[Cite as *State v. Sheppard*, 2015-Ohio-4084.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102563

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

MARK G. SHEPPARD

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584256-A

BEFORE: Boyle, J., Keough, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: October 1, 2015

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MARY J. BOYLE, J.:

{¶1} This case involves an ongoing issue with the county prosecutor's office and a common pleas court judge. In February 2014, the judge issued a standing order in his courtroom that generally states that the prosecutor's office is not entitled to notice of community control violation hearings, nor is it permitted to represent the state of Ohio at these hearings unless it first seeks leave of court to be present and to be heard at the hearing.[1]

{¶2} In this particular case, the defendant was sentenced to 48 months of community control sanctions in June 2014. He was back in court for his first community control violation hearing in November 2014; the trial court continued his community control with modified conditions. In January 2015, he was back in court for another community control violation hearing.

{¶3} It was at this second hearing that the trial court began by stating that they were in court for a community control violation hearing with the probation officer present "representing the interests of the state of Ohio." The prosecutor present at the hearing indicated that he was there to assert "the prosecutor's right to be present and heard at all

[1]The state had previously filed a mandamus action asking the Ohio Supreme Court to require the trial court to provide notice to the state of all CCS violation hearings and allow the prosecutor to participate without having to comply with the trial court's order, but the Supreme Court granted the respondent-judge's motion to dismiss the action. *See State ex rel. McGinty v. Sutula*, 140 Ohio St.3d 1495, 2014-Ohio-4845, 18 N.E.3d 1249 (original action in mandamus).

probation violations." The trial court asked the prosecutor if he had filed "a request to speak" at the hearing or whether he had served the defendant with notice of the state's intent to appear at the hearing. The prosecutor indicated that he had not done so because the state is not required to do so. The trial court refused to allow the state to participate in the hearing. We note, however, that the prosecutor never proffered anything on the record regarding statements that he wanted to make at the hearing, nor did he formally object on the record as to the proceeding going forward.

{¶4} The state subsequently moved for leave to appeal, which this court granted. The state raises one assignment of error for our review:

> 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.

{¶5} This court, however, has addressed this exact issue several times, rejecting the state's claim. *See, e.g., State v. Heinz*, 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763, and *State v. Wheeler*, 8th Dist. Cuyahoga Nos. 102182 and 102183, 2015-Ohio-3231. Consistent with this authority and stare decisis, we overrule the state's sole assignment of error and affirm.

Eighth District's Precedent

{¶6} In its sole assignment of error, the state raises three arguments in support of its appeal. Its arguments, however, are verbatim to the arguments it raised in *Heinz* and

Wheeler, where this court thoroughly analyzed and ultimately rejected the state's claims. *See Heinz* for an in-depth analysis.[2] We further note that the state briefed the same arguments presented here in the case of *State v. Rosario*, 140 Ohio St.3d 1496, 2014-Ohio-4845, 18 N.E.3d 1251, which is pending before the Ohio Supreme Court. The Ohio Supreme Court accepted that case based on the following 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." Oral arguments were held on September 1, 2015, in that case.

{¶7} The state has also appealed our decisions in *Heinz* and *Wheeler*, which are still under consideration. Thus, until the Supreme Court definitively answers this question, we are compelled to follow *Heinz*.

{¶8} Accordingly, the state's sole assignment of error is overruled.

{¶9} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[2]One judge dissented in *Heinz*, finding that because the county probation department is an arm of the court, essentially making probation officers employees of the court, that it puts the judge in the position to act as both the prosecutor and the judge in a community control violation case. *Id.* at ¶ 29 (Stewart, J., dissenting). The dissenting judge found that this is a clear violation of the separation of powers doctrine. *Id.* While the dissenting judge makes a good point, we are compelled to follow the majority decision until the Supreme Court decides the issue.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

MARY J. BOYLE, JUDGE

ANITA LASTER MAYS, J., CONCURS;
KATHLEEN ANN KEOUGH, P.J., CONCURS IN JUDGMENT ONLY