Supreme Court of Ohio Clerk of Court - Filed October 06, 2015 - Case No. 2015-1637

NO.

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 102563

STATE OF OHIO
Plaintiff-Appellant

-vs-

MARK G. SHEPPARD
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellant

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Frank Romeo Zeleznikar (#0088986)
Mary McGrath (#0041381)
Assistant Prosecuting Attorneys
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

Robert L. Tobik
Cuyahoga County Public Defender
By: Cullen Sweeney
Assistant Public Defender
310 Lakeside Ave.
Cleveland, OH 44113

TABLE OF CONTENTS

EXPLANATION OF WHY THIS FELONY CASE INVOLVES AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST.....1

STATEMENT OF THE CASE AND FACTS 3

LAW AND ARGUMENT 5

Proposition of Law: 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 AND AN OPPORTUNITY TO BE HEARD AT THESE HEARINGS.

CONCLUSION.....12

SERVICE.....13

EXPLANATION OF WHY THIS FELONY CASE INVOLVES AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST.

With respect to community control sanctions proceedings, the Eighth District has established a system of justice where neither the people of the state of Ohio, nor the county prosecutor, as their duly elected representative, have a right to be represented at a hearing when a criminal offender has violated the terms of his community control. As a result of this decision, the majority has expanded the authority of the probation department in community control proceedings to a point that the General Assembly never intended; while simultaneously limiting a county prosecutor's authority to criminal proceedings only. Such liberal interpretations of these statutes has resulted in a system of justice which allows "the trial court [to] act as both judge and prosecutor" in a clear violation of the separation of powers. *See State v. Heinz,* 8th Dist. Cuyahoga No. 102178, ¶ 28 (Stewart, J., dissenting).

As a result of the Eighth District's decisions, prosecutors in Cuyahoga County no longer have a right to be present and heard at community control violation hearings. The Eighth District's decision, while not only contrary to the community control scheme set up by the General Assembly, is illogical and will result in impractical complications; particularly on appeal. For example, when a criminal offender has violated his terms of community control and the trial court sends him to prison as a result; who represents the state of Ohio if the offender chooses to appeal? Is it the probation department, or is it the prosecutor, the party that had no right to be present at the hearing which led to the appeal? One would think that the obvious answer would be the latter. But as the dissent in *Heinz* so rightly points out:

> Barring the state from violation hearings would make decisions continuing community control in the face of a violation unreviewable because the state would not be able to preserve error.

Id. at ¶ 35 (Stewart, J., dissenting).

This puts the appellate review process in an untenable position. Does the party that has no right to be present, and therefore denied any right to preserve error at the violation hearing, be the party that represents the state on appeal? Or is it the probation department, an arm of the court, that represents the interests of the State of Ohio on appeal? Neither of these options are tenable; and this is a direct result of the Eighth District's holding in this case.

Furthermore, as a result of its decision, the Eighth District has eliminated the adversarial process from the community control violation hearings. The probation department is an arm of the court; it is not a part of the prosecuting attorney's office. *See* 2301.27(A)(1)(a). As such, by eliminating the prosecuting attorney from the community control sanction process, the Eighth District has bestowed upon the trial court the authority to act as both the judge and the prosecutor at these hearings. A gutting of the adversarial process was never what the General Assembly had in mind when drafting these statutes.

On the contrary, when granting the probation department authority with respect to community control sanctions, the General Assembly intentionally limited the probation department's role to merely supervising offenders and reporting to the court any violations of community control sanctions by the offender. *See* R.C. §2929.15(A)(2). "A statutory duty to *report* community control violations is not the same as empowering the *prosecution* of community control violations." *Heinz* at ¶ 33 (Stewart, J., dissenting).

It is for these reasons that this Honorable Court should accept jurisdiction over this case. The Eighth District's decision leads to illogical conclusions and untenable complications on appeal; while simultaneously undermining the General Assembly's intent that the prosecuting attorney "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party . . ." R.C. §309.08. It is for these reasons that this case represents an issue of public

and great general interest. The people of the State of Ohio have a right be heard and represented at these hearings. The State would ask this Honorable Court accept jurisdiction over this case.

STATEMENT OF THE CASE AND FACTS

On April 10, 2014, Appellee, Mark Sheppard (hereinafter "Appellee") was charged by the Cuyahoga County Grand Jury in a seven count indictment. Count One charged Appellee with Felonious Assault, in violation of R.C. §2903.11(A)(1), a felony of the second degree. Counts Two and Three charged Appellee with Domestic Violence, in violation of R.C. §2919.25(A), misdemeanors of the first degree. Counts Four, Five, Six, and Seven charged Appellee with Endangering Children, in violation of R.C. §2919.22(A), misdemeanors of the first degree. *See* Indictment filed April 10, 2014.

On May 15, 2014, Appellee pleaded guilty to amended Count One, Attempted Felonious Assault, a felony of the third degree; one count of Domestic Violence; and one count of Endangering children. *See* Judgment Entry filed May 16, 2014. Appellee was ultimately sentenced to forty-eight (48) months of community control sanctions (CCS). *See* Judgment Entry filed June 16, 2014.

On November 17, 2014, Appellee was in court on a CCS violation hearing. He was found to be in violation of CCS. The trial court continued him on CCS with modified conditions. *See* Judgment Entry filed November 18, 2014.

On January 26, 2015, Appellee was again in court on a CCS violation hearing. At the hearing, when introducing the parties present, even though the prosecutor representing the State of Ohio was present in the courtroom, the trial court instead recognized that the State of Ohio was being represented by Probation Officer, Jennifer Walt. (Tr. 3) At this point the prosecutor addressed the court, and asserted the prosecutor's office to be present and heard at all probation

violation hearings. (Tr. 3) The trial court proceeded to ask the prosecutor if he had filed a request for leave to appear, to which the prosecutor replied in the negative. (Tr. 3) The trial court did not let the prosecutor be heard, and refused to recognize the prosecutor as a party to the case.

Furthermore, the cover page of the Transcript notes that Jennifer Walt, from the probation department, represented the State of Ohio at the proceeding. The prosecutor was not even noted as being present. (Tr. 1)

Appellee was found to be in violation; and was continued on CCS with modified conditions. *See* Judgment Entry filed January 30, 2015. The prosecutor was never given the opportunity to be heard.

The trial court's actions stem from a standing order it issued in *State v. Washington,* CR-10-542057, in which the trial court refuses to allow the prosecutor to speak, or to represent the State of Ohio at community control sanctions hearings, absent first seeking leave of court. *See* Judgment Entry filed on February 14, 2014 in *State v. Washington,* CR-10-542057. This order was in response to the State's motion to reopen a CCS hearing that had been held on January 2, 2014. The State has previously sought to appeal the trial court's order. On March 21, 2014, 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 535298 and 542057. Once Eighth District accepted the State's appeal, the trial court abandoned its February 14, 2014 order. 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. Once the appeal was dismissed, the trial court reversed course and reinstated its February 14, 2014 blanket policy of barring assistant prosecutors from representing the State at these proceedings.

On February 2, 2015, Appellant filed a Notice of Appeal on the judgment entry filed January 29, 2015. Appellant also filed a Motion for Leave to Appeal with this Honorable Court. On February 25, 2015, this Honorable Court granted Appellant leave to appeal. On October 1, 2015, the Eighth District affirmed the trial court. *State v. Sheppard,* 8th Dist. Cuyahoga No. 102563, 2015-Ohio-4084.

The State hereby appeals to this Honorable Court. This Honorable Court has already accepted this issue in multiple appeals from this office.[1] Oral argument in *State v. Rosario,* 2014-1174, was held on September 1, 2015. On September 30, 2015, this Court accepted jurisdiction in *State v. Heinz,* 2015-1288.

LAW AND ARGUMENT

PROPOSITION OF LAW: 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 AND AN OPPORTUNITY TO BE HEARD AT THESE HEARINGS.

A. R.C. §309.08 grants the prosecutor the authority to represent the State of Ohio at community control revocation hearings.

Ohio Revised Code §309.08 sets forth the powers and duties of a prosecuting attorney. The statute is clear, and 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

[1] This Honorable Court has accepted review of this issue in the following cases: *State v. Rosario,* 2014-1174; *State v. Washington,* 2014-1363, 2014-1368; *State v. Wiley,* 2014-1201; *State v. Scott,* 2014-1177; *State v. Marks,* 2014-1173; *State v. Jenkins*, 2014-1175; *State v. Harris,* 2014-1176; *State v. Collins,* 2014-1200; *State v. Diamond,* 2014-1712, 2014-1714, 2014-1721; *State v. Wimbush,* 2014-1717, 2014-1776; *State v. Melton,* 2014-1716; *State v. Turner,* 2014-1715; *State v. Stewart,* 2014-1725.

> 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). *Black's Law Dictionary* defines prosecute as follows:

> **Prosecute,** *vb.* **1.** To commence and carry out a legal action <because the plaintiff failed to prosecute its contractual claims, the court dismissed the suit>. **2.** To institute and pursue a criminal action against (a person) <the notorious felon has been prosecuted in seven states>. **3.** To engage in; carry on <the company prosecuted its business for 12 years before going bankrupt>. – **prosecutory,** *adj.*

Black's Law Dictionary 1258 (8th Ed.2004). As this definition and its examples demonstrate, legal cases may be prosecuted in both the criminal realm *and* the civil realm. As such, the language contained in R.C. §309.08 is general, and it is not limited to criminal proceedings. *See In re Elmore,* 13 Ohio App.3d 79, 81, 468 N.E.2d 97 (10th Dist.1983).

Contrary to the trial court's standing orders, violation hearings have been held to be within the purview of "complaints, suits, and controversies" set forth in R.C. §309.08. "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*. S*ee 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. . .”). In rejecting a similar proposition to the one adopted by the Eighth District in this case, the Third District explained:

> Although community control sanction violations are not necessarily considered criminal proceedings, a prosecuting attorney's duties are not limited to purely criminal proceedings. R.C. 309.08 empowers prosecuting attorneys to prosecute, on behalf of the state, "*all* complaints, suits, and *controversies* in which the state is a party * * * and other suits, matters, and controversies that the prosecuting attorney is required to prosecute within or outside of the county, in the probate court, court of common pleas, and court of appeals." *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.*
>
> While R.C. 2929.15 subjects criminal defendants to the general control and supervision of the department of probation for administration of community control sanctions and directs that related entities "*shall*" report violations "directly to the sentencing court," nothing precludes the prosecutor from reporting such violations. Furthermore, R.C. 2951.08(A), which controls the arrest of community control violators, permits that such arrest may be made "on the warrant of the judge or magistrate before whom the cause was pending." Nothing prevents the prosecutor from seeking such warrants. Our research supports that this practice is permitted and regularly followed in various venues throughout the state. We therefore hold that R.C. 2929.15 does not limit the power of the prosecuting attorney to initiate revocation proceedings *either expressly or by necessary implication.* (Emphasis added)

Young, supra, at ¶¶ 7 – 8.

The Eighth District would limit *Young* to its facts; that is, the Eighth District would have *Young* only stand for the proposition that prosecutors have a right to be involved in violation hearings *only* when the offender has a new felony pending. However, this is simply not what the statutes provide for. The Third District’s analysis in *Young* recognized what the State put forth in its merit brief, and soundly rejects what Appellee puts forth in his; that is, R.C. §309.08 “empowers prosecuting attorneys to prosecute, on behalf of the state, "*all* complaints, suits, and *controversies* in which the state is a party” and community control violation proceedings fall within that general power it provides. *See Young, supra,* at ¶¶ 7 – 8. As the dissent in *Heinz* recognized, “the violation

of community control is . . . a controversy in which the people of the state of Ohio are a party * * *" *Heinz, supra* at ¶ 32 (Stewart, J., dissenting).

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. The trial court's standing order 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*, 6th Dist. Erie No. E-12-040, 2013-Ohio-3559, ¶ 18.

B. The general provisions set forth in R.C. §309.08 do not conflict with any specific provisions set forth in R.C. §2929.15.

A long recognized principle of statutory construction requires that specific statutory provisions will prevail over general statutes. This principle has been codified at R.C. §1.51 which provides as follows:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

In regards to CCS proceedings, R.C. §2929.15 provides that if an offender is placed on CCS, "the court shall place the offender under the general control and supervision of a department of probation in the county that serves the court for the purposes of reporting to the court a violation of any condition of sanctions[.]" R.C. §2929.15(A)(2)(a). The probation department's role is

clear; it is to monitor an offender on CCS and report any violations of CCS to the court. A statutory duty to *report* community control violations is not the same as empowering the *prosecution* of community control violations." *Heinz, supra,* at ¶ 33 (Stewart, J., dissenting).

There is nothing in the statute providing the probation department with the authority to prosecute and prove said violations. This was simply never contemplated by the General Assembly. Had the General Assembly wanted to give the probation department such authority, it could have drafted a comprehensive statute indicating as much; similar to R.C. §2967.28(E), where the General Assembly granted exclusive authority to the department of rehabilitation and corrections to determine whether a parolee had violated his conditions of post-release control. The General Assembly simply chose not to do so, as it never contemplated the probation department serving a prosecutorial function. CCS proceedings fall within the purview of "complaints, suits, and controversies" contemplated by R.C. §309.08. *Young, supra,* at ¶ 8. As such, the duty to prove such violations fall upon the prosecuting attorney; not the probation department.

The general grant of authority conferred upon the prosecutor to prosecute, "on behalf of the state, all complaints, suits, and controversies in which a state is a party" by R.C. §309.08 does not conflict with the probation department's limited authority to report violations of CCS to the trial court, pursuant to R.C. §2929.15(A)(2)(a). As such, it is clear that, pursuant to R.C. 309.08, the General Assembly has tasked the prosecuting attorney with the authority to prosecute all community control sanctions matters; not the probation department.

C. Requiring probation officers, non-lawyer court employees, to replace assistant prosecutors, the State's legal representatives, at community control violation and revocation hearings violates the doctrine of separation of powers.

The Eighth District's finding that the probation department is assigned the primary responsibility of instituting community control sanctions revocation hearings ignores the basic

governmental structure in which the probation department works. "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 Eighth District, however, has now replaced prosecutors with non-lawyer court employees to represent the State's interests and to fulfill the State's duties at violation and revocation hearings. Further, violation and revocation hearings may become sentencing hearings. In the event community control is terminated, the defendant is sentenced immediately, with no notice to the State or victims.

This new structure created by the Eighth District violates the 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. Giffee*, 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. It must be remembered, that "[t]he reason the legislative, executive, and judicial powers are separate and balanced is to protect the people, not to protect the various branches of government." *State ex rel. Bray v. Russell,* 89 Ohio St.3d 132, 135, 729 N.E.2d 359 (2000).

The State has the burden of proof at revocation hearings to establish a violation and revoke community control sanctions by "substantial" evidence. *Lenard*, *supra,* 2010-Ohio-81. By its actions, the Eighth District has now 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.

The Eighth District justifies its position by directing us to the trial court's standing order that allows a prosecutor to speak and be present at revocation hearings, *only after first receiving leave* from the trial court. The inherent flaw in this scheme is quite apparent. The trial court's order requires that a request for leave must be filed by the prosecutor no later than two days prior to the revocation hearing and shall include any evidence and witnesses that support the claimed violation. However, in the trial court's same order, the trial court states that "[a]s the prosecution is not entitled to notice of probation violation hearings, *it will not receive notice* either from the Court or from the Probation Department." (Emphasis added) Indeed, how is the prosecution to request leave to a hearing that it never receives notice of? As a result, the trial court's standing order is not only incorrect in stating that the prosecutor does not have an inherent right to be present at revocation hearings, the order also effectively eliminates the prosecutor from being able to timely request leave to attend; thereby effectively eliminating the prosecutor from the proceedings altogether.

As the forgoing demonstrates, the scheme set up by the trial court and adopted by the majority its opinion is a clear violation of the separation of powers that the General Assembly never intended.

CONCLUSION

It is clear that the General Assembly never intended for the probation department to represent the state of Ohio at community control violation hearings. Instead, R.C. §309.08 clearly contemplates the prosecuting attorney to prosecute "all complaints, suits, and controversies in which the state is a party." Since CCS violation hearings fall within the purview of "complaints, suits, and controversies" as contemplated by R.C. §309.08, the prosecuting attorney is a necessary party to all CCS proceedings. As such, the prosecutor is entitled to notice, to be present, and to be heard at all such hearings.

The Eighth District's decision in this case effectively denies the people of the state of Ohio from representation at these hearings, by and through their duly elected prosecutor. As a result, the Eighth District has established a system of justice where neither the people of the state of Ohio, nor the county prosecutor, have a right to be represented at a hearing when a criminal offender has violated the terms of his community control. It is for these reasons that this case is one which presents an issue of great and general interest. The State would ask this Honorable Court accept jurisdiction over this case.

Respectfully Submitted,

Timothy J. McGinty
Cuyahoga County Prosecutor

By: /s/ Frank Romeo Zeleznikar
Frank Romeo Zeleznikar (#0088986)
Mary McGrath (#0041381)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been sent by regular U.S. mail or electronic service this 6th day of October, 2015, to:

Robert L. Tobik
Cuyahoga County Public Defender
By: Cullen Sweeney
Assistant Public Defender
310 Lakeside Ave.
Cleveland, OH 44113

service@opd.ohio.gov

By: /s/ Frank Romeo Zeleznikar
Frank Romeo Zeleznikar (#0088986)
Assistant Prosecuting Attorney