[Cite as *State v. George*, 2015-Ohio-4187.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102562

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

WILLIAM GEORGE, JR.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-568307-A

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

RELEASED AND JOURNALIZED: October 8, 2015

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TIM McCORMACK, J.:

{¶1} Plaintiff-appellant, the state of Ohio, appeals the trial court's decision denying the prosecutor's office an opportunity to represent the state and be heard at the community control violation hearing of defendant-appellee William George.[1] For the reasons that follow, we affirm.

{¶2} On November 5, 2012, George was indicted on two counts of drug possession, in violation of R.C. 2925.11(A), one count of possessing criminal tools, in violation of R.C. 2923.24(A), and one count of tampering with evidence, in violation of R.C. 2921.12(A)(1). On November 16, 2012, he pleaded guilty to two counts of drug possession, and the remaining counts were nolled. On December 21, 2012, the trial court sentenced George to 36 months community control sanctions.

[1] The state filed a motion for leave to appeal from a trial court proceeding held on January 26, 2015, and an order journalized on January 30, 2015, pursuant to App.R. 5(C), R.C. 2505.02, and 2945.67, which this court granted.

{¶3} On January 26, 2015, the court held a community control violation hearing for George's failure to report to the probation department. Present at the hearing were the defendant, defense counsel, the prosecutor, and George's probation officer. At the outset of the hearing, the court recognized that the probation officer represented the state of Ohio. The prosecutor then addressed the court, asserting the prosecutor's right to be present and heard at all probation violation hearings. In response to the court's inquiry, the prosecutor acknowledged that he had not requested leave of court to appear at the hearing, nor did he notify defense counsel of his intent to appear. Thereafter, the court asked defense counsel if he would be prepared to extemporaneously rebut anything the prosecutor might say, to which defense counsel responded, "probably not." During the remainder of the hearing, the prosecutor was not afforded an opportunity to be heard.

{¶4} Ultimately, George admitted that he failed to report. The court found George in violation of his community control sanctions and continued community control. The court ordered George to report during the months of February, March, April, and May 2015, for drug testing, and stated that community control would terminate after May 2015, if George tested negative each month.

{¶5} The state now appeals the trial court's judgment, assigning one 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.

{¶6} The state claims that the trial court's "standing order" in which the court refuses to allow the prosecutor to speak or represent the state's interests at community control sanctions hearings is a violation of R.C. 309.08(A), due process, and the separation of powers doctrine. This court has previously addressed this exact argument and found no merit to the state's claims.[2] *See State v. Heinz*, 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763; *see also State v. Sheppard*, 8th Dist. Cuyahoga No. 102563, 2015-Ohio-4084; *State v. Wheeler*, 8th Dist. Cuyahoga Nos. 102182 and 102183, 2015-Ohio-3231.

[2] This issue is currently pending before the Ohio Supreme Court in *State v. Rosario*, Supreme Court No. 2014-1174.

{¶7} In *Heinz*, this court determined that because a community control revocation hearing "is not clothed in the formal trappings of a criminal prosecution * * * the state's role as contemplated by R.C. 309.08(A) is not implicated." *Heinz* at ¶ 15. We further found that the state is the entity that must provide due process and it has no right of due process from itself. *Id.* at ¶ 23, citing *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 (6th Dist.2000). Finally, in stating that the General Assembly's decision of assigning the responsibility of community control sanctions hearings to the probation department "is completely within the province of the legislative powers," this court found no merit to the state's argument that the trial court's order violates the separation of powers doctrine. *Heinz* at ¶ 26.

{¶8} Accordingly, in following the law in this district, we find no merit to the state's claims relevant to the community control sanctions violation hearing of William George. The state's sole assignment of error is overruled.

{¶9} 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 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.

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TIM McCORMACK, JUDGE

LARRY A. JONES, SR., P.J., and
MARY J. BOYLE, J., CONCUR