[Cite as *State v. Clark*, 2015-Ohio-4089.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 102758 and 102759

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

SARENA CLARK

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-11-547473-A and CR-11-553537-A

BEFORE: Boyle, J., Jones, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: October 1, 2015

ATTORNEYS FOR APPELLANT

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Frank Romeo Zeleznikar
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Robert L. Tobik
Cuyahoga County Public Defender
BY: Cullen Sweeney
John T. Martin
Assistant County Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} In this appeal, the plaintiff-appellant, state of Ohio, challenges a trial court's authority to require a prosecutor to seek leave of court to participate in a community control sanction violation hearing and its subsequent refusal to allow a prosecutor to participate when the prosecutor does not comply with the trial court's order. Specifically, 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 revocations hearings, is a violation of R.C. 309.08(A), due process, and the separation of powers doctrine.

{¶2} 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.

Procedural History and Facts

{¶3} In Cuyahoga C.P. No. CR-11-547473, defendant-appellee, Sarena Clark, was sentenced to 36 months of community control sanctions ("CCS") with several conditions after pleading guilty to aggravated theft in June 2011. Six months later, in Cuyahoga C.P. No. CR-11-553537, Clark was sentenced to 12 months of CCS with

several conditions after pleading guilty to two counts of attempted tampering with records and one count of forgery in January 2012.

{¶4} On March 4, 2015, the trial court held a CCS violation hearing on both cases, beginning the hearing by identifying the parties present and noting that the probation officer was present "representing the interests of the state of Ohio." At that point, the prosecutor present at the hearing indicated that he was there to assert "the prosecutor's right to be present and heard at all probation violation hearings." The trial court asked the prosecutor if he filed a request for leave to appear, to which the prosecutor indicated that "we are not required to."[1] The trial court further asked if the prosecutor notified defense counsel of his intent to appear or if the prosecutor provided defense counsel with any "allegations" that the prosecutor intended to make. The prosecutor indicated that he did not.

{¶5} The trial court then proceeded with the hearing without allowing the prosecutor to participate. We note, however, that the prosecutor never proffered anything on the record regarding statements he wanted to make at the hearing. Nor did the prosecutor formally object on the record as to the proceeding going forward.

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[1] In February 2014, the trial judge issued a standing order in his courtroom that generally states the prosecutor's office is not entitled to notice of a community control violation hearing, nor is it permitted to represent the state of Ohio at these hearings unless it first seeks leave of court to be present and be heard at the hearing. This order is the impetus of the state's appeal. And while the state previously filed a mandamus action asking the 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, the Ohio 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).

{¶6} The trial court ultimately found Clark to be in violation of the conditions of CCS on both cases and imposed six months of local incarceration with 150 days stayed. The trial court further ordered Clark to complete an additional 150 hours of community service and extended CCS to January 11, 2017.

{¶7} The state subsequently filed a notice of appeal, along with a motion for leave to appeal, which a separate panel of this court granted.

Eighth District's Precedent

{¶8} The state raises one assignment of error and provides three arguments in support of its appeal. Its arguments, however, are verbatim to the arguments it raised in *Heinz*, 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763, and *Wheeler*, 8th Dist. Cuyahoga Nos. 102182 and 102183, 2015-Ohio-3231. This court has 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, 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

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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.

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.

{¶9} 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*.

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

{¶11} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

LARRY A. JONES, SR., P.J., and
TIM McCORMACK, J., CONCUR