

ORIGINAL

NO. 12-2156

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 97531

STATE OF OHIO,
Plaintiff-Appellee

-vs-

CHRISTOPHER RICHMOND,
Defendant-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

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 In the absence of a prosecutor’s objections, can a trial court ever sentence a
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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.

Appellant Christopher Richmond asks this Court to review this duty and abrogate it, seeking for this Court to accept his proposition of law, which reads, "In the absence of a prosecutor's objections, can a trial court ever sentence a defendant to community control sanctions without first considering a pre-sentence investigative report?" The State contends in this case that the Eighth District Court of Appeals properly determined that a trial court may not sentence an offender to community control sanctions in light of the duty to obtain a presentence investigative report.

In support of accepting this matter, the State notes that on August 30, 2012, the Eighth District Court of Appeals released two opinions that conflict on this point of law. In *State v. Amos*, 9th Dist. No. 97719, 2012-Ohio-3954, the court affirmed the trial court's sentence of community control sanctions including, 30 days in county jail with credit for 35 days served, a \$150.00 fine, and a suspended license for 6 months upon a fifth-degree felony of drug

trafficking, holding that the trial court did not commit plain error by failing to first obtain a presentence investigation report. Specifically the court held:

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.

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

The State filed a *Memorandum in Support of Jurisdiction* with this Court contesting that holding in *State v. Amos*, Ohio Supreme Court Case No. 2012-2093 (Jurisdictional determination pending.) The State's proposition of law in *Amos* asks this Court to hold that a trial court may not sentence a criminal defendant to community control sanctions without having a presentence investigation report.

By contrast, in this case, *State v. Richmond*, 8th Dist. No. 97531, 2012-Ohio-3946, the Court reversed and remanded the trial court's sentence of community control sanctions including, 30 days in county jail and a \$200 fine upon a fifth-degree felony of harassment by inmate, holding that the trial court committed plain error by not first obtaining a presentence investigation report. Specifically, the Court stated:

[T]he trial court deviated from the requirements mandated by law; namely, to obtain and consider a presentence investigation report prior to ordering a community control sanction. Therefore, we must again reverse the trial court and order it to comply with the sentencing obligations mandated by law.

State v. Richmond, 8th Dist. No. 97531, 2012-Ohio-3946, at ¶ 10 (Relying on *State v. Mitchell*, 141 Ohio App.3d 770, 753 N.E.2d 284 (8th Dist. 2001)), discretionary appeal not allowed, 92 Ohio St.3d 1443, 751 N.E.2d 482.

The issue of whether or not a trial court has a duty to order a presentence investigation report prior to sentencing a felony offender to community control sanctions is clear. Appellant seeks to have this Court transfer that duty to one of the parties in the case, the State, and

abrogate clear, unambiguous law existing in the Ohio Revised Code and the Rules of Criminal Practice. As such, the State asks this Court to accept this matter along with *State v. Amos*, Ohio Supreme Court Case No. 2012-2093, and stay this matter pending resolution of *Amos*.

I. STATEMENT OF THE CASE AND FACTS

On September 26, 2011, Appellant Christopher Richmond was charged with two counts by information, Count 1 being a violation of R.C. 2921.38(B), Harassment by Inmate, and Count 2 being a violation of R.C. 2917.07(A)(1), Inciting Violence. On October 25, 2011, Appellee thereafter 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 Appellant, imposing a sentence of 30 days in county jail and a fine of \$200. Appellant was ordered released from custody.

After taking the plea to a felony offense in this matter, the trial court proceeded directly to sentencing. Appellant's counsel noted that this case was Appellant's first involvement in the Common Pleas Court and that Appellant regretted his actions and was employed. Appellant declined to speak. There was no presentence investigation report prepared. The State was represented at the proceeding but did not object to the sentence imposed. The trial court imposed sentence as follows:

THE COURT: *** You don't have a prior record. You seem like a nice enough man, buy you were drinking and things got out of control. I would hope you've learned your lesson that nothing good happens in bars.

THE DEFENDANT: Yes, your Honor.

THE COURT: Just doesn't. It's not the kind of place there is anything positive going to happen. I'm going to sentence you to 30 days in county

jail, credit for 30 days served. You are to pay a \$200 fine but your costs are waived. You're all set. You're ordered released.

The sentence imposed was reversed by the Eighth District Court of Appeals. In reversing the sentence, the court determined:

{¶ 7} We have reviewed the record and begin our analysis with determining whether a sentence that is rendered without the benefit of a statutorily-mandated presentence investigation report is authorized by law.

{¶ 8} R.C. 2951.03(A)(1) states, in pertinent part, that “[n]o 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.” *See also* Crim.R. 32.2 (“[i]n felony cases the court shall * * * order a presentence investigation and report before imposing community control sanctions or granting probation”).

{¶ 9} This court has previously held that a trial court must order and then review a presentence investigation report prior to considering the imposition of community control sanctions. *State v. Mitchell*, 141 Ohio App.3d 770, 753 N.E.2d 284 (8th Dist.2001), discretionary appeal not allowed, 92 Ohio St.3d 1443, 751 N.E.2d 482; *State v. Ross*, 8th Dist. No. 92461, 2009–Ohio–4720. We have also held that, in the absence of objection, a trial court's imposition of community control sanctions before taking into account a presentence investigation report constitutes plain error. *State v. Disanza*, 8th Dist. No. 92375, 2009–Ohio–5364; *State v. Walker*, 8th Dist. No. 90692, 2008–Ohio–5123; *State v. Pickett*, 8th Dist. No. 91343, 2009–Ohio–2127.

{¶ 10} Similar to the cases cited, in this case, the trial court deviated from the requirements mandated by law; namely, to obtain and consider a presentence investigation report prior to ordering a community control sanction. Therefore, we must again reverse the trial court and order it to comply with the sentencing obligations mandated by law.

II. LAW AND ARGUMENT

Appellant's proposition of law reads:

In the absence of a prosecutor's objections, can a trial court ever sentence a defendant to community control sanctions without first considering a pre-sentence investigative report?

The answer to Appellant's proposition of law is that no, a trial court cannot abrogate a mandatory duty imposed upon it not only by statute, but by rule. This Court has recently iterated that a trial court has only the authority to, and must sentence in accordance with statutory law. *State v. Fischer*, 128 Ohio St.3d 92, 942 N.E.2d 332, 2010-Ohio-6238, at ¶ 22. Specifically, this Court stated judges must apply the law as written in the Revised Code, and that, "[T]he only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law." *Id.*, quoting, *Colgrove v. Burns*, 175 Ohio St. at 438, 25 O.O.2d 447, 195 N.E.2d 811 (1964).

Ohio Revised Code §2929.13 authorizes a trial court to impose any sanction or combination of sanctions on an offender convicted of a felony, in compliance with R.C. §2929.14 through §2929.18. For a felony of the fifth degree, the court is not required to impose a mandatory prison sentence. However, it may impose a prison sentence of six, seven, eight, nine, ten, eleven, or twelve, months. R.C. §2929.14(A)(4). In the alternative, the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to section §2929.16, §2929.17, or §2929.18 of the Revised Code. R.C. §2929.15(A)(1).

Prior to imposing any community control sanction, the sentencing court must first obtain a presentence investigation report as mandated by Crim.R. 32.2, which dictates that, "In felony cases the court shall *** order a presentence investigation and report before imposing community control sanctions or granting probation." Similarly, R.C. §2951.03 mandates that a court obtain a presentence investigative report prior to the imposition of any community control sanction. Moreover, one of the results of sentencing an offender to community control is supervision of the offender. To that end, R.C. §2929.15(A)(2)(a) provides that when sentencing an offender to community control, " *** [T]he court *shall* place the offender under the general control and supervision of a department of probation... 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." (Emphasis added.)

In this case, the trial court could either sentence Appellant to community control sanctions or imprisonment. It did neither. He was never placed under a community control sanction after a presentence investigation report was prepared. Therefore, the trial court had not authority to enter the sentence it imposed on Appellee. The trial court's sentence was clearly contrary and the appellate court properly reversed the matter and r remanded for resentencing in accordance with law.

III. CONCLUSION

Appellant asks that this Court find that mandatory duties set forth in the Revised Code and Criminal Rules may be abandoned by a trial court sentencing upon a felony offense. That

should not and cannot be the law. Further, the State has raised the counter to this issue in in *State v. Amos*, Ohio Supreme Court Case No. 2012-2093 (Jurisdictional determination pending.) The State's proposition of law in *Amos* asks this Court to hold that a trial court may not sentence a criminal defendant to community control sanctions without having a presentence investigation report. For the foregoing reasons, the State respectfully requests this Court accept both *Amos* and this case and hold this case pending a determination in *Amos*.

Respectfully submitted,

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A copy of the foregoing Memorandum in Response has been mailed this 14th day of January, 2013, to John T. Martin, 310 Lakeside Avenue, 2nd Floor, Cleveland, Ohio 44113.


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