County Prosecutor’s unduly broad interpretation of R.C. 309.08, it would render meaningless multiple statutory provisions granting authority to different State agencies to handle probation, parole, and PRC

violations. Moreover, the County Prosecutor's suggested interpretation of R.C. 309.08 would have clearly unintended and unfortunate consequences. By using the word "shall," R.C. 309.08 sets forth mandatory obligations for the County Prosecutor. If this Court were to accept the County Prosecutor's interpretation of R.C. 309.08 as encompassing CCS violation hearings (and necessarily parole and PRC violation hearings), then the County Prosecutor *must* handle each and every one of those hearings. Although the County Prosecutor seems to suggest that R.C. 309.08 allows him to pick and choose in which proceedings to involve himself, such an interpretation ignores the mandatory language of the statute. While Rosario maintains that R.C. 309.08 does not require the County Prosecutor's involvement in CCS violation hearings, if this Court disagrees, then it must necessarily conclude that the County Prosecutor is obligated to handle every CCS, parole, and PRC violation—a result that was clearly not intended or even contemplated by the General Assembly.

In sum, the County Prosecutor's reliance on R.C. 309.08's general grant of authority is misplaced given the specific statute enacted by the General Assembly to govern CCS violation hearings. No Court has previously interpreted R.C. 309.08 as broadly as suggested by this County Prosecutor. And the County Prosecutor has identified no good reason for this Court to do so.

C. The trial court's standing order is consistent with historical practice, the statutory framework established by the General Assembly and does not constitute a violation of the Separation of Powers Doctrine.

The County Prosecutor also maintains that the trial court's standing order violates the separation of powers doctrine "by supplanting the role of executive-branch prosecutors with judicial branch prosecutors." (County Prosecutor's Br. at 5). The

County Prosecutor's separation of powers argument does not raise a distinct issue but simply contends that the trial court's failure to adhere to the Prosecutor's suggested interpretation of R.C. 309.08 results in a separation of powers' violation. This Court will never have to reach this constitutional claim. If this Court finds that R.C. 309.08 requires the County Prosecutor to prosecute all CCS violation hearings, then the standing order must fall based on the County Prosecutor's statutory argument. If, on the other hand, this Court finds R.C. 309.08 to be inapplicable and applies the plain language of the R.C. 2929.15, the CCS statute, which allocates responsibility for CCS violations to the Probation Department and the courts, then the standing order complies with the law and does not violate the separation of powers doctrine.

The County Prosecutor does *not* advance, nor could he, any freestanding argument that the General Assembly is powerless to decide that the probation department (and not the County Prosecutor) should handle CCS violations.⁴ The separation of powers doctrine is "implicitly embedded in the framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of government." *State v. Bodyke*, 126 Ohio St. 3d 266, 275, 933 N.E.2d 753, 2010-Ohio-2424. This Court has emphasized that the judiciary has the "power and solemn duty" to "ensure that the boundaries between branches remain intact." *Id.* at 276. Although "the authority to legislate is for the General Assembly alone," the courts have, on rare occasions, struck down legislation that that improperly "encroach[es] on the province of

⁴ Placing exclusive responsibility for CCS violations within the judicial branch is certainly no more constitutionally problematic than placing exclusive responsibility for parole violations within the executive branch. *Cf. Woods v. Telb*, 89 Ohio St. 3d 504, 511-12, 733 N.E.2d 1103, 2000-Ohio-171 (explaining that "for as long as parole has

the judiciary.” *Id.* at 277-78 (finding the Adam Walsh Act’s reclassification provinces improperly intruded on the judiciary’s authority by, among other things, delegating authority to the executive branch to review past decisions of the judicial branch); *See also State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 134-35 (finding the General Assembly’s enactment of a “bad time” statute unconstitutional because it conferred judicial power upon the executive branch.”).

Here the General Assembly’s exercise of legislative power is entirely appropriate as it merely conferred authority upon the judicial branch that has historically been within its province. It is well-established that a probation or CCS revocation proceeding “is *not* a stage of a criminal prosecution.” *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S.Ct. 1756 (1973). Traditionally, the probation officer has been entrusted with “broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation.” *Id.* at 784. And, at probation or CCS revocation proceedings, “the State is represented, *not by a prosecutor*, but by a parole [or probation] officer.” *Id.* at 789. The General Assembly’s decision to follow the historical practice of assigning responsibility for probation revocation hearings to a probation officer and not a prosecutor is well within its legislative authority and does not intrude upon the powers of the executive branch.

D. The County Prosecutor has no standing to assert a Constitutional Due Process violation.

The County Prosecutor’s final argument, that the standing order violates the State’s alleged constitutional right to Due Process, is wholly meritless.

existed in Ohio, the executive branch (the [Adult Parole Authority] and its predecessors) has had absolute discretion over that portion of an offender’s sentence.”)

The State does not have a constitutional right to Due Process. The State “is the entity which must *provide* due process, it has no right of due process from itself.” *State v. Mayo*, 8th Dist. No. 80216, 2002 WL 853547, ¶ 12, n.1 (emphasis in original). As explained in greater detail in *State v. Hartikaninen*, the state and federal Due Process Clauses protect *persons* from “the arbitrary and unreasonable exertion of power by every governmental agency.” 137 Ohio App. 3d 421, 424, 738 N.E.2d 881 (2000). The State is not a legal person and “has no standing to assert a due process claim . . . against itself.” *Id.* at 425. “If the State wants to enact a rule or statute” that provides for the mandatory participation of prosecutors at CCS violation hearings, “it is free to do so.” *Cf. Id.* (reaching that same conclusion in the context of notice of final judgments and delayed appeals for the State).

Probationers, on the other hand, do have due process rights that must be upheld at probation violation hearings. *Gagnon*, 411 U.S. at 783-84. Indeed, as explained by Judge Sutula in his motion to dismiss the County Prosecutor’s mandamus petition, Judge Sutula specifically adopted his standing order “to assure that the probationer’s due process rights are observed.” (Mot. to Dismiss at 17, filed on 7-30-2014 in *State ex rel. McGinty v. Sutula*, Ohio Sup. Ct. Case No. 2014-993). His order is designed to ensure that the probationer receives proper notice of the prosecutor’s intent to be heard at his particular hearing and proper notice of “any claimed violations, witnesses, and evidence” that the County Prosecutor intends to present at the hearing. *Id.*

E. The County Prosecutor’s policy arguments should be directed to the General Assembly.

Throughout its brief, the County Prosecutor argues that it is bad policy to have probation officers handling the State’s interest at probation violation hearings. Despite

the fact that probation officers have successfully handled probation violation hearings for decades, the County Prosecutor now contends that these “non-lawyer employees of the court itself” are poorly equipped to handle these hearings. (County Prosecutor’s Br. at 10). Such a claim is dubious in light of a longstanding historical practice and a demonstrated track record of success. However, even if the claim had some merit, the County Prosecutor should direct his concerns to the General Assembly who, unlike this Court, have the power to enact legislation to give the County Prosecutor the statutory right he seeks.

F. Any error in this case has not been adequately preserved and, even if preserved, is harmless.

This Court should hold that the trial court’s standing order is an entirely appropriate exercise of discretion in managing its docket and is consistent with the statutory framework for CCS violation hearings. However, even if this Court identifies some infirmity in the standing order, the State failed to properly preserve that error through a proffer, *Cf.* Evid. R. 103(A)(2) and any error was harmless in this case. Given that this case merely involved a status hearing, it is difficult to conceive of what, if anything, the County Prosecutor would have contributed that would have impacted the outcome. In any case, the assistant prosecutor present at the hearing did not proffer anything that he intended to present at the hearing that the judge did not already know or did not already take into consideration.

Thus, even if this Court were to conclude that the standing order was flawed in some manner, it should nonetheless affirm the trial court’s judgment because any error was not properly preserved and/or was harmless.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the Eighth District Court of Appeals.

Respectfully submitted,

/s/ Cullen Sweeney
CULLEN SWEENEY
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CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served via email upon Mary McGrath and Allan Regas, Counsel of Record for the State of Ohio, at aregas@prosecutor.cuyahogacounty.us and mmcgrath@prosecutor.cuyahogacounty.us on this 10th day of March, 2015.

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