

ORIGINAL

NO. 12-2093

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 97719

STATE OF OHIO,

Plaintiff-Appellant

-vs-

LASHAWN AMOS

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellant

WILLIAM D. MASON
Cuyahoga County Prosecutor

T. ALLAN REGAS (0067336)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

BRIAN McGRAW
1370 Ontario Street #2000
Cleveland, Ohio 44113

RECEIVED
DEC 14 2012
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
DEC 14 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST..... 1

STATEMENT OF THE CASE AND FACTS..... 2

LAW AND ARGUMENT..... 5

 PROPOSITION OF LAW
 A TRIAL COURT MAY NOT SENTENCE A CRIMINAL DEFENDANT TO COMMUNITY CONTROL SANCTIONS WITHOUT HAVING A PRESENTENCE INVESTIGATION REPORT

CONCLUSION..... 11

SERVICE..... 12

Appendices

Journal Entry denying en banc
State v. Amos, 2012-Ohio-3954

**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST.**

R.C. 2951.03 and Crim.R. 32.1 prohibit a court sentencing an offender to community control sanctions without first obtaining a presentence investigation report. R.C. 2951.03(A)(1) specifically mandates that, “No person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court.” Crim.R. 32.1 similarly mandates that, “In felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation.” Courts throughout the State have determined that the failure of a trial court to comply with law constitutes reversible error until the instant case.

In this case, *State v. Amos*, 8th Dist. No. 97719, 2012-Ohio-3954, the appellate court determined that a trial court may sentence an offender to community control sanctions without a presentence investigation report, finding the absence of obtaining such report to be harmless error, relying on an application of this Court’s opinion in *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988), which solely discusses the issue in the context of sentencing a defendant to a term of imprisonment. The standard of review to be applied in a case where the offender is sentenced to community control sanctions by a court that violates the Crim.R. 32.1 mandate that it must first obtain a presentence investigation report is that of plain error.

Moreover, the Eighth District Court now has conflicting opinions as to the standard of review when a trial court does not follow the mandatory rule that it cannot sentence a felony offender to community control sanctions without first obtaining a presentence

investigation report; opinions which conflict not only within the Eighth District in *State v. Richmond*, 8th Dist. No. 97531, 2012-Ohio-3946 but with the First, Second, Fifth, Sixth, Ninth, Tenth, and Eleventh District Courts of Appeal. As such, to promote uniformity throughout the State as to the duty of felony sentencing courts to obtain presentence investigation reports prior to imposing community control sanctions, the State asks this court to accept and adopt its proposition of law:

A TRIAL COURT MAY NOT SENTENCE A CRIMINAL DEFENDANT TO
COMMUNITY CONTROL SANCTIONS WITHOUT HAVING A PRESENTENCE
INVESTIGATION REPORT

Because the law is clear that a sentencing court cannot impose a sentence of community control sanctions without first obtaining and considering a written presentence investigation report, the State asks that this Court accept jurisdiction of this case, adopt as law its sole proposition of law, summarily reverse the court of appeals opinion, and remand this matter to the trial court for resentencing.

I. STATEMENT OF THE CASE AND FACTS

On November 28, 2011, Appellee Lashawn Amos was charged with two counts by information, Count 1 being a violation of R.C. 2925.03 (A)(1), Drug Trafficking, and Count 2 being a violation of R.C. 2925.11 (A), Drug Possession. On December 6, 2011, Appellee entered into a plea agreement with the State of Ohio where he entered a guilty plea to Count 1, with Count 2 being dismissed. After the plea was taken, the trial court proceeded to sentence Appellee, imposing a sentence of 30 days in county jail, with a credit for 35 days served, a fine of \$150, and a suspended driver's license for 6 months. The State objected to the sentence on the record. Appellee was ordered released from custody.

The trial court proceeded directly to sentencing after accepting the plea. The State informed the court that Appellee had a prior felony record, including drug offenses that stemmed from the early 2000's. Also, the State noted that Appellee was placed on probation and received prison as part of prior sentencing and that Appellee was found to be a probation violator in the past. As to the current case, Appellee made a direct offer to sell drugs to a detective of the second district vice unit who was investigating drug activity.

In mitigation, Appellee's counsel noted that Appellee had been in jail for the last 35 days, stated that was significant punishment for \$20.00 or 0.14 grams of cocaine, and asked the court to exercise discretion in giving Appellee a time-served sentence. Appellee said he was sorry and apologized for his actions.

The trial court did not order a written presentence investigation report and imposed sentence as follows:

THE COURT: 30 days is a long time spent in jail for a \$20.00 buy. Aren't you getting tired of this

THE DEFENDANT: Yes.

THE COURT: You're sentenced to 30 days in County Jail. Credit for time served. You will pay a \$150 fine. Suspended driver's license for 6 months.

THE STATE: Can you note the State's objection. For felony 5's it's community control or prison.

THE COURT: Noted.

The State appealed the sentence as being contrary to law, arguing that the trial court was without authority to impose a sentence of time served in county jail upon a felony offense when the law required the imposition of either a prison sentence or community control sanctions. The State argued to the appellate court that the trial court could either

sentence Appellee to community control sanctions or imprisonment and that it did neither. Appellee was never placed under a community control sanction after a presentence investigation report was prepared and further, Appellee's 30 day sentence in county jail did not satisfy the minimum term of imprisonment for a felony of the fifth degree. Therefore, the trial court had no authority to enter the sentence it imposed.

In resolving the State's appeal, the appellate court found that the sentence was legal and then stated as to the lack of a written presentence investigation report:

{¶ 13} As to the requirement for a presentence investigation prior to the imposition of a community control sanction pursuant to Crim.R. 32.2, the record reflects the state did not request one. The prosecutor merely objected to the sentence in general. Crim.R. 47 requires a motion to "state with particularity the grounds upon which it is made" and to set forth the relief requested. In addition, paragraph four of the syllabus of *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988), states:

The decision to order a presentence report lies within the sound discretion of the trial court. Absent a request for a presentence report in accordance with Crim.R. 32.2, no grounds for appeal will lie based on a failure to order the report, except under the most exigent of circumstances.

{¶ 14} The foregoing language indicates that a trial court's failure to order a presentence report pursuant to Crim.R. 32.2 when no objection is lodged does not make the sentence contrary to law. Furthermore, the record of this case does not present exigent circumstances because the prosecutor seemed fully aware of both Amos's criminal record and the circumstances that led to Amos's conviction. Compare *State v. Ross*, 8th Dist. No. 92461, 2009-Ohio-4720 (state objected); *State v. Peck*, 8th Dist. No. 92374, 2009-Ohio-5845 (did not apply *Adams*); *State v. Disanza*, 8th Dist. No. 92375, 2009-Ohio-5364 (same). Indeed, the prosecutor communicated this information to the trial court. Therefore, the state lacks grounds for appeal on the basis of Crim.R. 32.2.

State v. Amos, 8th Dist. No. 97719, 2012-Ohio-3954, at ¶ 13-14.

On the same day this opinion was released, the Eight District Court of Appeals released its opinion in *State v. Richmond*, 8th Dist. No. 97531, 2012-Ohio-3946, in which it

found plain error where a trial court sentenced the offender to community control sanctions without first obtaining a presentence investigation report and remanded the case to the trial court for resentencing. The State sought en banc review of the matter, but was denied such by order on November 8, 2012 in which the court determined that, “We find that although the panel in this appeal applied a different standard of review than the panel in *State v. Richmond*, 8th Dist. No. 97531, 2012-Ohio-3946, the standard of review is not dispositive of these appeals.”

II. LAW AND ARGUMENT

PROPOSITION OF LAW

A TRIAL COURT MAY NOT SENTENCE A CRIMINAL DEFENDANT TO COMMUNITY CONTROL SANCTIONS WITHOUT HAVING A PRESENTENCE INVESTIGATION REPORT

In *State v. Amos*, 9th Dist. No. 97719, 2012-Ohio-3954, the court held that a trial court has discretion to determine whether or not to order a presentence investigation report prior to sentencing a felony offender to community control sanctions. This holding is in direct contravention with Ohio statutory law as articulated in Crim.R. 32.2 and R.C. 2951.03(A)(1). The State believes this Court will find that the rule of law and standard of review used in this case was patently errant as sentencing courts have a mandatory duty to obtain a presentence investigation report prior to placing an offender on community control for a felony offense.

Criminal sentences are reviewed under the two-prong test set out in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First, the reviewing court is required to look to whether a sentencing court complied with all applicable rules and statutes in imposing sentence and determine whether the sentence is contrary to law. *Id.* at ¶ 4. If the sentence is not contrary to law, the court is then reviews the sentence under an abuse-of-

discretion standard. *Id.* In *Amos*, the court incorrectly applied an abuse-of-discretion standard based on a misinterpretation of the law articulated in *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988). In *Adams*, this Court determined that where an offender was sentenced to prison:

Appellant erroneously asserts that a silent record raises a presumption that the trial court did not consider R.C. 2929.12. As previously stated, the defendant in the case at bar did not request a presentence investigation, nor did he object to the lack of it. The record is devoid of any indication that the trial court failed to consider R.C. 2929.12. Appellant's failure to address these issues at trial leads to a presumption that the trial court considered these factors. See *State v. Davis*, [(1983), 13 Ohio App.3d 265, 13 OBR 329, 469 N.E.2d 83].

Relative to this context, this Court stated that, “[t]he decision to order a presentence report lies within the sound discretion of the trial court. Absent a request for a presentence report in accordance with Crim.R. 32.2, no grounds for appeal will lie based on a failure to order the report, except under the most exigent of circumstances.” *Id.* at ¶ 4 of the syllabus. However, the sentencing court in *Adams* did not violate the clear duty stated by law to order a presentence investigation report. *Adams* is clearly distinguished from the facts in *Amos*, as the offender in *Adams* appealed a sentence of imprisonment.

In that context, ordering and considering a presentence investigation report was within the discretion of the trial court because the trial court had no duty to order or consider such report as the offender was sentenced to prison. In contrast, in *Amos*, the trial court failed to comply with the mandatory duty stated in Crim.R. 32, which provides:

In felony cases the court **shall**, and in misdemeanor cases the court may, **order** a presentence investigation and report **before imposing community control sanctions** or granting probation.

(Emphasis added.)

Similarly, R.C. 2951.03(A)(1) states:

No person who has been convicted of or pleaded guilty to a felony **shall** be placed under a community control sanction **until** a written presentence investigation report has been considered by the court

(Emphasis added).

The mandatory duty to order a presentence investigation prior to placing a felony offender on community controls is absolute. The Tenth District Court of Appeals, in *State v. Preston*, 155 Ohio App.3d 367, 2003-Ohio-6187, 801 N.E.2d 501, ¶ 7 (10th Dist.), held that even if both parties agreed to waive a presentence investigation report, the trial court was still required to order and review one prior to sentencing the defendant to community control sanctions. Further, aside from the application of *Adams*, all of the cases cited within *Amos* recognized the mandatory duty of trial courts to order and consider a presentence investigation report before sentencing a defendant to community control sanctions. *State v. Ross*, 8th Dist. No. 92461, 2009-Ohio-4720; *State v. Peck*, 8th Dist. No. 92374, 2009-Ohio-5845; *State v. Disanza*, 8th Dist. No. 92375, 2009-Ohio-5364. In *Amos*, the panel noted that these cases did not apply *Adams*. However, it is apparent from reading these cases that *Adams* was not applicable because none of the defendants in these cases were sentenced to imprisonment. See *State v. Price*, 8th Dist. No. 61891, 1993 WL 127068, *4 (Apr. 22, 1993) (citing *Adams* for the rule that trial court had discretion in deciding whether or not to order a presentence investigation report before sentencing the defendant to a term of imprisonment); *State v. Miller*, 8th Dist. No. 60640, 1992 WL 126021, *4 (June 4, 1992) (same); *State v. Smalcer*, 8th Dist. No. 60863, 1992 WL 125243, *5 (June 4, 1992) (same). Additionally, *Adams* can be distinguished from from *Amos* because *Adams* deals with an appeal filed by the defendant and not one filed by the State. Further, in *Peck*

and *Disanza*, as well as in *Richmond*, the Court applied a plain error analysis; such analysis ensued after there was no specific objection. Similarly, plain error analysis also ensued under the first prong of *Kalish*, even when the State did object on the record to the lack of a presentence investigative report. *State v. Ross*, 8th Dist. No. 92461, 2009-Ohio-4720.

But the Eighth District Court of Appeals has not been alone (prior to this case) in determining that a trial court cannot impose community control sanctions on a felony offense without first obtaining a presentence investigation report. The following cases demonstrate a uniform application of the duty of trial courts to obtain a presentence investigation before imposing community control throughout the State of Ohio:

DISTRICT	CASE	
1 st	<i>State v. Kane</i> , 1st Dist. No. C-110629, 2012-Ohio-4044, ¶ 18	“Here, the trial court imposed a prison term, so it was not required to order a presentence investigation prior to sentencing”).
1 st	<i>State v. Lattimore</i> , , 1st Dist. No. C-100675, 2011-Ohio-2863, ¶ 11	“Crim.R. 32.2 * * * requires a presentence investigation only as a prerequisite to granting community control sanctions or probation, ‘and not as a prerequisite to all sentencing proceedings.’ In this case, the trial court imposed a prison term, not community control. Therefore, the court was not required to order a presentence investigation report”

1st	<i>State v. Sawyer</i> , 1st Dist. No. No. C-080433, 2010-Ohio-1990, ¶ 7-8	"On its face, the statute does not require the court to order a PSI in felony cases unless community control is granted. * * * This reading is consistent with the wording of related laws, including R.C. 2929.19 and 2951.03. The first statute requires the court, before imposing sentence, to consider the PSI, 'if one was prepared'; the second forbids the imposition of a community-control sanction until a written PSI report has been considered by the court, but omits this requirement for defendants committed to institutions, who may be subject to a 'background investigation and report' if a PSI is not completed
2nd	<i>State v. Brooks</i> , 2d Dist. No. 23385, 2010-Ohio-1682, ¶ 10	"The court may not impose community control sanctions or probation for a felony offense without first ordering a presentence investigation and report").
2nd	<i>State v. Driscoll</i> , 2d Dist. No. 2008 CA 93, 2009-Ohio-6134, ¶ 65	("A trial court is not required to order a presentence report pursuant to Crim.R. 32.2(A) in a felony case when probation is not granted. <i>State v. Cyrus</i> (1992), 63 Ohio St.3d 164, 586 N.E.2d 94, syllabus").
5th	<i>State v. Ewert</i> , 5th Dist. No. CT2012-0002, 2012-Ohio-2671, ¶ 35	"[U]nless a sentencing court is imposing community control or granting probation in a felony case, there is no requirement that a court order a pre-sentence investigation
5th	<i>State v. Kvintus</i> , 5th Dist. No. 09 CA 58, 2010-Ohio-427, ¶ 51	("The Ohio Supreme Court has held that a trial court need not order a pre-sentence report in a felony case when probation or a community control sanction is not granted. <i>State v. Cyrus</i> (1992), 63 Ohio St.3d 164, 586 N.E.2d 94, syllabus; see also Crim.R. 32.2; R.C. § 2951.03(A)(1)

6 th	<i>State v. Zimmerman</i> , 6th Dist. No. S-11-007, 2012-Ohio-2813, ¶ 5	"Under Crim.R. 32.2, a trial court is only required to obtain a presentence investigation report prior to sentencing if the trial court is imposing community control or granting probation
6 th	<i>State v. Brown</i> , 6th Dist. No. L-08-1183, 2009-Ohio-513, ¶ 19	"Because the trial court did not place Brown on community control or probation, Brown had no right to a presentence investigation and report prior to sentencing"
8 th	<i>State v. Berlingeri</i> , 8th Dist. No. 95458, 2011-Ohio-2528, ¶ 9	"A trial court is without authority to order a community control sanction in felony cases without a PSI. <i>State v. Peck</i> , 8th Dist. No. 92374, 2009-Ohio-5845. However, a PSI is mandatory only if the trial court sentences a felony offender to community control sanctions instead of prison. <i>State v. Leonard</i> , 8th Dist. No. 88299, 2007-Ohio-3745, ¶ 15.
8 th	<i>State v. Lee</i> , 8th Dist. No. 92327, 2009-Ohio-5820, ¶ 5	"We agree a PSI report must be considered prior to sentencing a defendant who committed a felony to community control"
8 th	<i>State v. Peck</i> , 8th Dist. No. 92374, 2009-Ohio-5845, ¶ 3	"The terms of R.C. 2951.03(A)(1) and Crim.R. 32.2 are mandatory, so the court had no authority to order a community control sanction absent compliance with the statute and rule"

8 th	<i>State v. Disanza</i> , 8th Dist. No. 92375, 2009-Ohio-5364, ¶ 8	"Thus, while the trial court could immediately sentence appellant to a definite term of imprisonment, it was required to first order and consider a presentence investigation report before imposing community control sanctions. The trial court committed plain error when it imposed community control sanctions for a felony conviction without first considering a presentence investigation report"
9 th	<i>State v. Reglus</i> , 9th Dist. No. 25914, 2012-Ohio-1174, ¶ 19	"Under R.C. 2951.03, however, a presentence investigation report is not required before an offender is sentenced to prison
11 th	<i>State v. Montgomery</i> , 11th Dist. No. 2009-A-0057, 2010-Ohio-4555, ¶ 34	"Crim.R. 32.2 requires a PSI only as a prerequisite to granting probation, and not as a prerequisite to all sentencing proceedings."

III. CONCLUSION

The Eighth District's decision in *Amos* has resulted in aberrant application of *Adams* to a case in which the trial court did not order a sentence of imprisonment. *Adams* clearly limits its holding that the decision to order a presentence report is discretionary in the trial court only to cases in which the offender has been sentenced to prison. But Crim.R. 32.2 and R.C. 2951.03(A)(1) mandate that in all other cases where the court imposes community control sanctions, it must first order and consider a written presentence report prior to sentencing. In the face of this mandatory statutory requirement and the repeated holdings of Ohio courts that a failure to do so is plain error, the appellate court decided that a presentence report is entirely discretionary in all cases. The court in *Amos* erred by skipping ahead to the second prong of *Kalish* and applying an abuse of discretion standard

based on its erroneous belief that Appellee's sentence was lawful under *Adams*. Moreover, the appellate court refused to correct this error despite the fact that it released a decision applying the opposite standard on the same day.

The State respectfully submits that Supreme Court Review is necessary to address the conflict of law within Ohio (and within the Eighth District itself) and clarify that a presentence investigation report is mandatory in cases where the trial court imposes community control sanctions. The State therefore submits that this case is worthy of Supreme Court review and respectfully requests that this Honorable Court accept jurisdiction in this case, adopt as law its proposition, summarily reverse the court of appeals' opinion, and remand this matter to the trial court for resentencing.

Respectfully submitted,

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR

BY:



T. ALLAN REGAS (0067836)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216.443.7800

SERVICE

A copy of the foregoing Memorandum in Support has been mailed this 13th day of December, 2012, to Brian McGraw, 1370 Ontario Street #2000, Cleveland, Ohio 44113.



Assistant Prosecuting Attorney

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO.
97719

LOWER COURT NO.
CP CR-556214

COMMON PLEAS COURT

-vs-

LASHAWN AMOS

Appellee

MOTION NO. 458453

Date 11/08/12

Journal Entry

Motion by Appellant for en banc hearing is denied. See separate journal entry of this same date.

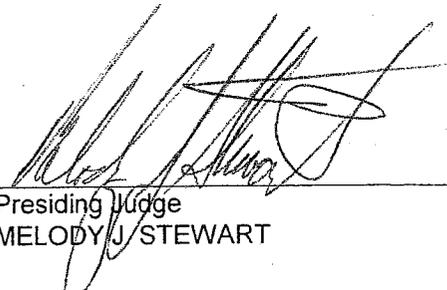
COPIES MAILED TO COUNSEL FOR
ALL PARTIES.-COSTS TAXED

RECEIVED FOR FILING

NOV 08 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

Judge FRANK D. CELEBREZZE, JR., Concur


Presiding Judge
MELODY J. STEWART

CA 97719

T. ALLAN REGAS
ASST. COUNTY PROSECUTOR
8TH FLOOR, JUSTICE CENTER
1200 ONTARIO STREET
CLEVELAND, OH 44113

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO.
97719

LOWER COURT NO.
CP CR-556214

COMMON PLEAS COURT

-vs-

LASHAWN AMOS

Appellee

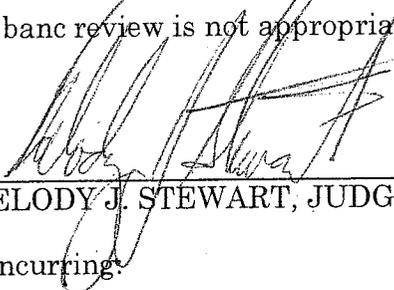
MOTION NO. 458453

Date 11/08/2012

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find that although the panel in this appeal applied a different standard of review than the panel in *State v. Richmond*, 8th Dist. No. 97531, 2012-Ohio-3946, the standard of review applied is not an issue that is dispositive of these appeals. Therefore, en banc review is not appropriate. The application for en banc consideration is denied.

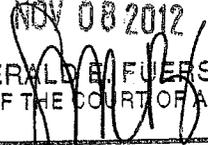


MELODY J. STEWART, JUDGE

Concurring:

PATRICIA A. BLACKMON, A.J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
KENNETH A. ROCCO, J., and
JAMES J. SWEENEY, J.

RECEIVED FOR FILING

NOV 08 2012
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

Dissenting:

MARY J. BOYLE, J.,
COLLEEN CONWAY COONEY, J., and
SEAN C. GALLAGHER, J.

COPIES MAILED TO COUNSEL FOR ALL PARTIES - COSTS TAHRD

[Cite as *State v. Amos*, 2012-Ohio-3954.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97719

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

LASHAWN AMOS

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-556214

BEFORE: Rocco, J., Sweeney, P.J., and Keough, J.

RELEASED AND JOURNALIZED: August 30, 2012

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: T. Allan Regas
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Brian R. McGraw
1370 Ontario Street
Suite 2000
Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶1} Plaintiff-appellant the state of Ohio appeals from the sentence imposed by the trial court upon defendant-appellee Lashawn Amos for Amos's fifth-degree felony drug trafficking conviction, i.e., 30 days in jail with credit for time served, a six-month driver's license suspension, and a \$150.00 fine.

{¶2} The state presents one assignment of error. The state argues that the trial court's sentence of "time served" without supervision and without first ordering a presentence report was contrary to law. In light of this court's opinion in *State v. Nash*, 8th Dist. No. 96575, 2012-Ohio-3246, rehearing en banc, and the applicable provisions of R.C. 2929.13, this court disagrees.¹ Consequently, the state's assignment of error is overruled, and Amos's sentence is affirmed.

{¶3} After his arrest on November 1, 2011, Amos was charged in this case by information with one count of drug trafficking and one count of drug possession.² The drug involved was .14 grams (one "rock") of crack cocaine; therefore, the charges were fifth-degree felony offenses. Amos entered a plea of not guilty.

{¶4} On December 6, 2011, the parties informed the trial court that a plea bargain had been arranged. As outlined by the prosecutor, in exchange for Amos's guilty plea to

¹This court is cognizant of a contrary decision in *State v. Cox*, 8th Dist. No. 97924, 2012-Ohio-3158. Because *Cox* presents facts distinguishable from those of this case, this opinion will follow the analysis presented in *Nash*.

²H.B. 86, with its new version of R.C. 2929.13, went into effect on September 30, 2011.

Count 1, the second count would be dismissed. The trial court engaged in a thorough colloquy with Amos prior to accepting his plea to Count 1 and dismissing Count 2.

{¶5} The trial court proceeded immediately to sentencing. According to the prosecutor, Amos offered to sell a \$20.00 rock of crack cocaine to an undercover vice detective, and Amos had the item in his pocket when he was arrested. The prosecutor stated that Amos had a “prior felony record” that included drug offenses, had received prison terms as sentences, and had “probation violations as part of those cases.”

{¶6} Amos’s defense counsel requested a sentence of “time-served.” Amos apologized to the court. The court then addressed Amos as follows:

THE COURT: 30 days is a long time spent in jail for a \$20.00 buy.

Aren’t you getting tired of this[?]

THE DEFENDANT: Yes.

THE COURT: You’re sentenced to 30 days in County jail. Credit for time served. You will pay a \$150 fine. Suspended driver’s license for 6 months.

{¶7} The prosecutor placed the state’s objection to the sentence on the record. The state presents the following as its sole assignment of error.

“I. The trial court erred by imposing a sentence of 30 days in jail, with credit for 35 days served, a \$150 fine, and a suspended driver’s license for 6 months for the offense of drug trafficking, a fifth-degree felony, when Ohio law requires the imposition of either 1) a prison sentence, or 2) community control sanctions.”

{¶8} The state contends, as it did in *Nash*, 8th Dist. No. 96575, 2012-Ohio-3246, that the sentence imposed on Amos was “contrary to law” pursuant to R.C. 2929.13. As authority for its position, the state cites *State v. Eppinger*, 8th Dist. No. 92441, 2009-Ohio-5233.

{¶9} In *Eppinger*, this court decided that because Eppinger was not placed under the supervision of the probation department and was not informed of the consequences of violating the sanction, his sentence of time-served in jail did not constitute a valid community control sanction and did not meet the first prong of the analysis set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. This court followed *Eppinger* in several subsequent cases.

{¶10} In considering *Eppinger* in *Nash*, however, this court revisited certain assumptions *Eppinger* made. *Nash* determined that *Eppinger* was too narrowly decided. This court held in *Nash* at ¶ 8, in reviewing a defendant’s sentence in a fifth-degree felony drug case pursuant to *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, that a sentence of “time served” in county jail can be construed as a community control sanction and thus is not, per se, “contrary to law,” because the court is not required to place every defendant sentenced to community control sanctions under supervision.³

³Pursuant to R.C. 2929.13(B)(1), if any of the subsections set forth in (a)(i-iii) are inapplicable, the trial court is *not* required to impose “a community control sanction of at least one year’s duration.” *Compare Cox* at ¶ 5.

{¶11} The version of R.C. 2929.13 in effect at the time of Amos's sentencing states

in relevant part:

(A) Except as provided in division (E), (F), or (G) of this section and *unless a specific sanction is required to be imposed* or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony *may impose any sanction* or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code.

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code as the sole sanction for the offense.

* * *

(B)(1)(a) * * * [If] an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence, the court shall sentence the offender to a community control sanction of at least one year's duration *if all of the following apply*:

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

(iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

* * *

(B)(1)(c) If a court that is sentencing an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence believes that no community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing, the court shall contact the department of rehabilitation and correction and ask the department to provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court. * * *

* * *

(B)(3)(b) Except as provided in division (E), (F), or (G) of this section, if the court does not make a finding described in division (B)(2)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that *a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code*, the court shall impose a community control sanction or combination of community control sanctions upon the offender. (Emphasis added.)

{¶12} In this case, the trial court proceeded pursuant to R.C. 2929.13(A) in determining that a financial sanction was appropriate. This distinguishes Amos's case from the situation presented in *Cox*, 8th Dist. No. 97924, 2012-Ohio-3158, ¶ 2.

{¶13} As to the requirement for a presentence investigation prior to the imposition of a community control sanction pursuant to Crim.R. 32.2, the record reflects the state did not request one. The prosecutor merely objected to the sentence in general. Crim.R. 47 requires a motion to "state with particularity the grounds upon which it is made" and to set forth the relief requested. In addition, paragraph four of the syllabus of *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988), states:

The decision to order a presentence report lies within the sound discretion of the trial court. Absent a request for a presentence report in accordance with Crim.R. 32.2, no grounds for appeal will lie based on a failure to order the report, except under the most exigent of circumstances.

{¶14} The foregoing language indicates that a trial court's failure to order a presentence report pursuant to Crim.R. 32.2 when no objection is lodged does not make the sentence contrary to law. Furthermore, the record of this case does not present exigent circumstances because the prosecutor seemed fully aware of both Amos's

criminal record and the circumstances that led to Amos's conviction. Compare *State v. Ross*, 8th Dist. No. 92461, 2009-Ohio-4720 (state objected); *State v. Peck*, 8th Dist. No. 92374, 2009-Ohio-5845 (did not apply *Adams*); *State v. Disanza*, 8th Dist. No. 92375, 2009-Ohio-5364 (same). Indeed, the prosecutor communicated this information to the trial court. Therefore, the state lacks grounds for appeal on the basis of Crim.R. 32.2.

{¶15} A sentence of a fine in combination with time-served for a fifth-degree felony, moreover, does not constitute an abuse of discretion if it finds support in the record. *Nash*, 8th Dist. No. 96575, 2012-Ohio-3246, at ¶ 15. In this case, in fashioning the appropriate sanction to impose the trial court was in the best position to weigh Amos's criminal record and the facts surrounding his conviction as outlined by the prosecutor against Amos's courtroom demeanor and the purposes and principles of sentencing. *State v. Allen*, 9th Dist. Nos. 10CA009910 and 10CA009911, 2011-Ohio-3621.

{¶16} The state's assignment of error, accordingly, is overruled.

{¶17} Sentence 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.

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR