

ORIGINAL

IN THE OHIO SUPREME COURT

State of Ohio,

:

Case No.

13-0332

Plaintiff-Appellant,

:

v.

:

On appeal from the Butler
County Court of Appeals
Twelfth Appellate District
Case No. CA2011-11-212

Donald Lee Johnson,

:

Defendant-Appellee.

:

NOTICE OF CERTIFIED CONFLICT

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Butler County Prosecutor

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FILED
FEB 25 2013
CLERK OF COURT
SUPREME COURT OF OHIO

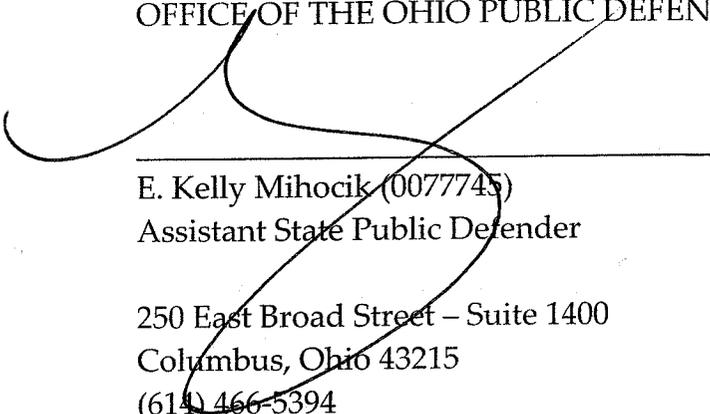
NOTICE OF CERTIFIED CONFLICT

In accordance with S.Ct. Prac. R. 4.1, Appellant Donald Johnson files notice that the Twelfth Appellate District has certified a conflict between its December 7, 2012 and January 16, 2013 orders in *State v. Johnson*, CA2011-11-212, which prohibit appellate counsel from reviewing a presentence investigation report prior to filing an appellate brief, and the Fourth District Court of Appeals' order in with *State v. Jordan*, 4th Dist. Case No. 03CA2878 (Nov. 17, 2003), which allows appellate counsel to have access to the presentence investigation report prepared in a case. The Entry Granting Motion to Certify Conflict and the conflicting court of appeals' orders are attached.

On January 25, 2013, Mr. Johnson filed a timely motion to certify a conflict in the Twelfth Appellate District in case number CA2011-11-212. On February 21, 2013, well within the sixty day period set forth in App.R. 25(C), the Twelfth Appellate District certified the following question: whether newly appointed appellate counsel should have the opportunity to review the appellant's presentence investigation report.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



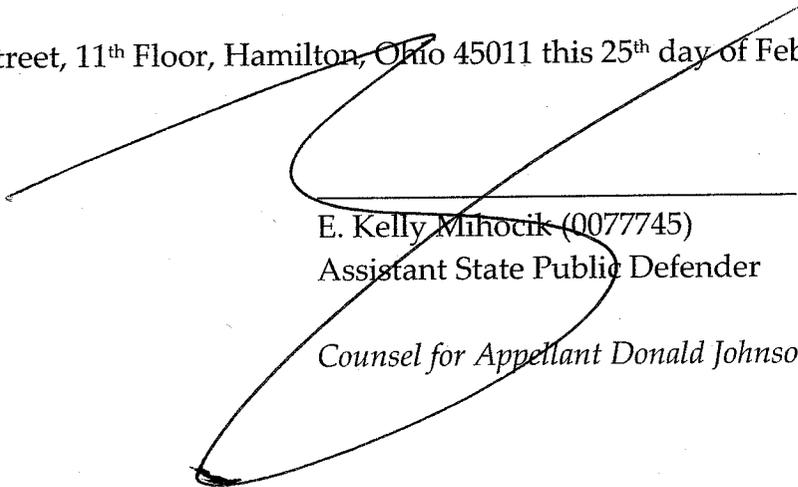
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Counsel for Appellant Donald Lee Johnson

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was sent by regular U.S. Mail, to the office of Michael A. Oster, Jr., Assisting Prosecuting Attorney, Butler County Prosecutor's Office, 315 High Street, 11th Floor, Hamilton, Ohio 45011 this 25th day of February, 2013.



E. Kelly Mihocik (0077745)
Assistant State Public Defender

Counsel for Appellant Donald Johnson

#387872

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

2013 FEB 21 PM 2:58 CASE NO. CA2011-11-212

STATE OF OHIO,

Appellee,

MARY L. SWAIN
BUTLER COUNTY CLERK OF COURTS
CERTIFY CONFLICT

vs.

FILED BUTLER CO.
COURT OF APPEALS

DONALD LEE JOHNSON,

FEB 21 2013

Appellant.

MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to a motion to certify conflict filed by counsel for appellant, Donald Lee Johnson, on January 25, 2013. No response to the motion has been filed. The motion seeks certification of this court's decision denying newly-appointed appellate counsel the opportunity to review the appellant's presentence investigation report as in conflict with a decision by the Fourth District Court of Appeals, *State v. Jordan*, 4th Dist. Case No. 03CA2878 (Nov. 17, 2003).

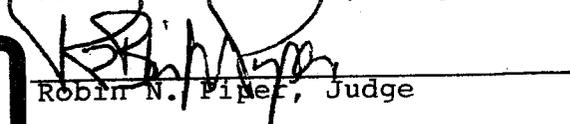
This court is authorized to certify a conflict to the Ohio Supreme Court for resolution pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, which states that when the judgment or order of a district court of appeals conflicts with a judgment pronounced upon the same question by another court of appeals, the court shall certify the matter to the Supreme Court of Ohio for review and final determination.

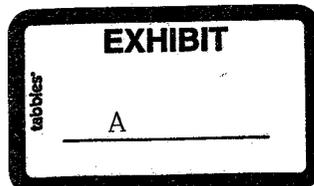
Upon consideration, the motion is GRANTED. The issue for certification is whether, pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report.

IT IS SO ORDERED.


Robert P. Ringland,
Administrative Judge


Michael E. Powell, Judge


Robin N. Piper, Judge



IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

SCIOTO COUNTY
OHIO
FILED

2003 NOV 17 AM 8:29

State of Ohio,

Appellee,

v.

Stephanie Jordan,

Appellant.

CLERK OF COURTS
Case No. 03CA2878

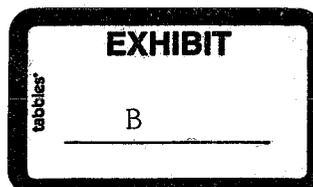
ENTRY

Appellant filed a motion to view the presentence investigation report ("PSI"), based on the right to effective assistance of appellate counsel under the Sixth Amendment to the Constitution of the United States, as accorded by *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.E.2d 821. We stayed briefing in this case until resolution of this issue.

STATUTORY BACKGROUND

R.C. 2951.03(B)(1) requires the trial court to permit the defendant or counsel to view a PSI before sentencing, except for certain, specified contents:

- (a) recommendations as to sentence;
- (b) diagnostic opinions that the court believes might seriously disrupt the defendant's rehabilitation, if disclosed;
- (c) sources of information obtained upon a promise of confidentiality;



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- (d) any other information that the court believes might result in physical harm or some other type of harm to the defendant or any other person, if disclosed.

R.C. 2951.03(B) (2) requires the trial court to permit the defendant or counsel to comment on the PSI and permits challenges to the factual accuracy of the PSI. However, under R.C. 2951.03(B) (3), if the trial court believes that any information is subject to any of the four criteria for nondisclosure, instead of releasing the PSI to the defendant or counsel, the court may provide an oral or written summary of the information it will use in sentencing. If it uses this procedure, the trial court must also permit the defendant or counsel to comment on the summary.

Under R.C. 2951.03(B) (4), if the trial court discloses any material to the defendant or counsel, the trial court must also disclose it to the prosecutor.

Under R.C. 2951.03(B) (5), if the defendant or counsel challenges the accuracy of the PSI or any summary, the trial court must either (a) make a finding as to the allegation, or (b) make a determination that no finding is necessary because the matter challenged will not be taken into account in determining sentence.

R.C. 2951.03(D)(2) requires the defendant or counsel and the prosecutor to return all copies of a PSI or summary made available to them and prohibits them from making other copies.

The statute also addresses the availability of the report after sentencing. R.C. 2951.03(D)(1) states that a PSI and summary are confidential and not public records. The section directs an appellate court to receive and use a PSI or summary only as authorized by R.C. 2953.08(F)(1). Further, R.C. 2951.03(D)(3) states that the appellate court shall retain the PSI or summary under seal, except when being used as authorized by R.C. 2953.08(F)(1).

R.C. 2953.08(F)(1) requires the trial court to make the PSI a part of the record on appeal. It also states a court of appeals that reviews a PSI in connection with an appeal shall comply with R.C. 2951.03(D)(3) - i.e., shall keep it under seal - when the court is not using it. The section further states that an appellate court's use of the PSI does not cause the PSI to become a public record after the appellate court's use of the report.

To summarize: The statutes require the trial court to provide a PSI to the defendant or counsel before sentencing. After sentencing, the parties must return any copies and not make others. The PSI is placed under seal, is not a public record, and may be used on appeal only by the appellate court,

which must preserve its confidentiality when not using it. There are other provisions for use by other authorized personnel, including personnel of the Department of Rehabilitation and Correction. However, we find no express authorization to make the PSI available to an appellant or to the prosecutor after sentencing and thus on appeal. Likewise, no special provision is made for newly appointed counsel on appeal.

ANALYSIS

Many Ohio cases hold that a convicted defendant is not entitled to view the PSI after sentencing. See, e.g., *State ex rel. Normand v. Wilkinson* (Nov. 28, 1995), Franklin App. No. APE05-563 (prisoner could not compel disclosure by writ of mandamus after sentencing); *State ex rel. Sharpless v. Gierke* (2000), 137 Ohio App.3d 821, 739 N.E.2d 1231 (writ of mandamus seeking to compel access to PSI for purposes of seeking postconviction relief); *State v. Fisher*, Butler App. No. 98-09-190, 2002-Ohio-2069, and *State v. Hicks*, Butler App. No. CA2002-07-162, 2003-Ohio-506 (appellate counsel not de facto ineffective because unable to view PSI after sentencing); and *State v. Roberson* (2001), 141 Ohio App.3d 626, 752 N.E.2d 984 [trial counsel not ineffective because unable to view parts of PSI restricted under R.C. 2951.03(B)(1)]

Roberson, supra, cited *Williams v. New York* (1949), 337 U.S. 241, 69 S.Ct. 1069, 93 L.Ed.2d 1337, which held that due process did not require disclosure of information available to the trial court for sentencing. This was true even though the court did not reveal it to the defendant or counsel prior to sentencing and thus the defendant had no opportunity to deny or explain it. 141 Ohio App.3d at 629; 337 U.S. at 250-251. The *Williams* court based this conclusion on the historically wide latitude trial courts had to consider additional information in order to promote the modern trend in crafting individualized sentences. 337 U.S. at 246-250.

The *Roberson* court also noted that *Williams* has been distinguished in capital cases by *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. The *Gardner* court found that the trial court in *Williams* "had stated the facts of the report on the record", 141 Ohio App.3d at 630; 430 U.S. at 355. *Gardner* then held that due process required full disclosure of the PSI. 430 U.S. 362

Roberson then concluded that *Gardner* was limited to capital cases, 141 Ohio App.3d at 631-632. While we agree that *Gardner* appears to be limited to capital cases, we find, independently, that due process requires a PSI to be shown to newly appointed appellate counsel.

We believe the statute's failure to allow newly appointed appellate counsel to view the PSI is a serious omission that violates an appellant's right to due process of law under the Sixth Amendment to the Constitution of the United States. In *Evitts v. Lucey*, supra, the Supreme Court stated:

* * * if a State has created appellate courts "as an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct. at 590, the procedures used must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. 469 U.S. at 393; 105 S.Ct. at 834.

This state has, of course, created a system of appellate courts, and it has granted to every litigant a first appeal as of right. R.C. 2505.03. Moreover, R.C. 2953.08(A) provides in part:

In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

* * *

(4) The sentence is contrary to law.

* * *

Given these rights to appeal and to challenge the lawfulness of the sentence, we believe that fundamental fairness and due process require newly appointed appellate

counsel have access to the PSI. However, we deem this due process right to extend only to permitting newly appointed appellate counsel to view that part of the summary that was available to trial counsel, and not to include parts of the PSI restricted under R.C. 2953.01(B)(1). *Roberson, supra*; *State v. Gonzales* (June 15, 2001), Wood App. No. WD-00-077.

Moreover, we emphasize that our decision is based on due process, as extended through the right to effective assistance of appellate counsel by *Evitts, supra*, and not on the standard announced in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, of "deficient performance and resulting prejudice".¹ Rather, the statutory prohibition preventing newly appointed counsel from viewing the unrestricted parts of the PSI or a summary violate the due process guarantee that underlies the right to effective assistance of appellate counsel on an appeal as of right, as announced in *Evitts*.² Thus, we view this right to access akin to the right to a transcript accorded by *Griffin v. Illinois* (1956), 351 U.S. 12, 78 S.Ct. 585, 100 L.Ed 891. Without the

¹ "Deficient performance means performance falling below an objective standard of reasonable representation. 'Prejudice' means a reasonably probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-688 * * *." (Additional citation omitted.) *State v. Hutton*, 100 Ohio St.3d 176, ¶ 44, ___ N.E.2d ___, 2003-Ohio-5607.

² "In this case, we must decide whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such appeal [as of right]." 469 U.S. at 388-389.

PSI, newly appointed counsel is prevented from being effective, rather than being deemed ineffective under the *Strickland* standard.

We have examined the record in this case, including the PSI. It appears that the trial court did not redact the PSI or use a summary in lieu of the PSI. We find no diagnostic opinions subject to restriction under R.C. 2951.03(B)(1)(b), no sources of information obtained on promises of confidentiality subject to restriction under R.C. 2951.03(B)(1)(c), and no information indicating danger to appellant or others subject to restriction under R.C. 2951.03(B)(1)(d). We do note, however, that the final page of the report, entitled "RECOMMENDATION", contains the sentencing recommendation of the officer who compiled the report. Access to this recommendation is restricted under R.C. 2951.03(B)(1)(a). *Roberson and Gonzales supra.*

ORDER

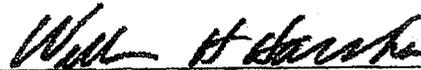
Accordingly, we instruct the clerk of the court of appeals, upon application of counsel for the appellant or the appellee, to permit counsel to inspect and copy the presentence investigation report contained in the record, except for the last page entitled "RECOMMENDATION". Counsel may retain and use the redacted copies of the report during the pendency of this appeal. Upon the journalization of our

final decision and judgment entry, counsel shall return all copies to the clerk and not make others. The clerk shall accept such copies and file them with the presentence investigation report, which is then under continued seal.

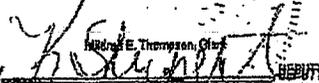
Appellant shall file her brief within twenty days after this entry is filed. Thereafter, further briefing shall be conducted under App.R. 18(A). SO ORDERED.

Evans, P.J.: Concur
Kline, J.: Dissents

FOR THE COURT



William H. Harsha, Administrative Judge

THE STATE OF OHIO. Scioto County, ss.	I, MARGARET THOMPSON, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRUE; THAT THIS IS COPIED FROM THE ORIGINAL COPIES NOW ON FILE IN MY OFFICE AND THAT I AM A CLERK OF SAID COURT	
NOV 17 2003	
MARGARET THOMPSON, Clerk	
BY 	DEPUTY

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

STATE OF OHIO, 2013 JAN 16 PM 2:11

CASE NO. CA2011-11-212

Appellee,

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

ENTRY DENYING APPLICATION
FOR RECONSIDERATION

vs.

DONALD LEE JOHNSON,

FILED BUTLER CO.
COURT OF APPEALS

JAN 16 2013

Appellant.

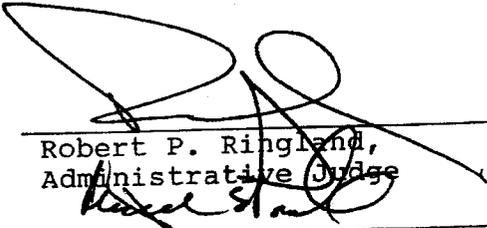
MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellant, Donald Lee Johnson, on December 17, 2012. Appellant seeks reconsideration of this court's December 7, 2012 decision denying his counsel's request to review the presentence investigation report.

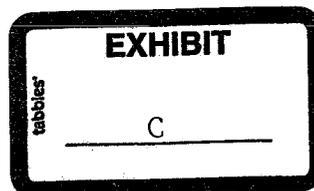
Upon consideration of the foregoing, the application for reconsideration is DENIED. The application does not call the court's attention to an obvious error in its decision, or raise an issue for consideration that was not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.*, 91 Ohio App.3d 469 (1993).

Appellant's brief shall be filed within 20 days of the date of this entry or on or before **February 4, 2013**.

IT IS SO ORDERED.


Robert P. Ringland,
Administrative Judge

Michael E. Powell, Judge



IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

STATE OF OHIO,

2012 DEC -7 PM 1:41

CASE NO. CA2011-11-212

Appellee,

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

vs.

DONALD LEE JOHNSON

FILED BUTLER CO.
COURT OF APPEALS

Appellant.

ENTRY GRANTING MOTION TO
SUPPLEMENT RECORD ON APPEAL
WITH PRESENTENCE INVESTIGATION
REPORT AND DENYING MOTION
BY APPELLANT'S COUNSEL TO VIEW
THE REPORT

DEC 07 2012

MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to a motion to view and supplement record with presentence investigation report filed by counsel for appellant, Donald Lee Johnson, on November 29, 2012, and a memorandum in opposition filed by counsel for appellee, the state of Ohio, on December 4, 2012.

R.C. 2951.03 addresses presentence investigation reports in felony cases. R.C. 2951.03(D)(1) addresses disclosure of a presentence investigation report. No provision of that section permits disclosure of a presentence investigation report to counsel after the defendant has been sentenced. Accordingly, the motion to disclose the presentence investigation report to appellate counsel is DENIED.

Pursuant to R.C. 2953.08(F)(1), the record on appeal shall include "any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed." Accordingly, the motion to supplement the record on appeal with the presentence investigation report is GRANTED.

IT IS SO ORDERED.

Bennett A. Manning
Bennett A. Manning, Magistrate

