Supreme Court of Ohio Clerk of Court - Filed October 26, 2015 - Case No. 2015-1288

NO. 2015-1288

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 102178

STATE OF OHIO,

Plaintiff-Appellant

-vs-

Joseph Heinz,

Defendant-Appellee

MERIT BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

This Honorable Court has accepted the State's following proposition of law in this case:

> 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.

The State is asking this Honorable Court for a holding stating that the prosecutor represents the State of Ohio at community control sanctions ("CCS") violation hearings, the trial court must give the prosecutor notice of CCS hearings, and the trial court must allow the prosecutor to participate in in all CCS proceedings.

With respect to CCS proceedings, the Eighth District Court of Appeals 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 or given notice of any hearing where a criminal offender has violated the terms of his CCS. This Honorable Court has recognized that if an offender is found to be in violation of his CCS at a hearing, "the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and *must comply with the relevant sentencing statutes.*" (Emphasis added) *State v. Fraley,* 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17. The Eighth District Court of Appeals' decision bars the prosecutor from these violation and sentencing hearings, leaving the State without legal representation, in violation of R.C. §2929.19(A). This interpretation of the CCS 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. *State v. Heinz,* 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763, ¶ 28 (Stewart, J., dissenting).

In this case, the trial court issued a standing order that requires the prosecutor to request leave two days prior to the revocation hearing. 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) How is the prosecutor to request leave to a hearing that no notice is given? These hearings are often not placed on the public docket; and the only other means by which the prosecutor can be made aware of such hearings is by leafing through a schedule book kept with the court's bailiff.

Moreover, how is the prosecutor to provide notice of evidence and witnesses that support the claimed violation? The probation officer who notified the court of the violation *is* the State's fact-witness, yet is prohibited by the trial court from notifying the State of the violation. In other words, the trial court has prohibited probation officers from notifying prosecutors of the existence of the evidence and witnesses that support the violation, the very evidence and witnesses of which the trial court requires prosecutors to provide two days' written notice in order to participate at the hearing. This circular scheme ensures prosecutors cannot comply with the trial court's standing order and are therefore precluded from representing the State at violation and sentencing hearings. As recognized by the dissenting Judge in *State v. Johnson*, 8th Dist. No. 102860, 102761, 2015-Ohio-4189, "It should be simple. If the defendant is represented by legal counsel, the state should not be precluded from being represented by its attorney." *Johnson*, ¶ 37, (Gallagher, J., dissenting).

The Eighth District Court of Appeals' opinion ignores Ohio law. The prosecutor represents the state of Ohio in CCS violation proceedings, and therefore has a right to notice of and to be heard at these hearings. R.C. §308.09 sets forth the authority of the prosecuting

attorney and provides that, "[t]he prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." CCS proceedings fall within the purview of "complaints, suits, and controversies." *See State v. Young*, 154 Ohio App.3d 609, 798 N.E.2d 629, 2003-Ohio-4501. As such, it is clear that the General Assembly intended the prosecutor to represent the State of Ohio in CCS hearings. At these hearings, the probation officer's role is that of a fact witness, not as the legal representative of the state, from whom the prosecutor may elicit testimony in order to present evidence of a violation of CCS.

However, the Eighth District Court of Appeals' decisions improperly determined that in CCS proceedings, "the state's traditional role is adequately represented by the probation department." *See Heinz* at ¶ 15. In other words, the Eighth District Court of Appeals determined that non-attorney court employees represent the State's interests in legal proceeding. *See State ex rel. Hillyer v. Tuscarawas Cty. Bd. Of Commrs.*, 70 Ohio St3d 94, 100, 637 N.E.2d 311 (1994). (recognizing that "R.C. 2301.27 allows courts of common pleas to appoint probation officers, fix their salaries, and supervise their work.") As such, in Cuyahoga County, the defendant is represented by counsel, while the State is represented by a probation officer, not the prosecutor or another attorney.

The Eighth District Court of Appeals' ruling allowing the trial court to exclude the prosecuting attorney from criminal cases which he initially brought, rests on a misreading of statutes. 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. 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).

There is nothing in the sentencing statutes providing the probation department with the authority to prosecute or prove in court CCS violations. Nor does R.C. §2929.15 appoint the probation department as being the representative of the State in these matters. There is nothing in the statute that indicates that the General Assembly intended for non-attorney probation officers to represent the State of Ohio in legal matters. 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. It did not. Rather, it 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 falls 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 CCS matters; not the probation department.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. Appellee's convictions and his history of violating his community control sanctions.

On October 11, 2011, Appellee, Joseph Heinz (hereinafter "Appellee") was charged by the Cuyahoga County Grand Jury in a two-count indictment. Count One charged Appellee with Kidnapping, in violation of R.C. §2905.01(A)(3), a felony of the first degree. Count Two charged Appellee with Assault, in violation of R.C. §2903.13(A), a misdemeanor of the first degree. *See* Indictment filed on October 11, 2011.

On December 1, 2011, Appellee pleaded guilty to an amended count of the indictment: Attempted Abduction, a felony of the fourth degree. The assault charge was dismissed. *See* Judgment Entry filed on December 9, 2011. On December 28, 2011, the trial court sentenced Appellee to CCS for a period of 24 months. *See* Judgment Entry filed on December 30, 2011.

On April 6, 2012, Appellee was found to be in violation of CCS. There was no notice of this hearing journalized on the docket prior to the date of this hearing. The trial court continued Appellee on CCS with modified conditions. *See* Judgment Entry filed on April 12, 2012. On November 22, 2013, Appellee was once again found to be in violation of CCS. There was no notice of this hearing journalized on the docket prior to the date of this hearing. His term of CCS was extended until December 28, 2015 and the trial court once again continued Appellee on CCS with modified conditions. *See* Judgment Entry filed on November 26, 2013.

On October 14, 2014, Appellee was once 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 indicated that the State of Ohio was being represented by Probation Officer, stating:

> THE COURT: We are here in the case of the State of Ohio versus Joseph Heinz. This is Case No. 555134. We are here on a community control violation hearing. Present is Mr. Heinz along with his counsel, Jay Milano. Representing the interests of the State of Ohio is probation officer, Erin Becker.

(Tr. 3)

At this point the prosecutor addressed the court, and asserted the prosecutor's right to be present and heard at all probation violation hearings. (Tr. 3) The trial court ignored the prosecutor and asked the probation officer to speak. Furthermore, the cover page of the Transcript notes that Erin Becker, from the probation department, represented the State of Ohio at the proceeding. The prosecutor was merely noted as being present. (Tr. 1) Appellee was found to be in violation; and once again the trial court continued Appellee on CCS. *See* Judgment Entry filed October 17, 2014. The prosecutor was never given the opportunity to be heard.

On November 7, 2014, the State filed a Notice of Appeal on the judgment entry filed October 17, 2014. The State also filed a Motion for Leave to Appeal with the Eighth District Court of Appeals. On November 21, 2014, the Eighth District Court of Appeals granted the State's leave to appeal. On July 9, 2015, the Eighth District Court of Appeals, in a 2-1 split opinion, affirmed the trial court's judgment and standing order. *State v. Heinz,* 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763. The State appealed to this Honorable Court, and this Honorable Court accepted jurisdiction over this matter.

B. The trial court's history of recognizing probation officers (non-attorney court employees) as representing the State of Ohio at community control violation proceedings, and refusing to give prosecutor's notice, or an opportunity to be heard at these hearings.

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 CCS 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 sought to appeal the trial court's order.

On March 21, 2014, the Eighth District Court of Appeals 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 the Eighth District Court of Appeals 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 Court of Appeals granted the parties' motion to dismiss.

Once the appeal was dismissed, the trial court reversed course and reinstated its February 14, 2014 policy of barring the prosecutor from representing the State of Ohio at these proceedings. At an April 24, 2014 hearing in a case captioned: *State v. Brian K. Washington,* the court barred an assistant prosecutor from speaking, or otherwise representing the State, by telling the assistant prosecutor:

> 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, Motion hearing of April 24, 2014, Tr. 11-12.

The trial court went further. Once the transcript was prepared in a February 28, 2014 CCS violation hearing in *State v. Washington,* the court entered an order finding the court reporter inaccurately reflected the representation of the parties on the cover page of the transcript and ordered the cover page changed to reflect the 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.

C. The history of this issue on appeal.

After the trial court reinstated its policy of refusing to give notice of CCS proceedings to the prosecutor, and refusing to allow the prosecutor to participate in said proceedings without first receiving leave of court, the State appealed this issue in multiple cases. However, the Eighth District Court of Appeals continued to deny the State's motions for leave in the following cases: *State v. Washington*, 8th Dist. No. 101406; *State v. Washington*, 8th Dist. No. 101407; *State v. Collins*, 8th Dist. No. 101557; *State v. Rosario*, 8th Dist. No. 101558; *State v. Marks*, 8th Dist. No. 101559; *State v. Jenkins*, 8th Dist. No. 101560; *State v. Harris*, 8th Dist. No. 101562; *State v. Wiley*, 8th Dist. No. 101563; *State v. Scott*, 8th Dist. No. 101565; *State v. Wimbush,* 8th Dist. Nos. 101858, 101857; *State v. Turner,* 8th Dist. No. 101860; *State v. Melton,* 8th Dist. No. 101859; *State v. Diamond,* 8th Dist. Nos. 101914; 101915; 101916; and *State v. Stewart,* 8th Dist. No. 101917.

On June 13, 2014, the Cuyahoga County Prosecutor filed a Petition and Complaint for Writ of Mandamus in Case No. 2014-0993, seeking a writ of mandamus from this Court, ordering the trial court to provide notice to the County Prosecutor of CCS violation hearings and to allow the Prosecutor to be heard as the representative of the State. This court dismissed the

complaint. *State of Ohio ex rel. Timothy J. McGinty, Cuyahoga County Prosecuting Attorney v. The Honorable John D. Sutula, Cuyahoga County Court of Common Pleas,* Case No. 2014-0993, entry of November 5, 2014.

However, this Honorable Court then accepted jurisdiction 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. Oral argument was held in *State v. Rosario,* 2014-1174, on September 1, 2015. The remaining cases remain stayed.

After this Honorable Court accepted jurisdiction to hear this issue in the above cases, the Eighth District Court of Appeals began to grant leave to the State. Briefing was ordered, arguments were held, and the Eighth District Court of Appeals rendered decisions in the following cases: *State v. Heinz,* 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763; *State v. Wheeler,* 8th Dist. Cuyahoga Nos. 102182, 102183, 2015-Ohio-3231; *State v. Clark,* Cuyahoga Nos. 102758; 102759, 2015-Ohio-4089; *State v. Sheppard,* 8th Dist. Cuyahoga No. 102563, 2015-Ohio-4084; *State v. Johnson,* Cuyahoga Nos. 102760;102761, 2015-Ohio-4189; and *State v. George,* Cuyahoga No. 102562, 2015-Ohio-4187. Each of these decisions affirmed the trial court's standing order which recognized probation officers as representing the State of Ohio in these matters, and refusing to grant notice to the prosecutor, but some judge's on the panels filed a dissent. *See State v. Heinz,* 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763, ¶ 28 (Stewart, J., dissenting).; *State v. Johnson,* Cuyahoga Nos. 102760;102761, 2015-Ohio-4189 (Gallagher, J., dissenting).

These decisions were appealed to this Honorable Court. This Court accepted jurisdiction in the instant case; the remaining cases have yet to be accepted by this Honorable 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 and an opportunity to be heard at these hearings.

A. The trial court's standing order effectively eliminates the prosecutor from community control sanction proceedings and replaces him with non-attorney court employees.

The Eighth District Court of Appeals ratified the trial court's order and essentially eliminated the prosecutor from CCS proceedings. The lower court's decision rests on the faulty premise that the probation department represents the State of Ohio at CCS proceedings. This premise is faulty as it 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). These officers are employed by the court; not the prosecutor.

The Eighth District Court of Appeals has now replaced prosecutors with these non-attorney court employees to represent the State's interests in a court proceeding. This scheme makes it impossible for prosecutors to attend, and it ignores the basic principles of reason and law.

This Honorable Court recognized that if an offender is found to be in violation of his CCS at a hearing, "the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and *must comply with the relevant sentencing statutes.*" (Emphasis added) *State v. Fraley,* 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17.

In the event CCS is terminated, the defendant is often sentenced immediately. As prosecutors are not given notice of these hearings from the trial court, they are effectively eliminated from these sentencing hearings. As the dissent in *Johnson, supra,* so rightly states: "If the defendant is represented by legal counsel, the state at the least should be afforded the same opportunity, unhindered by arbitrary rules requiring the prosecutor to "seek leave" to attend." *Johnson, supra,* at ¶ 39 (Gallagher, J., dissenting).

The Eighth District Court of Appeals justifies its decision 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 standing 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? Instead, the prosecutor is relegated to sifting through a notebook on the bailiff's desk to see if any CCS hearings are going to be held at any time in the future. Further, the probation officer is prohibited from notifying the State of the very violation and witness the State is required to provide two day's written notice of to the trial court in order to be heard.

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 and potential sentencings altogether.

B. The Eighth District Court of Appeals' decisions unjustly creates a scheme that is a direct violation of the separation of powers.

This new structure created by the trial court and endorsed by the Eighth District Court of Appeals violates the separation of powers by supplanting the role of executive-branch prosecutors with non-attorney court employee 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 CCS by "substantial" evidence. *State v. Lenard*, 8th Dist. No. 93373, 2010-Ohio-81. Now, the Eighth District Court of Appeals has delegated the State's evidentiary burden of proof to non-attorney employees of the court itself. No explanation as to how court employees may constitutionally do so has been provided, as none exists. Such liberal interpretations of the CCS statutes results 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. *State v. Heinz,* 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763, ¶ 28 (Stewart, J., dissenting).

As the forgoing demonstrates, the scheme set up by the trial court and adopted by the Eighth District Court of Appeals is a clear violation of the separation of powers that the General Assembly never intended.

C. 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 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. (Emphasis added)

R.C. 309.08(A). *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 matters are prosecuted in both the criminal realm *as well as* 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 order and the Eighth District Court of Appeals' decision, 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. 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. . ."). In rejecting a similar proposition to the one adopted by the Eighth District Court of Appeals 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 Court of Appeals 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 the Eighth District adopted below; 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 CCS 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* at ¶ 32 (Stewart, J., dissenting).

The State has the burden of proof at revocation hearings to establish a violation and revoke CCS 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 the offender's 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. Instead, the offenders in these matters are prosecuted and sentenced by one party: the trial court.

D. 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* 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; it never contemplated the probation department to serve a prosecutorial function.

E. The fact that the community control sanction statute, R.C. §2929.15, does not mention the prosecutor does not limit the prosecutor's role in community control violation proceedings.

In interpreting R.C. §2929.15, the Eighth District Court of Appeals relies on the fact that "[n]othing in [R.C. §2929.15] explicitly gives the prosecutor's office any role in the community control violation proceedings." *Heinz* at ¶ 13. The Eighth District's reliance on this observation is misplaced. First, while R.C. §2929.15 may not mention the prosecutor, this does not mean that the General Assembly meant to exclude the prosecutor from CCS proceedings. "[A] long-standing tenet of statutory interpretation is that courts must avoid statutory interpretations that render any part of a statute 'surplusage or nugatory.'" *State v. Ryan,* 8th Dist. Cuyahoga No. 98005, 2012-Ohio-5070, ¶ 15. Requiring the CCS statute to explicitly mention the prosecutor by name would render R.C. §309.08 meaningless. The purpose of R.C. §309.08 is to confer upon the prosecutor the authority and duty to, "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." By requiring each statute that deals with a "complaint, suit, or controversy" in which the state is a party, to also mention the prosecutor by name renders §309.08 surplusage. R.C. §2929.15 does not need to mention the prosecutor *again* in order to confer this authority with respect to CCS violation hearings. Since CCS proceedings are a suits in which the State is a party, the prosecutor has a right to notice and to participate. *See, Young, supra.*

Second, as this Honorable Court recognized, if an offender is found to be in violation of his CCS at a hearing, "the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and *must comply with the relevant sentencing statutes.*" (Emphasis added) *State v. Fraley,* 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17. *See also State v. Brooks,* 103 Ohio St.3d 134, 139, 2004-Ohio-4746, 814 N.E.2d 837.

R.C. §2929.19 sets forth the procedure for conducting a sentencing hearing. R.C. §2929.19(A) provides, in relevant part, that at the sentencing hearing "the offender, *the prosecuting attorney*, the victim or the victim's representative . . ., and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case." (Emphasis added) Crim.R. 32(A)(2) also recognizes the prosecutor's presence at the sentencing hearing, and provides that at such a hearing the trial court must "[a]fford the *prosecuting attorney* an opportunity to speak." (Emphasis added)

Since CCS violation proceedings most often turn into sentencing hearings, it is necessary that the prosecuting attorney be given notice of these hearings, and be afforded an opportunity to speak. The relevant sentencing statutes buttress this assertion. The fact that R.C. §2929.15 does not explicitly mention the prosecutor is irrelevant. R.C. §309.08 recognizes the prosecuting attorney as a party in CCS violation proceedings; and the relevant sentencing statutes of R.C. §2929.19 and Crim.R. 32(2) support this interpretation.

CONCLUSION

The Eighth District Court of Appeals' decision in this case effectively denies the people of the state of Ohio from representation at CCS violation 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 CCS. These proceedings most often turn into sentencing hearings from which the prosecuting attorney has effectively been excluded; in turn, establishing a system wherein the trial court acts as both the judge and the prosecutor.

Contrary to the Eighth District Court of Appeals' decisions, the State of Ohio is not represented by the probation department in legal proceedings. Their role at CCS hearings is limited to reporting to the court that violations have occurred, and as fact witnesses from whom the prosecutor may elicit testimony to establish a violation has occurred. R.C. §309.08 clearly provides that the prosecuting attorney will 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.

It is for the above reasons that the State asks this Honorable Court to reverse the judgment of the Eighth District Court of Appeals and hold that the prosecutor represents the State of Ohio at CCS violation hearings, the trial court must give the prosecutor of CCS hearings, and must allow the prosecutor to participate in in all CCS proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant was sent by regular U.S. mail or electronic service this 26th day of October, 2015 to Cullen Sweeney, 310 Lakeside Ave., Cleveland, OH 44113, counsel for Defendant-Appellee.

/S/ Frank Zeleznikar
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Supreme Court of Ohio Clerk of Court - Filed August 06, 2015 - Case No. 2015-1288

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	
	)	Case No.
Plaintiff-Appellant,	)	
	)	On Appeal from Cuyahoga
vs.	)	County Court of Appeals
	)	Eighth Appellate District
JOSEPH HEINZ	)	
	)	C.A. Case No. 102178
Defendant-Appellee.	)	

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized on July 9, 2015, in *State v. Heinz*, 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763.

This case raises a substantial constitutional question or is of public and great general interest.

Respectfully submitted,

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A copy of the foregoing Notice of Appeal of Appellant State of Ohio was forwarded by regular U.S. mail or electronic service this 6th day of July, 2015, to

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Supreme Court of Ohio Clerk of Court - Filed August 06, 2015 - Case No. 2015-1288

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102178

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JOSEPH HEINZ

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-555134-A

BEFORE: Blackmon, J., Keough, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: July 9, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant state of Ohio ("the state") appeals the trial court's decision that denied the prosecutor's office an opportunity to be heard at a probation violation hearing. The state assigns the following error for our review:

> I. The trial court's determination that the prosecuting attorney does not represent the state at community control violation hearings, and is therefore not a party to community control revocation hearings is a violation of R.C. § 309.08(A), due process, and the separation of powers doctrine.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶3} On October 11, 2011, the Cuyahoga County Grand Jury indicted Heinz on one count each of kidnapping, a first-degree felony, and assault, a first degree misdemeanor. On December 1, 2011, Heinz pleaded guilty to attempted abduction, a fourth-degree felony. On December 28, 2011, the trial court sentenced Heinz to community control sanctions for 24 months. The sanctions included 80 hours of community work service, random drug testing, completion of outpatient substance abuse and anger management treatments, obtain verifiable employment, and avoid any contact with the victim.

{¶4} On April 6, 2012, the trial court found Heinz in violation of the sanctions imposed because he tested positive for marijuana. The trial court continued Heinz on community control sanctions with some modifications. On November 22, 2013, the trial court again found Heinz in violation of the previous

sanctions because he tested positive for marijuana. The trial court continued Heinz on community control sanctions, but extended his supervision for 18 months.

{¶5} On October 14, 2014, Heinz appeared before the trial court based on a report from the probation department that he had submitted a diluted urine sample at the September 17, 2014 random drug test. At this hearing, an assistant prosecutor was present and indicated on the record that he was there to assert the right of his office to be present and be there at all probation violation hearings.

{¶6} Thereafter, the trial court asked Heinz's defense counsel if he had received notice from the prosecutor's office of their intention to appear, notice of a list of charges and arguments, or opportunity to prepare for those arguments. Heinz's defense counsel indicated that he had not received any notice. The assistant prosecutor was not afforded an opportunity to be heard at the hearing.

{¶7} Ultimately, Heinz admitted the violation, the probation department recommended a 14-day jail sentence, and the trial court found him in violation. The trial court imposed a 14-day sentence and increased Heinz's community work service by 24 hours. The state now appeals the trial court's decision denying the assistant prosecutor an opportunity to be heard at the hearing.

Prosecutor's Right to be Heard at Community Sanctions Violation Hearings

{¶8} In the sole assigned error, the state argues the prosecutor's office has a right to be present and be heard at all community control violation hearings. The state contends that the trial court's refusal to allow the state to be a party to community sanctions violation proceedings amounts to a violation of due process and the separation of powers doctrine.

{¶9} In the instant case, prior to oral argument, we granted the state's motion to supplement the record with the trial court's standing order that generally states that the prosecutor's office is not entitled to a notice of community control sanctions hearings. The trial court's standing order also pointed out that the state is being represented by the probation department and that the prosecutor is not inherently entitled to speak at a community control sanctions hearing. Further, the trial court's standing order required the prosecutor to move for leave of court before the prosecutor may be heard at the hearing.

{¶10} The state argues that R.C. 309.08 permits prosecutors to act in matters in which the state is an interested party. R.C. 309.08 provides in pertinent part as follows:

> (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. * * *

The state contends that community control violations are matters to which the state remains an interested party.

{¶11} However, R.C. 2929.15(A)(2)(a) provides as follows:

> If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, 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 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.

Thus, R.C. 2929.15(A)(2)(a), delegates "general control and supervision" of community control sanctions to the probation department.

{¶12} In addition, R.C. 2929.15(A)(2)(b) provides in pertinent part that:

> [i]f the court imposing sentence upon an offender sentences the offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, and if the offender violates any condition of the sanctions, any condition of release under a community control sanction imposed by the court, violates any law, or departs the state without the permission of the court or the offender's probation officer, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation or departure directly to the sentencing court * * *.

Thus, by the plain language of R.C. 2929.15(A)(2)(b), the probation department, and not the prosecutor's office, is the entity entrusted with the authority to properly institute community control violation proceedings. Undoubtedly, there will be instances where an offender who has been placed on community control sanctions commits a new indictable offense that would also result in a violation of community control. However, pursuant to R.C. 309.08, the prosecutor's office is charged with prosecuting the new offense, while the probation department, by a plain reading of R.C. 2929.15(A)(2)(b), is charged with reporting the new indictable offense to the trial court.

{¶13} In interpreting statutes, a reviewing court should make every effort to give effect to each word, phrase, and clause. *Selwyn v. Grimes,* 8th Dist. Cuyahoga No. 101252, 2014-Ohio-5147, citing *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21. A court's primary concern in statutory construction is the legislative intent in the statute's enactment, which is normally found in the words and phrases of the statute, read in context according to standard rules of grammar and common usage. *Id.*, citing *State ex rel. Mager v. State Teachers Retirement Sys. of Ohio*, 123 Ohio St.3d 195, 2009-Ohio-4908, 915 N.E.2d 320, ¶ 14. Nothing in the above statute explicitly gives the prosecutor's office any role in the community control violation proceedings.

{¶14} In its brief to this court, despite asserting that community control violation hearings fall with the purview of R.C. 309.08, the state acknowledges that a community control revocation hearing is not a criminal proceeding. In the standing order referenced above, the trial court underscored that the U.S. Supreme Court, the Ohio Supreme Court, as well as Ohio appellate courts including ours, have held that revocation of probation or parole are not criminal proceedings. *See Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *State ex rel. Wright v. Ohio Adult Parole Auth.,* 75 Ohio St.3d 82, 661 (1991); *State ex rel. Coulverson v. Ohio Adult Parole Auth.*, 62 Ohio St.3d 12, 577 N.E.2d 352 (1991); *State v. Delaney*, 11 Ohio St.3d 231, 465 N.E.2d 72 (1984); *State v. Lenard*, 8th Dist. Cuyahoga No. 93373, 2010-Ohio-81; *State v. Hayes*, 8th Dist. Cuyahoga No. 87642, 2006-Ohio-5924; *In re Bennett*, 8th Dist. Cuyahoga No. 71121, 1997 Ohio App. LEXIS 2546 (June 12, 1997); *State v. Parsons*, 2d Dist. Greene No. 96 CA 20, 1996 Ohio App. LEXIS 4957 (Nov. 15, 1996).

{¶15} Here, because a community control revocation hearing is not clothed in the formal trappings of a criminal prosecution, where the state would have been required to establish a violation beyond a reasonable doubt, the state's role as contemplated by R.C. 309.08 is not implicated. We deem it helpful to underscore that a community control revocation hearing is "an informal hearing structured to assure that the finding of a * * * [probation] violation will be based

on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the * * * [probationer's] behavior." *Morrissey* at 484. Thus, the state's traditional role is adequately represented by the probation department.

{¶16} The trial court, considered a neutral and detached body who placed a defendant on probation, has the duty to initially determine whether the defendant's conduct, as reported by the probation department, violated the terms of his community control sanctions. Under these circumstances, any contribution from the assistant prosecutor would arguably be cumulative. For example, in this specific case, the probation department reported that Heinz submitted a diluted urine sample; Heinz admitted the violation and the trial court found him in violation.

{¶17} However, in the event that there is conceivably something that the prosecutor's office could add to the proceeding, the trial court's standing order provided that the prosecutor's office could be heard with leave of court. Pursuant to the standing order, a request for leave to be heard shall be filed no later than two days before the scheduled revocation hearing and shall include any evidence and witnesses supporting the claimed violations. In addition, the standing order required case specific statements as to the violation be set forth in detail in a brief attached to the request. Further, the standing order required

that the request for leave to be heard be served on the probation department, counsel for defendant, and defendant.

{¶18} Nonetheless, in support of its argument that the prosecutor's office has the right to attend and participate in community control violation hearings, the state cites *State v. Young*, 154 Ohio App.3d 609, 2003-Ohio-4501, 798 N.E.2d 629 (3d Dist.).

{¶19} In *Young*, the defendant was sentenced to community control sanctions as a result of a conviction for driving while intoxicated ("DWI"). After being released from all terms of his community control, the defendant was indicted again for DWI and driving while under suspension. The prosecutor's office filed a pleading with the trial court setting forth the facts surrounding defendant's community control sanctions and requested a hearing. Defendant was sentenced to community control sanctions as a result of a conviction for DWI. The trial court issued an order finding that the prosecutor's office had no authority to initiate community control violation proceedings. On appeal, the court found no statutory provision prohibiting the state from initiating such proceedings.

{¶20} However, *Young* is distinguishable from the instant case. Pivotally, in *Young*, unlike the instant case, the defendant was indicted for a separate offense. That new indictment would necessarily implicate the prosecutor's role as contemplated by R.C. 309.08, and invariably the domino effect of the new

indictment would result in a violation of the defendant's community control sanctions.

{¶21} Here, having no new indictment, the violation proceedings remain clearly within the ambit of the probation department and the trial court having jurisdiction of Heinz. Consequently, the trial court's standing order that lays the groundwork for the prosecutor's office to participate in the violation proceedings did not constitute an abuse of discretion. An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶22} Within this assigned error, the state argues the trial court's actions amount to a violation of due process. We find no merit to this assertion.

{¶23} We have previously held the state is the entity that must provide due process; it has no right of due process from itself. *See State v. Mayo*, 8th Dist. Cuyahoga No. 80216, 2002 Ohio App. LEXIS 2075 (Apr. 24, 2002), citing *State v. Hartikainen*, 137 Ohio App.3d 421, 424-425, 738 N.E.2d 881 (2000).

{¶24} Within this assigned error, the state argues that the trial court's determination violates the separation of powers doctrine.

{¶25} The Supreme Court of Ohio has long held, ""[t]he essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought

not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others."" *State v. Dopart*, 9th Dist. Lorain No. 13CA010486, 2014-Ohio-2901, quoting *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 134, 2000-Ohio-116, 2000-Ohio-117, 2000-Ohio-119, 729 N.E.2d 359 (2000), quoting *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929).

{¶26} The General Assembly's decision of assigning primary responsibility of instituting community control sanctions revocation hearing to the probation department is completely within the province of legislative powers. We cannot fathom how this exercise of the General Assembly's legislative powers infringes upon the powers of the executive branch. As such, we find no merit to these assertions. Accordingly, we overrule the sole assigned error.

{¶27} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

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

JUL - 9 2015

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Deputy

KATHLEEN ANN KEOUGH, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS WITH
ATTACHED DISSENTING OPINION

MELODY J. STEWART, J., DISSENTING:

{¶28} I respectfully disagree with the court's conclusion that the state is represented at community control violation hearings by the probation department and that the prosecuting attorney has no right to be heard at revocation hearings. This conclusion not only violates the separation of powers, but leads to an anomalous proposition that the trial court can act as both judge and prosecutor.

{¶29} The Cuyahoga County Probation Department is a department of the court of common pleas, not the prosecuting attorney's office. *See* R.C. 2301.27(A)(1)(a) (permitting the court of common pleas to "establish a county department of probation."). In addition to hiring and paying employees of the county probation department, *State ex rel. Hillyer v. Tuscarawas Cty. Bd. of Commrs.*, 70 Ohio St.3d 94, 100, 637 N.E.2d 311 (1994), R.C. 2301.27(A)(1)(a) makes it clear that the court shall "supervise their work." Allowing an employee of the court of common pleas to prosecute probation violations gives rise to the

untenable proposition that the court of common pleas can act as both prosecutor and judge in community control violation cases. This is a clear violation of the separation of powers doctrine, stating the essential principle that "the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments * * *." *State ex rel. Bryant v. Akron Metro. Park Dist. of Summit Cty.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929).

{¶30} R.C. 309.08(A) defines the power of the prosecuting attorney, a function of the executive branch of government. It states that, with certain inapplicable exceptions, the prosecuting attorney "shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party * * *." "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, 2003-Ohio-4501, 798 N.E.2d 629 (3d Dist.), ¶ 7, citing *State v. Ferguson*, 72 Ohio App.3d 714, 716, 595 N.E.2d 1011 (3d Dist. 1991). Community control violation proceedings qualify as criminal proceedings in which the state is an interested party as shown by the number of cases speaking of the state's burden of proof in such cases. *See, e.g., State v. Tooley*, 9th Dist. Medina Nos. 09CA0098-M, 09CA0099-M, 09CA0100-M, 2011-Ohio-2449, ¶ 2

("This Court has written that there are competing views as to whether the State's burden of proof in instances of community-control violations is 'substantial evidence' or 'preponderance of the evidence.'"); *State v. Kelley*, 5th Dist. Delaware No. 12 CAA 04 0028, 2014-Ohio-464, ¶ 34; *State v. Baker*, 4th Dist. Scioto No. 09CA3331, 2010-Ohio-5564, ¶ 6 ("the state is not required to establish a violation of the community control terms 'beyond a reasonable doubt.'"). To speak of a burden of proof can only mean that it is the state that has the burden of proof in community control violation cases, for placing the burden of proof on the probation department, an arm of the court, would make the judicial branch the prosecutor in a criminal proceeding.

{¶31} The trial court's order requiring the prosecuting attorney to obtain leave of court in order to attend community control violation hearings can only be sustained if such proceedings are non-criminal in nature. It was formerly true that a grant of probation was generally considered to be an act of grace by the court that was outside the kind of criminal law protections offered to offenders. *See In re Varner*, 166 Ohio St. 340, 343, 142 N.E.2d 846 (1957), citing *Escoe v. Zerbst*, 295 U.S. 490, 492, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). For example, under the former law dealing with probation, there was generally no right to counsel for such hearings. *See, e.g., Thomas v. Maxwell*, 175 Ohio St. 233, 193 N.E.2d 150 (1963).

{¶32} Probation being an "act of grace" has gradually given way to the idea, especially in Ohio, that community control is itself a form of punishment to which certain constitutional rights apply — after all, the proper term is community control *sanction.* Consistent with community control being criminal in nature, rights attending thereto have expanded. United States Supreme Court precedent has made it clear, for example, that there is not only a right to counsel in revocation cases, *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), there is a due process right to notice and procedure.[1] *Morrissey v. Brewer*, 408 U.S. 471 (1972). With the passage of S.B.2 in 2006, community control sanctions are now considered a punishment or a sentence, as opposed to probations being considered an "act of grace" delivered by the judge. *State v. Wolfson*, 4th Dist. Lawrence No. 03CA25, 2004-Ohio-2750, ¶ 6. The violation of community control is thus a controversy in which the people of the state of Ohio are a party and the trial court's attempt to prosecute violations, through its probation department, gives itself prosecutorial authority beyond its power.

{¶33} The majority finds that R.C. 2929.15(A)(2)(b) makes the probation department "the entity entrusted with the authority to properly institute community control violation proceedings." The statute does not say this — it

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[1] The constitutional rights mentioned above have now been expressly codified by Crim.R. 32.3, which specifically addresses the rights attaching to revocation of probation proceedings. It is telling that these rights are contained in a "criminal" rule of procedure.

states that the "the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction" shall "report" the alleged violation either to the court or the probation department. A statutory duty to *report* community control violations is not the same as empowering the *prosecution* of community control violations. The duty to prosecute remains at all times with state of Ohio, not court personnel.

{¶34} To further underscore this point, it cannot be denied that in appeals from the revocation of community control the prosecuting attorney has the obligation to represent the interests of the state of Ohio. If the prosecuting attorney must represent the interests of the state of Ohio in an appeal from the revocation of community control, it stands to reason that the prosecuting attorney has the right to represent the interests of the state of Ohio in the proceeding that might give rise to the appeal.

{¶35} And apart from letting the state prosecute appeals from community control violations and revocations, the trial court's standing order implicitly acknowledges that the state has the authority to prosecute alleged violations and possible revocations at the trial court level — granting leave for the state to be present at such hearings necessarily means that the trial court understands that the state of Ohio is more than just a bystander to such proceedings. If the trial court grants leave for the state to appear, it is granting leave to participate in the proceedings. This leads to the conclusion that the trial court could make

arbitrary decisions as to when the state can prosecute community control violations. 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. While the trial court may not wish to have the state second-guessing its decision to continue community control after a violation is established, the desire to make such decisions unreviewable is contrary to our judicial system. I therefore dissent.