

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

REPLY BRIEF OF APPELLANT

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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. Appellee’s reliance on *Gagnon v. Scarpelli* throughout his brief supports the State’s contention that the State is represented by the County Prosecutor at Community Control Sanction hearings.

Throughout his merit brief, Appellee relies on a 1973 United States Supreme Court decision, *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), for the proposition that probation and parole violations are informal hearings in which the State is represented by the parole officer, not the prosecutor. However, “the holding in that case actually supported the opposite conclusion.” *State v. Johnson*, 8th Dist. Cuyahoga Nos. 102760, 102761, 2015-Ohio-4189, ¶ 36 (J. Gallagher, dissenting).

In *Gagnon*, the Court was faced with the question of whether an indigent offender had a right to counsel at probation violation hearings. The Court was reluctant to find an absolute constitutional right to counsel at these hearings, stating that “[i]f counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel.” *Id.* at 787. Instead, the court determined that a case-by-case inquiry was needed to determine whether counsel was necessary. *Id.* at 791.

The probation/community control sanction (“CCS”) structure in Ohio in 2015 is not the same as the probation structure that was before the United States Supreme Court in *Gagnon* in 1973. The Ohio Rules of Criminal Procedure now grant a defendant the right to counsel at revocation hearings. Crim.R. 32.3(B). The *Gagnon* court clearly recognized that when the defendant is afforded counsel at a probation violation hearing, the State in turn will provide its

own counsel. Since Appellee was provided counsel in this case, the *Gagnon* court recognized the State's right to be represented by legal counsel as well, i.e. the prosecuting attorney. Due to the introduction of defense counsel, the instant proceeding is not of the same nature as the proceeding in *Gagnon*, and the *Gagnon* court explicitly acknowledges that. *Gagnon, supra*, at 787. (stating that “[t]he introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding.”)

As the United States Supreme Court recognized, the introduction of counsel at CCS hearings significantly alters the nature of probation/community control violation hearings. As such, community control sanction hearings in Ohio, in the year 2015, are significantly different. Crim.R. 32.3(B) now guarantees a defendant the right to retained or appointed counsel at CCS violation hearings. As such, the State has “the inherent right to have its own legal advocate present to uphold the rights of the victim and the State.” *Johnson* at ¶ 37 (J. Gallagher, dissenting). The General Assembly has accounted for this by providing that the State of Ohio is represented by the prosecutor at every complaint, suit, and controversy in which the state is a party. R.C. §309.08. These include CCS violation hearings.

Based on the forgoing, Appellee's reliance on *Gagnon* throughout his merit brief is misplaced. The nature of the proceedings before the Court in *Gagnon*, in 1973, are significantly different than CCS hearings in Ohio more than forty years later. As the *Gagnon* court recognized, the introduction of counsel at these hearings significantly alters their nature. *See Gagnon, supra*, at 787. And since Crim.R. 32.3(B) now guarantees a defendant a right to counsel at these hearings, these hearings are significantly different than those found in *Gagnon*. As the dissent in *Johnson, supra*, recognized: “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* at ¶ 37 (J. Gallagher, dissenting).

B. The authority conferred upon the Adult Parole Authority in handling Parole Violation hearings pursuant to R.C. §2967.15 and §2967.28 is broader in scope than the authority conferred upon the Probation Department in handling Community Control Violation hearings under R.C. §2929.15.

In his merit brief, Appellee compares the authority granted to the Adult Parole Authority (“APA”) by R.C. §2967.15 and §2967.28 with the authority conferred upon the probation department by R.C. §2929.15. There is no comparison. The APA has the function of conducting parole violation hearings in an administrative setting. It is not a court; nor is it subject to the statutes and rules that govern court procedure.

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 and limited; it is to monitor an offender on CCS and report any violations of CCS to the court. There is nothing in the statute providing the probation department with prosecuting and proving 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. §2967.15 and §2967.28, 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.

On the other hand, the General Assembly granted exclusive authority to the Adult Parole Authority to not only monitor offenders on post-release control, but to prosecute these violations. R.C. §2967.28 tasks the department of rehabilitation and correction with the authority to determine whether a parolee violated the conditions of his or her post-release control, and what sanction, if any, is warranted. R.C. §2967.28(E)/(F). In fact, R.C. §2967.28(E), tasks the department of rehabilitation and corrections to adopt rules and standards regarding the imposition of post-release control; its modifications; punishments; and standards to be used by the adult parole authority in governing post-release control. For example, R.C. §2967.28(E)(5) tasks the department of corrections and rehabilitation with the following:

Establish standards to be used by the adult parole authority or parole board in imposing further sanctions under division (F) of this section on releasees who violate post-release control sanctions, including standards that do the following:

- (a) Classify violations according to the degree of seriousness;
- (b) Define the circumstances under which formal action by the parole board is warranted;
- (c) Govern the use of evidence at violation hearings;
- (d) Ensure procedural due process to an alleged violator;
- (e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;
- (f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

The Ohio Administrative Code therefore, controls the procedures for administrative hearings regarding parole violations. *See* Ohio Adm.Code 5120:1-1-18.

Furthermore, as Appellee recognizes in his merit brief, “[w]ith 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.” Appellee’s Merit Brief at pg. 13. Specifically, R.C. §2967.15(B) provides, in relevant part:

(B) Except as otherwise provided in this division, prior to the revocation by the adult parole authority of a person's pardon, parole, or other release and prior to the imposition by the parole board or adult parole authority of a new prison term as a post-release control sanction for a person, *the adult parole authority shall grant the person a hearing* in accordance with rules adopted by the department of rehabilitation and correction under Chapter 119 of the Revised Code. The adult parole authority is not required to grant the person a hearing if the person is convicted of or pleads guilty to an offense that the person committed while released on a pardon, on parole, or another form of release, or on post-release control and upon which the revocation of the person's pardon, parole, other release, or post-release control is based.

If a person who has been pardoned is found to be a violator of the conditions of the parolee's conditional pardon or commutation of sentence, the authority forthwith shall transmit to the governor its recommendation concerning that violation, and the violator shall be retained in custody until the governor issues an order concerning that violation.

If the authority fails to make a determination of the case of a parolee or releasee alleged to be a violator of the terms and conditions of the parolee's or releasee's conditional pardon, parole, other release, or post-release control sanctions within a reasonable time, the parolee or releasee shall be released from custody under the same terms and conditions of the parolee's or releasee's original conditional pardon, parole, other release, or post-release control sanctions. (Emphasis added)

This type of comprehensive language is not found anywhere in the CCS statute. Instead, the General Assembly limited the probation department to a supervisory and reporting role. *See* R.C. §2929.15 (A)(2)(a). But more importantly, the General Assembly recognized that CCS violation hearings occur in a court of law, not within in the confines of an administrative proceeding.

When an offender is placed on parole, he is placed under the jurisdiction of the Adult Parole Authority. Alternatively, when an offender is placed on CCS, the court retains jurisdiction over the offender throughout the duration of the term of the offender's CCS. *See* R.C. §2929.15. As discussed above, while under the trial court's supervision, a defendant has a statutory right to counsel pursuant to Crim.R. 32.3(B). Therefore, as recognized by the United

States Supreme Court in *Gagnon, supra*, when an offender is represented by counsel at these hearings, the State will provide its own counsel. *Id.* at 787.

Based on the forgoing, Appellee's comparison between parole and community control sanctions statutes is misplaced. The statutes governing parole clearly contemplate a broad role that the department of rehabilitation and corrections would have regarding post-release control violators; including the prosecution of these violations. The role of the probation department pursuant to R.C. §2929.15 is drawn much more narrowly. Had the General Assembly wished to confer the type of authority it conferred to the Adult Parole Authority to the probation department, it could have written the CCS statute in the same manner. It chose not to; instead it chose to make the probation department's role limited.

C. The County Prosecutor did not receive notice of the CCS hearing from either the clerk or the trial court in this case.

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) 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.

As Appellee notes in his answer brief, six days prior to the CCS violation hearing, the trial court did place notice of the CCS violation hearing on the docket. However, neither the trial court nor the clerk of courts notified the prosecutor that the hearing had been scheduled, as per the trial court's standing order. The only way the prosecutor can be made aware of these hearings is to either check the docket every day of every single CCS case, or to leaf through a

schedule book kept with the court's bailiff. When confronted with two impractical options, the prosecutor is stuck with the lesser of two evils, which happened to be the latter.

Furthermore, the trial court only started placing notice of CCS hearings on the public docket after the State began to appeal these cases to the Court of Appeals. This Honorable Court has accepted multiple cases on this issue stemming from the trial court's order. The State never received notice of these hearings from the trial court, and rarely were notice of these hearings placed on the public docket. The following chart represents the cases that this Honorable Court has accepted on this issue, outlining the lack of notice the County Prosecutor has received pertaining to each CCS violation hearing.

Case Name OSC #	Notice of Hearing filed on the docket	Hearing Date	Days of Notice filed on the docket
<i>State v. Harris,</i> 2014-1176	No Notice filed.	6/11/14	0
<i>State v. Jenkins,</i> 2014-1175	No Notice filed.	6/11/14	0
<i>State v. Marks,</i> 2014-1173	No Notice filed.	6/11/14	0
<i>State v. Scott,</i> 2014-1177	No Notice filed.	6/11/14	0
<i>State v. Wiley,</i> 2014-1201	No Notice filed.	6/11/14	0
<i>State v. Washington,</i> 2014-1363, 2014- 1368	No Notice filed.	2/14/14	0
<i>State v. Rosario,</i> 2014-1174	No Notice filed.	6/11/14	0
<i>State v. Stewart,</i> 2014-1725	8/15/14	8/14/14	0 ¹
<i>State v. Turner,</i> 2014-1715	7/25/14 ²	8/5/14 – there was no notice filed on the docket for this	0

¹ It appears that the notice of hearing was not docketed until one day *after* the CCS violation hearing was held.

² Notice filed on this date advised of CCS violation hearing to be held on 7/30/2014, however there was no hearing held on this date.

		date.	
<i>State v. Melton</i> , 2014-1716	7/18/14	8/5/14	17
<i>State v. Collins</i> , 2014-1200	5/30/14	6/9/2014	10
<i>State v. Diamond</i> , 2014-1712, 2014- 1714, 2014-1721	8/8/14 ³	8/14/15 – there was no notice filed on the docket for the hearing held on this date.	0 ⁴
<i>State v. Wimbush</i> , 2014-1717, 2014- 1776	7/28/14 ⁵	8/5/14 – there was no notice filed on the docket for the hearing held on this date.	0 ⁶

As this chart demonstrates, the trial court only recently began placing notice of CCS violation hearings on the public docket; and even these notices do not always accurately reflect the day the hearing is to be held. Also, the county prosecutor still never receives notice of these hearings from the either the court or the clerk.

The trial court’s standing order requires the prosecutor to request leave two days prior to the revocation hearing. However, the system the trial court has set up makes compliance with this order impractical, as the prosecutor does not receive notice from the trial court or the probation department, as per the trial court’s standing order. As such, the trial court has effectively cut out the county prosecutor from performing its statutory duty of representing the State of Ohio at CCS violation hearings.

³ Notice filed on this date advised of CCS violation hearing to be held on 8/8/14. The prosecutor was present in the back of the courtroom, the hearing was continued, but not docketed.

⁴ The prosecutor did have notice though; but only because he was present at the initial hearing. The date of this hearing was not docketed.

⁵ Notice filed on this date advised of CCS violation hearing to be held on 7/30/2014. The prosecutor was present. The hearing was continued, but not docketed.

⁶ The prosecutor did have notice of this date though; but only because he was present at the initial hearing.

D. This Honorable Court has recognized that when an offender is found to be in violation of CCS, the trial court holds a second sentencing hearing and is required to comply with the relevant sentencing statutes.

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. 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 subsequent sentencing hearings.

In his merit brief, Appellee would have this Honorable Court limit *Fraley* to its facts. Appellee states that the Court was only speaking in the context of former version of R.C. §2929.19(B)(5) (now codified at R.C. §2929.19(B)(4)) when it made the above statement. While it is true that former R.C. §2929.19(B)(5) was the issue at bar in *Fraley*, the court clearly contemplated that a new sentencing occurs upon a CCS violation. In *Fraley*, the court noted that “in order to comply with [former] R.C. 2929.19(B)(5), the *original* sentencing hearing is the time when the notification must be given for the court to impose a prison term upon defendant’s *first* community control violation.” (Emphasis in original) *Fraley*, at ¶ 15. However, the Court specifically recognized that upon a CCS violation, “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) *Fraley*, at, ¶ 17. As a result, upon a finding of a CCS violation, the trial court may notify an offender that upon violation he may be sent to a specified term of prison, pursuant to former R.C. §2929.19(B)(5).

As such, this Honorable Court clearly recognized that these subsequent sentencing hearings require a trial court to follow all relevant sentencing statutes; this would include R.C. §2929.19(A), which 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 represent the State of Ohio. To separate the violation portion of the hearing from the sentencing portion, in an attempt to deny the prosecutor from notice and the ability to participate in the hearings would be impractical and unworkable, since the violation and the sentencing often occur at the same hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was sent by regular U.S. mail or electronic service this 4th day of January, 2016 to Cullen Sweeney, 310 Lakeside Ave., Cleveland, OH 44113, counsel for Defendant-Appellee.

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