[Cite as *State v. Cart*, 2009-Ohio-4621.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2008-T-0120**
MICHAEL L. CART,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Newton Falls Municipal Court, Case No. 06 TRC 03537 C.

Judgment: Affirmed.

Richard F. Schwartz, Newton Falls City Prosecutor, 19 North Canal Street, Newton Falls, OH 44444 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Michael L. Cart appeals from a judgment of the Newton Falls Municipal Court denying his Motion to Vacate Probation Violation. For the following reasons, we affirm.

{¶2} **Substantive and Procedural Facts**

{¶3} On June 17, 2006, Trooper Gregory Allen stopped Mr. Cart's vehicle for displaying fictitious plates. According to Trooper Allen's Report of Investigation, after Mr. Cart's vehicle was stopped, Mr. Cart admitted that his license was suspended.

Trooper Allen smelled a strong odor of an alcoholic beverage about Mr. Cart's person and noted his speech was slow and slurred. His eyes were bloodshot and glassy. Mr. Cart could not produce identification and refused to provide any personal information. He also refused to perform any sobriety tests. While seated in the back seat of the trooper's patrol car, he urinated on himself. Trooper Allen arrested Mr. Cart and took him to the Trumbull County Jail. He was read BMV 2255 Form but refused to sign it. He also refused to take a breath test.

{¶4} During an administrative inventory of his vehicle, an open container was found near the driver's seat. A further investigation of Mr. Cart's driving record revealed this is his fifth OVI offense within the last six years. He was issued a ticket, which charged him with (1) OVI, in violation of R.C. 4511.19(A)(1); (2) driving under suspension, in violation of R.C. 4510.14(A) and R.C. 4510.16(A); (3) failure to wear a seatbelt, in violation of R.C. 4513.26; (4) obstructing justice, in violation of R.C. 2921.32; (5) open container, in violation of R.C. 4301.62(B)(1); and (6) fictitious plates in violation of R.C. 4949.08(A).

{¶5} On September 26, 2006, the trial court journalized a judgment entry reflecting Mr. Cart pled no contest to driving under suspension and the court sentenced him to 180 days in jail, with 174 days suspended; a $1,000 fine, with $750 suspended; one year of license suspension with occupational privileges; and one year of probation.

{¶6} The next entry journalized in the court's docket is a document filed by the Adult Probation Department titled "Notice of Hearing for Violation of Probation." This document was dated October 25, 2006, and bore the signature of his probation officer. It described Mr. Cart's original sentence for his infractions, including one year of

probation, and it indicated Mr. Cart "failed to report on scheduled report date." The notice required Mr. Cart to personally appear before the Newton Falls Municipal Court on November 16, 2006 at 9:00 a.m., to answer to the charge of "Violation of Probation." It also advised him he had the right to counsel and to present witnesses or documents in his defense. The notice stated: "If you fail to appear a Bench Warrant will be issued for your arrest." Handwritten on the bottom of the document was a notation added by his probation officer, which indicated Mr. Cart did not appear for his probation violation hearing on the scheduled date of November 16, 2006, and it also indicated the judge issued a bench warrant. The docket reflects that a bench warrant was issued by the trial court on that day and it was executed eighteen months later, on June 17, 2008.

{¶7} The docket next reflects a probation recommendation and order signed by the court and journalized on July 7, 2008, which re-imposed 174 days of jail time but allowed a release, after 60 days, on August 15, 2008, provided the fines and costs were paid. If the fines and costs were not paid within 60 days, however, Mr. Cart was to serve 174 days, to be released on December 19, 2008. The court also ordered him to pay a total of $1,504.50 in fines and costs, after imposing an additional $350 "for receiving a similar offense within one year of the sentencing" on the original charge, although the record did not reflect what that new offense was.[1]

{¶8} On August 12, 2008, Mr. Cart, through counsel, filed a Motion for Review of Sentencing Upon Probation Violation. It appears from the docket that the court reviewed the matter and was willing to grant an early release upon certain conditions

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1. Although the judgment stated "[r]e-impose $350 of $750 suspended fine for receiving a similar offense within one year of sentencing on above charges," it appears the $350 fine is an *additional* fine, because the entry stated the total balance of fines and costs was now $1,504.50, while the original fine was only for the amount of $1,000.

recommended by the probation department. However, Mr. Cart refused to accept the conditions, and therefore, according to a commitment document filed by the clerk of court on September 11, 2008, Mr. Cart was ordered to serve out the 174-day jail term until December 19, 2008.

{¶9} On September 18, 2008, Mr. Cart, through counsel, filed a Motion to Vacate Probation Violation. He requested the court to discharge his jail sentence and fines and costs, and release him from the jail, arguing that the warrant to arrest him was issued "without the oath or affirmation necessary to constitute a valid warrant." On September 29, 2008, the court denied the motion. Mr. Cart filed a timely appeal, assigning the following error for our review:[2]

{¶10} "The trial court erred in denying appellant's motion to vacate probation violation."

{¶11} Under the assignment, Mr. Cart raises a single argument, and we limit our review accordingly. He argues the trial court erred by denying his Motion to Vacate Probation Violation because the bench warrant was issued without an oath or affirmation necessary to constitute a valid warrant.

{¶12} **Whether Bench Warrant is Statutorily Authorized**

{¶13} In Ohio, R.C. 2935.11 provides for the issuance of a bench warrant when a person is summoned but fails to appear. That statute states:

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2. As an initial matter, we note that "[w]here a defendant, convicted of a criminal offense, has voluntarily paid the fine or completed the sentence for that offense, an appeal is moot when no evidence is offered from which an inference can be drawn that the defendant will suffer some collateral disability or loss of civil rights from such judgment or conviction." *State v. Wilson* (1975), 41 Ohio St.2d 236, syllabus. Here, from what we can tell from the record, Mr. Cart had already served his jail term but apparently had not paid the fine. Therefore, his "sentence" has not been completed and this appeal is not moot. See *State v. Bailey* (Apr. 27, 2000), 8th Dist. No. 76190, 2000 Ohio App. LEXIS 1853, *5 (although appellant has served his sentence, the fine assessed against him remains outstanding; therefore, his appeal is not moot).

{¶14} "2935.11. Failure of person summoned to appear

{¶15} "If the person summoned to appear as provided in division (B) of section 2935.10 of the Revised Code fails to appear without just cause and personal service of the summons was had upon him, he may be found guilty of contempt of court, and may be fined not to exceed twenty dollars for such contempt. *Upon failure to appear the court or magistrate may forthwith issue a warrant for his arrest*." (Emphasis added.)

{¶16} R.C. 2935.10(B), in turn, states the following:

{¶17} "(B) If the offense charged is a misdemeanor or violation of a municipal ordinance, such judge, clerk, or magistrate may:

{¶18} "(1) Issue a warrant for the arrest of such person, directed to any officer named in section 2935.03 of the Revised Code but in cases of ordinance violation only to a police officer or marshal or deputy marshal of the municipal corporation;

{¶19} "(2) *Issue summons*, to be served by a peace officer, bailiff, or court constable, commanding the person against whom the affidavit *or complaint* was filed to appear forthwith, or at a fixed time in the future, before such court or magistrate. Such summons shall be served in the same manner as in civil cases." (Emphasis added.)

{¶20} Here, the "hybrid" document dated October 25, 2006, although captioned as "Notice of Hearing for Violation of Probation," can be reasonably construed as combining both a complaint for Mr. Cart's probation violation and the summons for his appearance at the probation violation hearing. The document listed the infractions upon which Mr. Cart's probation was granted, his original jail sentence, and the one-year probation that had been imposed. It also indicated Mr. Cart "failed to report on scheduled report date" and was signed by his probation officer. Although inartfully

captioned and informally drafted, it is a complaint in spirit and effect, if not technically in form.

{¶21} The second part of the document contains the following language:

{¶22} "You must personally appear before the Newton Falls Municipal Court on 11/16/2006 at 9:00 a.m. to answer to the charge of the 'Violation of Probation.' You have the right to have counsel (an attorney) with you. You also have the right to present witnesses and to present documents on your defense. If you fail to appear a Bench Warrant will be issued for our arrest."

{¶23} After a careful review, we are satisfied that this document styled as "Notice of Hearing for Violation of Probation" served the function of both a complaint for probation violation and a summons commanding Mr. Cart to appear before the court for the charge, as required by R.C. 2935.10(B)(2).[3]

{¶24} Pursuant to R.C. 2935.11, when a person summoned to appear as provided in R.C. 2935.10(B) fails to appear, the court may "forthwith issue a warrant for his arrest." Therefore, when Mr. Cart failed to appear on November 16, 2006 at his scheduled probation violation hearing, the court was authorized to issue a bench

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3. We note that R.C. 2935.10 (B) authorizes "such judge, *clerk*, or magistrate" to issue the summons. Here, the document in question was issued by "Adult Probation Department, Newton Falls Municipal Court" bearing the signature of Mr. Cart's probation officer. The dissent sua sponte undertook a plain error analysis and considered the signing of the court-issued document by the probation officer to constitute plain error. The Supreme Court of Ohio has frequently limited application of the plain error rule. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Not only did Mr. Cart fail to allege any claim before the trial court, he did not present any error in this regard on appeal either. While a defendant who forfeits such an argument still may argue plain error on appeal, the appellate courts have refused to sua sponte undertake a plain error analysis if a defendant fails to do so. *State v. Lewis*, 179 Ohio App.3d, 649, 2008-Ohio-6256, ¶22. Here, the issue raised by the dissent does not merit plain error analysis, e*ven if* Mr. Cart had presented it. This is because the statute authorizes a "clerk" to issue the summons. The court-issued document here was signed by a probation officer, an employee and/or agent of the court, and therefore, we fail to see how the court was divested of its

warrant without any additional requirements.[4] R.C. 2935.11. See *State v. Williams* (Dec. 3, 1996), 5th Dist. No. 95 CA 93, 1996 Ohio App. LEXIS 6174, *10 ("R.C. 2935.11 permits the issuance of a bench warrant when a defendant fails to appear without cause. This statute does not require a court to include in the bench warrant an affidavit supporting probable cause for the person's arrest"). The issuance of the warrant without a sworn affidavit here does not run afoul of the Fourth Amendment of the United States Constitution ("***no Warrants shall issue, but upon probable cause, supported by Oath or affirmation"), because the probable cause for the arrest in this case arose from Mr. Cart's failure to appear before the court *itself.* As the court had first-hand knowledge of his failure to appear, no sworn affidavit by a law enforcement officer would be necessary to establish probable cause.

{¶25} For his claim that the bench warrant in this case was issued improperly because it lacked an oath or affirmation, Mr. Cart cites a single case authority, *United States v. Vargas-Amaya* (C.A.9, 2004), 389 F.3d 901. His reliance on that federal authority is misplaced.

{¶26} In that case, the defendant completed 18 months of custody term and was placed on supervised release. Several months before his supervised release expired, his probation officer petitioned the district court for a bench warrant and an order to show cause why supervised release should not be revoked. The allegations in the "Petition for Warrant or Summons for Offender Under Supervision" were not sworn to

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statutory authority, as the dissent believes. No "manifest miscarriage of justice" exists to justify a plain error analysis in this case and a sua sponte undertaking of such an analysis is even more inappropriate.

4. We also note that personal service of the summons is required before the finding of a failure of a person summoned to appear pursuant to R.C. 2935.11. While the docket is silent on whether Mr. Cart received personal service of the summons, he did not challenge the propriety of the service at the trial court and does not claim errors regarding the service on appeal, thus waiving any claims in this regard.

under oath. The district court nonetheless issued a bench warrant and the defendant was arrested two months after the expiration of his term of supervised release. He argued the district court lacked jurisdiction to revoke his term of supervised release because a valid warrant was not issued within the supervised period as required by 18 U.S.C. §3583(i). The Ninth Circuit, *interpreting that federal statute*, agreed with the defendant and held that the district court lacked jurisdiction to consider the alleged violations of supervised release because the warrant was not based on facts supported by an oath or affirmation, as required by the Fourth Amendment.

{¶27} 18 U.S.C. §3583(i) states:

{¶28} "(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation."

{¶29} The Ninth Circuit explained that in order for the court to retain jurisdiction after a term of supervised release has already expired, the statute requires (1) a warrant or summons, (2) issued before the expiration of a term of supervised release, (3) on the basis of an allegation of a violation of supervised release. *Vargas-Amaya* at 903. The last two requirements were met in the case and at issue was whether the warrant, which was based on unsworn facts, was a "warrant" within the meaning of that term in §3583(i). The court held that "a district court's jurisdiction to revoke supervised release

can be extended beyond the term of supervision under §3583(i), based upon a warrant issued during the term of supervision, only if the warrant was issued 'upon probable cause, supported by Oath or affirmation,' as required by the Fourth Amendment." Id. at 907.

{¶30} The *Vargas-Amaya* holding is inapposite here -- the applicable statute and the procedural facts are different in these two cases. In that case, the court issued a warrant based upon the probation officer's petition and allegations of released control violations, and the issue was whether the warrant was proper under the federal statute 18 U.S.C. §3583(i), a statute that allows a district court to retain jurisdiction to revoke supervised release when a defendant's term of supervised release has already expired *if* a valid warrant is issued before the expiration of the term. That case is about the court's jurisdiction for delayed revocation of supervised release and the issue was what constitutes a proper warrant for the purposes of the statute authorizing such delayed revocation.

{¶31} In the instant case, Mr. Cart was *first* issued a "Notice of Hearing for Violation of Probation," which combined an informally drafted complaint alleging his probation violation and a summons ordering him to appear before the court for a hearing on the matter; the "notice" also advised him of the statutory consequence of a failure to appear, namely, the issuance of a bench warrant for his arrest. When he failed to appear at that hearing, the trial court issued a bench warrant, as specifically authorized by R.C. 2935.11. *Vargas-Amaya* does not apply to the circumstances presented in this case.

{¶32} For the foregoing reasons, Mr. Cart's assignment of error is without merit, and the judgment of the Newton Falls Municipal Court is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶33} The summons issued for Cart was not statutorily valid. Consequently, the warrant was also invalid. Therefore, I respectfully dissent.

{¶34} R.C. 2935.10(B) authorizes "such judge, clerk, or magistrate" to issue a summons. Cart's summons was not issued by a judge, clerk, or magistrate as the statute requires. As the majority notes, "the document in question has the letterhead of 'Adult Probation Department, Newton Falls Municipal Court' and bore the signature of Mr. Cart's probation officer." Moreover, as the majority concedes, the "summons" was "inartfully captioned and informally drafted." Cart cannot be penalized for failing to respond to an invalid summons.

{¶35} The issuing of the summons by the probation officer calls into question the fairness of the proceedings, and, despite the fact that Cart failed to raise the issue, constitutes plain error. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, quoting *United States v. Atkinson* (1936), 297 U.S. 157, 160 (plain error should be noticed and corrected, "if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings'").

{¶36} Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings." *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, at ¶19.

{¶37} The majority rewrites the language in R.C. 2935.10(B) to add "an employee and/or agent of the court" to those who are statutorily authorized to issue a summons. Then, having judicially rewritten the statute, the majority indicates that since the statute allows for a clerk to issue a summons and the probation officer, like a clerk, is "an employee and/or agent of the court", the lower court was not "divested of its statutory authority." Since R.C. 2935.10(B), on its face, does not authorize the issuance of a summons by every employee or agent of the court (but rather specifically limits such authority only to judges, clerks, and magistrates), the majority's expanded interpretation of the statute is unwarranted and incorrect.

{¶38} Moreover, Black's Law Dictionary (8 Ed. 2004) 270, in relevant part, defines "clerk" as "[a] court officer responsible for filing papers, issuing process, and keeping records of court proceedings as generally specified by rule or statute." A probation officer, defined in Black's Law Dictionary as "[a] government officer who supervises the conduct of a probationer", although "an employee and/or agent of the court", clearly does not meet the definition of a "clerk". Black's Law Dictionary, at 1118. The majority's Opinion allows for any "employee and/or agent of the state" to issue a summons, and said summons would not create a manifest miscarriage of justice to justify a finding of plain error. I disagree. The issuance of a summons by any person other than a judge, clerk, or magistrate, divests the court of its statutory authority. The

fact that Cart's summons was not issued by a judge, clerk, or magistrate as R.C. 2935.10(B) mandates, seriously affects the fairness, integrity and/or public reputation of judicial proceedings and, therefore, constitutes plain error.

{¶39} The summons issued against Cart was deficient as a matter of law. R.C. 2935.11 states that "[i]f the person *summoned* to appear as provided in division (B) of section 2935.10 of the Revised Code fails to appear[,] *** [u]pon failure to appear the court or magistrate may forthwith issue a warrant for his arrest." (Emphasis added). Since Cart was never "summoned to appear as provided in division (B) of section 2935.10," he cannot be found to have violated R.C. 2935.11. It offends the basic principles of integrity and fairness underlying our criminal justice system to penalize a man for a violation he did not commit. Therefore, based on the foregoing reasons, I would reverse Cart's conviction for Probation Violation.