[Cite as *State v. Johnson*, 2015-Ohio-4189.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 102760 and 102761

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

PHILROY JOHNSON

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-12-568869-A and CR-11-548936-A

BEFORE: E.T. Gallagher, P.J., S. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: October 8, 2015

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EILEEN T. GALLAGHER, P.J.:

{¶1} In this consolidated appeal, the state of Ohio ("the state") appeals a standing order of the Cuyahoga County Common Pleas Court that prohibits the Cuyahoga County Prosecutor's Office from participating in community control revocation hearings without leave of court. The state assigns 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.

{¶2} We find no merit to the appeal and affirm the trial court's order.

I. Facts and Procedural History

{¶3} In May 2011, defendant Philroy Johnson ("Johnson"), pleaded guilty to escape in Cuyahoga C.P. No. CR-11-548936, and the court sentenced him to community control sanctions for a period of three years. One year later, the court found Johnson in violation of the terms of his community control sanctions, but nevertheless continued community control in lieu of prison.

{¶4} In April 2013, Johnson pleaded guilty to attempted having a weapon while under disability and carrying a concealed weapon in Cuyahoga C.P. No. CR-12-568869. The court sentenced him to 36 months of community control sanctions. Almost a year later, the court again found Johnson in violation of the terms of his community control and continued the community control sanctions.

{¶5} The court held yet another community control revocation hearing in March 2015. The transcript from the hearing shows that an assistant county prosecutor was present on behalf of the state and asserted that the prosecutor's office has a right to attend and participate in all community control revocation hearings. The trial court refused to allow the prosecutor to speak at the hearing because he had not previously sought leave to participate at the hearing as required by the court's standing order.

{¶6} At the hearing, the probation officer described the defendant's violations to the court. The court found Johnson in violation of his community control sanctions and imposed nine months of the suspended prison terms in the sentencing entries, to be served at a local residential facility.

{¶7} The state subsequently filed a notice of appeal together with a motion for leave to appeal, which we granted. The state now appeals the denial of its asserted right to be heard at all community control revocation hearings.

II. Law and Analysis

{¶8} In its sole assigned error, the state argues the prosecutor's office has a constitutional and statutory right to be present and heard at all community control violation hearings. The state contends the trial court's refusal to allow the state to be a party to community control revocation hearings violates its right to due process and the separation of powers doctrine.

A. Prosecutor's Statutory Rights

{¶9} The state argues it has a statutory right to be heard at community control revocation hearings pursuant to R.C. 309.08(A), which defines the power of the prosecuting attorney, a member of the executive branch of government. R.C. 309.08(A) provides, in relevant part:

> The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, * * * 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 community control revocation hearings fall within the purview of "complaints, suits, and controversies," and "other suits, matters, and controversies that the prosecuting attorney is required to prosecute."

{¶10} However, R.C. 2929.15(A)(2)(a), which governs community control sanctions, provides in relevant part:

> If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to [s]ection 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.

Nothing in R.C. 2929.15 gives the prosecutor's office any role at community control revocation hearings. The plain language of R.C. 2929.15 provides that the probation

department, not the prosecutor's office, is assigned the task of reporting alleged community control violations to the court.

{¶11} R.C. 2929.15 does not prescribe an adversary proceeding; it reflects the fact that a defendant sentenced to community control is supervised by the court through the county probation department. Indeed, the purpose of community control revocation hearings is to determine whether reasonable cause exists to believe that the defendant violated the court's orders as outlined in the community control sanctions. Community control revocation is a mechanism by which the court enforces its own orders. It is akin to a contempt finding. The trial court has a "fundamental and inherent" power to enforce its own orders. *Wind v. State*, 102 Ohio St. 62, 64, 130 N.E. 35 (1921); *see also Edwards v. Murray*, 48 Ohio St.2d 303, 305, 358 N.E.2d 577 (1976).

{¶12} An act reported to be in violation of community control may or may not be a criminal offense, but it is an alleged violation of the court's orders as outlined in the terms of the community control sanctions. If the action in violation of community control happens to also be a criminal offense, the state may prosecute the offense in a new criminal case pursuant to R.C. 309.08.

{¶13} However, the court is solely responsible for determining whether an act alleged to be in violation of community control is in fact a violation of the terms of the defendant's community control sanctions as set forth in the court's sentencing order. This is because community control revocation hearings are not criminal proceedings. *State v. Heinz*, 8th Dist. Cuyahoga No. 102178, 2015-Ohio-2763, ¶ 14; *Gagnon v.*

Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

{¶14} On this point, *Gagnon* is instructive. In that case, a probationer argued he was entitled to a hearing before revocation of his community control, and that he had a right to counsel at the hearing. The court observed that although a community control revocation is not a stage of criminal prosecution, it results in the loss of liberty. *Gagnon* at 781. Therefore, the court concluded that minimal requirements of due process demand that the probationer be afforded an opportunity to be heard before his community control may be revoked. *Id*., citing *Morrissey* at 480.

{¶15} Whether due process guaranteed the probationer a right to counsel at community control revocation hearings was a separate matter. In making this determination, the *Gagnon* court considered the purpose of community control, which "'is to help individuals reintegrate into society as constructive individuals as soon as they are able.'" *Id*. at 782, quoting *Morrissey* at 480. The court also noted significant differences between criminal proceedings and community control revocation hearings:

> In a criminal trial, the state is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a

parole officer with the orientation described above; formal procedures and rules of evidence are not employed.

Id. at 789. The "orientation described above" refers to the probation officer's function. The *Gagnon* court explained that a probation officer has a "double duty to the welfare of his clients and the safety of the general community." *Id.* However, "by and large, concern for the client dominates his professional attitude." *Id*.

{¶16} The court further explained that a probation officer does not "compel conformance" to Ohio laws. *Gagnon* at 784. That is the prosecutor's job. The probation officer supervises rehabilitation and decides, in his discretion, whether to recommend revocation. *Id.* The *Gagnon* court observed that revocation is viewed "as a failure of supervision." *Id*.

{¶17} Due to the differences between criminal prosecution and community control revocation hearings, the court held that a probationer does not have an absolute right to counsel in all community control revocation hearings. *Id*. The probationer is guaranteed only "minimum requirements of due process," and has a right to counsel only under certain circumstances. *Id*. The court distinguished a probationer's right to counsel from that of an accused in a criminal prosecution on the simple fact that the probationer has already been convicted and sentenced. *Id*. at 789. Surely the state does not have more rights than that of a probationer facing the potential loss of liberty.

{¶18} The *Gagnon* court acknowledged that the state has an interest in the accurate finding of fact and the informed use of discretion. Nevertheless, the court did not hold that the state has an absolute right to appear and be heard at community control violation

hearings. At most, the court intimates that "[i]f counsel is provided for the probationer or parolee, the state will in turn normally provide its own counsel." *Id*. at 787. However, the court does hold that the state has a right to be there. Rather, this statement refers to the common practice of many courts who allow prosecutors to be present and heard.

{¶19} The limitations on the state's rights with respect to community control violation hearings is evident in its limited right to appeal. Unlike the probationer whose liberty has been taken, the state does not have an automatic right to appeal judgments concerning the continuation or termination of community control. R.C. 2945.67(A) gives the state a statutory right to appeal decisions that "grant[ ] a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code." The state *may* appeal "any other decision, except the final verdict," *only by leave of court*. R.C. 2945.67(A). Thus, if the state believes the trial court erred in its revocation decision, its remedy is to file a motion for leave to appeal the erroneous judgment pursuant to App.R. 5(C).

{¶20} The state cites no legal authority expressly holding that the state has a statutory or constitutional right to be heard at community control violation hearings, except for a Third District decision, *State v. Young*, 154 Ohio App.3d 609, 2003-Ohio-4501, 798 N.E.2d 629 (3d Dist.). We have previously found *Young* inapplicable to facts identical to those presented in this case. *See State v. Heinz*, 8th Dist.

Cuyahoga No. 102178, 2015-Ohio-2763. The determinative issue in *Young* was not whether the state has a right to participate in a community control violation hearing; it was whether the state could initiate a community control violation proceeding. Unlike Johnson, Young's violation of community control involved an indictment on a new charge. Based on this fact, the *Young* court concluded that the new indictment implicated the prosecutor's role as contemplated by R.C. 309.08. *Young* at 611; *Heinz* at ¶ 20. In this case, there was no new indictment.

{¶21} Furthermore, *Young* says nothing about the county prosecutor's role at community control violation hearings; it merely holds that "R.C. 2929.15 does not limit the power of the prosecuting attorney to initiate revocation proceedings either expressly or by necessary implication." *Young* at ¶ 8. The state may expressly initiate a community control revocation hearing by filing a motion to invoke revocation proceedings just as it may file a motion for leave to appear and be heard at such proceedings.

B. Due Process

{¶22} The state also argues the trial court's order excluding the county prosecutor from community control violation hearings violates the state's right to due process. However, the state does not have a right to due process. *Delaney v. Testa*, 128 Ohio St.3d 248, 2011-Ohio-550, 943 N.E.2d 546, ¶ 20; *Avon Lake City School Dist. v. Limbach*, 35 Ohio St.3d 118, 122, 518 N.E.2d 1190 (1988). Our constitutions were written to protect the people from governmental harassment and oppression; they were

not written to protect the state. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

{¶23} In *Limbach*, a county auditor challenged the dismissal of her administrative appeal, arguing the dismissal was a violation of her right to due process. The court rejected that argument, explaining:

> The office of county auditor is the creation of Ohio law, and as a result, its powers and duties extend only so far as the statutes grant authority, while being constrained by whatever limits the statutes impose. * * *
>
> [T]he constitutional protection that the auditor may claim in the exercise of her statutorily granted powers does not at all imply that she may use the due-process guarantee to augment those powers or to override the limitations imposed on her authority by statute.

Id. at 122. *See also Heinz* at ¶ 23 ("We have previously held the state is the entity that must provide due process; it has no right to due process from itself."), 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).

{¶24} Therefore, the state has no constitutional or statutory right to due process.

C. Separation of Powers

{¶25} Finally, the state argues the court's order excluding it from community control violation hearings is a violation of the separation of powers doctrine described in the U.S. Constitution.[1] The state contends that by excluding it from community control

[1] Ohio does not have a separation of powers clause defining the separation of powers. However, "this doctrine is implicitly embedded in the entire framework

revocation hearings, the court's order requires the probation department, which is an arm of the judicial branch, to "prosecute" community control violations pursuant to R.C. 2929.15. As a result, the state argues, the court is at once both prosecutor (executive branch) and court (judicial branch).

{¶26} However, R.C. 2929.15 provides that "the offender's probation officer * * * or entity that operates or administers the sanction * * * shall report the violation * * * to the sentencing court." It does not assign the probation officer the task of prosecuting reported violations. As previously explained, R.C. 2929.15 does not contemplate prosecution of an alleged violation because community control violations are not criminal offenses, and community control revocation hearings are not criminal proceedings. *See Gagnon*, 411 U.S. 778 at 782, 93 S.Ct. 1756, 36 L.Ed.2d 656; *see also Morrissey*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484.

{¶27} A probation officer acts more like a witness than a prosecutor at community control revocation hearings. The officer, himself, describes the acts in violation of community control; he does not call witnesses. R.C. 2929.15 does not expect probation officers to engage in the unauthorized practice of law. The probation officer does not represent "the state" in the same capacity as a prosecutor, but he is concerned for safety of the community.

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of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 42, quoting *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-159, 503 N.E.2d 136 (1986).

{¶28} The executive branch is not the sole protector of the public. The judicial branch shares this obligation as evidenced in our sentencing statutes, which require the court to consider the danger an offender poses to public when imposing a felony sentence. R.C. 2929.11; R.C. 2929.12; and R.C. 2929.14(C). Indeed, the court must be mindful of public safety whenever it decides to continue community control in lieu of prison. Like a judge, the probation officer "has been entrusted with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even declare revocation." *Gagnon* at 784.

{¶29} Therefore, the court's order excluding the county prosecutor from such proceedings does not violate the separation of powers doctrine.

{¶30} We recognize that requiring the state to seek leave of court in advance of a community control violation hearing will often be impractical. Without a right to notice, the state will have to continually check each courtroom's docket to see if any community control revocation hearings are scheduled. There are times when community control revocation hearings take place less than two days from the time the alleged violation was reported, making the court's order that the state must seek leave two days in advance impossible to meet. In these instances, the state may possess probative information unknown to the court that may not be presented at the hearing because of the state's absence. This is a real problem. However, the solution lies with the legislature, who has the power to confer upon the state a statutory right to notice and an opportunity to

heard at community control revocation hearings. But for now, in the absence of a state right to notice and a hearing, we are compelled to affirm the trial court's standing order.

{¶31} The sole assignment of error is overruled.

III. Conclusion

{¶32} The trial court's order prohibiting the Cuyahoga County Prosecutor's Office from participating in community control revocation proceedings without leave of court does not violate either the separation of powers doctrine nor the Due Process Clauses of the Ohio and U.S. Constitutions. The state has no constitutional or statutory right to due process, and the trial court has inherent power to enforce its own orders, including terms of community control sanctions.

{¶33} Judgment affirmed.

It is ordered that appellee recover from 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
SEAN C. GALLAGHER, J., DISSENTS WITH SEPARATE OPINION

SEAN C. GALLAGHER, J., DISSENTING:

{¶34} I respectfully dissent from the majority opinion. The majority's decision is based on the premise that relief can only be granted if a legislature requires the prosecutor's presence at a community control violation hearing. That is not the issue before this panel. The issue is whether the trial court possesses authority to arbitrarily exclude the state's legal representative from a legal proceeding in which a defendant is represented by counsel. There is no authority for the trial court's actions. All parties to any legal proceedings have the inherent right to have legal counsel appear on their behalf. The legislature is not to blame.

{¶35} Although panels from this district have concluded that the state is not entitled to be present during probation violation hearings, I cannot agree with the majority's justification for such a position in this case. Johnson was sentenced to 11 months in prison with 307 days of jail-time credit, but qualified for local incarceration pursuant to R.C. 2929.16. That section, a community control sanction, is limited to imposition of six-month terms in either jail or a community-based correctional facility. The trial court later "clarified" that the 11 months was to be served in county jail, which is unquestionably a void sentence. This highlights the problems associated with allowing a probation officer, or the trial court itself, to "represent" the state of Ohio. The prosecutor attempted to bring this aberrant sentence to the trial court's attention at the

hearing, but evidently because no leave to appear was granted, the prosecutor's statement was not considered.

{¶36} As justification for the exclusion of the state's legal representative, the majority arbitrarily relies on the distinction between civil and criminal proceedings discussed in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). The holding of that case actually supports the opposite conclusion. In *Gagnon*, the issue was whether an indigent offender had a right to counsel during a probation revocation hearing. The United States Supreme Court held that an indigent offender is not always entitled to counsel at such a hearing because

> The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. *If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel*; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views.

(Emphasis added.) *Id.* at 787-788. In that case, the court concluded that a case-by-case inquiry was needed to determine whether legal advocates were necessary, and in fact, that was the purpose of the remand. *Id.* at 791. The majority's own citations undermine the conclusion that the prosecutor has no role in a community control violation hearing, especially when counsel is appointed for the defendant. In Ohio, Crim.R. 32.3 guarantees that at any violation hearing, a defendant is entitled to retained counsel or appointed counsel when a defendant was convicted of "a serious offense." If the

defendant has legal counsel, why would any court *preclude* the prosecutor from appearing as legal counsel on behalf of the state?

{¶37} In this case, an attorney was appointed for Johnson at the community control violation hearing. As such, the state of Ohio had the inherent right to have its own legal advocate present to uphold the rights of the victim and the state. A probation officer cannot provide legal representation for the state, and the judicial branch cannot act in the state's interest. Allowing the judiciary to advocate against a defendant's legal representative undermines the impartiality of the judiciary. It should be simple. If the defendant is represented by legal counsel, the state should not be precluded from being represented by its attorney. It should not be forgotten that the prosecutor in this case is not asking for a right to be included, but rather is challenging the trial court's decision to exclude the prosecutor from a legal proceeding.

{¶38} As the dissent recognized in *State v. Heinz*, 2015-Ohio-2763, 34 N.E.3d 1003, ¶ 29 (8th Dist.) (Stewart, J., dissenting):

> 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).

Shifting the burden to the trial court to advocate on behalf of the state does not alter Judge Stewart's point. It reenforces the notion that the trial court's exclusion of the prosecutor violates the separation of powers doctrine.

{¶39} This is not to say that a prosecutor is always necessary, only that to preclude the state from the hearing when the prosecutor believes it to be in the state's interest is contrary to any notion of a balanced judicial process. If the defendant is represented by legal counsel, the state at the least should be afforded the same opportunity, unhindered by arbitrary rules requiring the prosecutor to "seek leave" to attend. Accordingly, I cannot agree with the majority's rationale and must dissent.