**[Cite as *State v. Heinz*, 2015-Ohio-2763.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION

~~**No. 102178**~~

## STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

## JOSEPH HEINZ

DEFENDANT-APPELLEE

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**JUDGMENT:**
AFFIRMED

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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

**ATTORNEYS FOR APPELLANT**

Timothy J. McGinty
Cuyahoga County Prosecutor

By: Frank Romeo Zeleznikar
Assistant Prosecuting Attorney
The Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE**

Robert L. Tobik
Cuyahoga County Public Defender

By: Cullen Sweeney
Assistant Public Defender
310 Lakeside Avenue
Cleveland, Ohio 44113

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.

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PATRICIA ANN BLACKMON, JUDGE

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.

[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.

**{¶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 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.