

IN THE SUPREME COURT OF OHIO

Case No. 2012-2156

STATE OF OHIO :  
Appellee :  
-vs- :  
CHRISTOPHER RICHMOND :  
Appellant :

On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 97531

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**APPELLANT'S MERIT BRIEF**

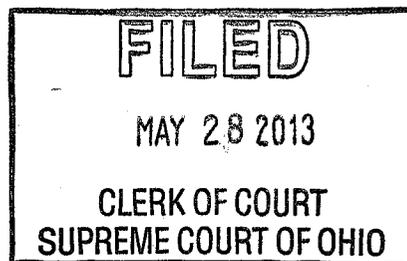
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## STATEMENT OF THE CASE AND FACTS

This is a sentencing appeal. Defendant Christopher Richmond pleaded guilty to a fifth-degree felony for harassment by an inmate, in violation of R.C. 2921.38(B). After taking the plea, and with the prosecutor present, the trial court sentenced Mr. Richmond to 30 days in jail and a \$200.00 fine. No pre-sentence investigation report (PSI) was ever prepared. The State did not object to proceeding to sentencing without a PSI. *T. passim; accord, State v. Richmond*, 8th Dist. App. No. 97531, 2012-Ohio-3946 (Opinion Below). Mr. Richmond was sentenced to 30 days in jail and a \$200.00 fine.

The State of Ohio, despite not objecting at trial to the lack of a PSI, appealed the sentence, arguing in part that a sentence of community control sanctions (*i.e.*, a sentence of jail and a fine) was impermissible in the absence of a PSI. On August 30, 2012, the Eighth District Court of Appeals reversed the sentence on this basis, holding that the trial court had plainly erred in imposing community control sanctions without a PSI.

That same day, a different panel of the Eighth District held that a similar sentence was not plainly erroneous. *See, State v. Amos*, 8th Dist. No. 97719, 2012-Ohio-3954. Recognizing that it was party to two decisions that it believed to be in conflict, the State of Ohio moved the Eighth District for rehearing en banc in both the instant case and in *Amos*. Mr. Richmond concurred in the motion in his case. The Eighth District denied the motion for rehearing en banc on November 8, 2012.

Mr. Richmond's timely appeal to this Court followed. Mr. Richmond's memorandum in support of jurisdiction urged this Court to accept the instant case as well as the State's appeal in *Amos*, which is docketed as Case No. 2012-2093 in this Court, and to order briefing on each case. The State concurred that both cases should be accepted, although the State argued that only *Amos* need be briefed.

This Court accepted both cases for plenary consideration. The briefing schedules of the two cases are similar, with the State being the appellee in the instant case and the appellant in *Amos*.

## ARGUMENT

### *Proposition of Law I:*

**When neither party request the preparation of a pre-sentencing investigation, a trial court's felony sentence of community control sanctions will not be disturbed on appeal in the absence of the most exigent circumstances.**

The issue before this Court is simple: Whether a trial court can ever sentence a defendant to community control sanctions for a felony offense without first considering a PSI? Unless this Court holds that such a sentence is illegal *per se*, Mr. Richmond should prevail in this appeal -- because the State of Ohio can point to nothing in the record to demonstrate that the sentence was inappropriate. Indeed, the Eighth District held that the sentence was otherwise permissible. Opinion Below, at ¶¶ 15-16, and the State has not cross-appealed this aspect of the Eighth District's decision.

Thus, this Court's inquiry needs to focus on whether the imposition of community control sanctions without consideration of a PSI falls into one of two categories of cases where error can be present on appeal in the absence of an objection at trial: Structural error and plain error. *See, State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306.

### **There Is No Structural Error**

The error in this case is not structural. Structural error is always a constitutional error. *Payne*, at ¶ 18. Here, there is no constitutional requirement of a PSI -- there is no constitutional provision that guarantees the prosecution the right to a PSI.

Rather, the Eighth District relies upon:

1. R.C. 2951.03(A)(1)'s requirement 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" and
2. Crim. R. 32.2's similar provision that "[i]n 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."

Accordingly, there is no structural error.

#### **There Is No Plain Error**

Nor is there plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim. R. 52(B). There are three requirements to plain error under Crim. R. 52(B):

"First, there must be an error, *i.e.*, a deviation from the legal rule. \* \* \*  
Second, the error must be plain. To be 'plain' within the meaning of Crim. R. 52(B), an error must be an 'obvious defect in the trial proceedings.' \* \* \*  
Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240. Courts are to notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio st.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus.

*Payne*, at ¶ 16 (ellipses and form of internal citations, *sic*).

Applying the test for plain error reveals that the State has not shown, and cannot show, that the absence of the PSI in this case was outcome determinative. *i.e.*, that the sentence would have been different had a PSI been prepared and considered. This failure to meet *Payne's* third

leg of the plain error standard should have caused the Eighth District to reject the State's argument on appeal. The Eighth District erred in not doing so.

Rejecting the Eighth District's plain error analysis in the instant case will also cause this Court to parallel its analysis in the converse situation -- where prison is ordered without consideration of a PSI:

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.

*State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1998), syllabus ¶ 4. While the converse situation confronted in *Adams* is distinguishable by virtue of the language of R.C. 2951.03 and Crim. R. 32.2, *Adams'* broad language nonetheless recognizes the PSI as a means to accomplishing an end goal of a fair sentence -- and not an end unto itself. The Eighth District's remand of Mr. Richmond's case for resentencing for want of a PSI that no one requested is a waste of resources, further prolongs a case that should be over, and should be rejected by this Court. *See*, R.C. 2901.04(B). ("Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.").

#### CONCLUSION

Wherefore, the decision of the Eighth District Court of Appeals should be reversed.

Respectfully submitted,

  
JOHN T. MARTIN  
Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Merit Brief was served via ordinary U.S. Mail this 28 day of May, 2013 upon Timothy J. McGinty, 1200 Ontario Street, 9<sup>th</sup> floor, Cleveland, Ohio 44112.

 per Jan 0069870  
JOHN T. MARTIN, ESQ.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

No.

**12-2156**

Appellee,

On Appeal from the  
Cuyahoga County Court of Appeals,  
Eighth Appellate  
District, Case No. 97531

v.

CHRISTOPHER RICHMOND,

Appellant.

---

NOTICE OF APPEAL OF CHRISTOPHER RICHMOND

---

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**FILED**  
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CLERK OF COURT  
SUPREME COURT OF OHIO

Notice of Appeal of Appellant CHRISTOPHER RICHMOND in Felony Case

Appellant Christopher Richmond hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 97531, released on August 30, 2012, journalized on September 4, 2012, and for which rehearing en banc was denied on November 8, 2012.

This case is a felony, raises substantial constitutional questions, and is one of public and great general interest.

Respectfully submitted,



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COUNSEL FOR APPELLANT,  
CHRISTOPHER RICHMOND

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was hand delivered upon Timothy J. McGinty, Cuyahoga County Prosecutor and/ or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 24th day of December, 2012.



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Assistant Public Defender  
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COUNSEL FOR APPELLANT

P

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 97531

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CUYAHOGA COUNTY, OHIO

STATE OF OHIO

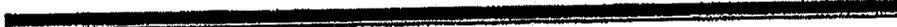
PLAINTIFF-APPELLANT

vs.

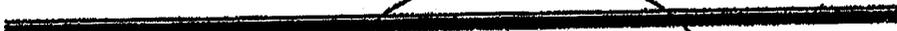
CHRISTOPHER RICHMOND

DEFENDANT-APPELLEE

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**JUDGMENT:  
REVERSED AND REMANDED  
FOR RESENTENCING**



Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-554731

BEFORE: Stewart, P.J., Boyle, J., and Recco, J.

RELEASED AND JOURNALIZED: August 30, 2012

0759 0240

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**FILED AND JOURNALIZED  
PER APP.R. 22(C)**

**AUG 30 2012**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *[Signature]* DEP.**

RECEIVED BY THE CLERK OF THE COURT OF APPEALS  
ON AUGUST 30, 2012

NO 0759 00241

MELODY J. STEWART, P.J.:

{¶1} Plaintiff-appellant, the state of Ohio, appeals from the trial court's sentence of 30 days in county jail and a \$200 fine imposed on defendant-appellee, Christopher Richmond. For the following reasons, we reverse.

{¶2} After Richmond pleaded guilty to an amended indictment of harassment by inmate, a fifth degree felony, the trial court sentenced him to the above-noted sentence with credit for time served and ordered him to be released.

{¶3} The state, in its sole assignment of error, argues that because Richmond pleaded guilty to a fifth degree felony, under Ohio law the trial court is limited to a choice between sentencing Richmond to one or more community control sanctions or a prison sentence of 6-12 months. The state contends that Richmond was not placed under a community control sanction because no presentence investigation report was prepared, and that 30 days of incarceration in the county jail does not fulfill the statutory minimum term of imprisonment. The state complains that the sentence was therefore not authorized by law and requests this court to reverse and remand for resentencing.

{¶4} Sentences are reviewed by applying a two-prong test as set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First, we must review whether the trial court complied with all applicable rules and

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statutes in imposing the sentence to conclude whether the sentence is contrary to law: *Kalish* at ¶ 4. If the sentence is in conformance with the law, we then review the trial court's decision under an abuse-of-discretion standard. *Id.*

{¶5} We note that a prosecutor was present at Richmond's sentencing hearing, but did not object when the trial court sentenced Richmond without the benefit of a presentence investigation report. Accordingly, the state has waived all but plain error.

{¶6} In the absence of objection, this court may notice plain errors or defects that affect substantial rights, pursuant to Crim.R. 52(B). Plain errors are obvious defects in proceedings due to a deviation from legal rules. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16.

{¶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").

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{¶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.

{¶11} The state also asserts that supervision is obligatory when community control sanctions are imposed. Therefore, the state argues that Richmond's sentence was not a valid community control sanction.

{¶12} When a trial court sentences a defendant to community control sanctions, R.C. 2929.15(A)(2)(a) states that the court:

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[s]hall place the offender under the general control and supervision of a department of probation in the county that serves the court for the 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.

{¶13} Community residential sanctions are a form of community control sanctions, and the time that Richmond spent in jail constitutes a permissible community residential sanction under R.C. 2929.16(A)(2). See R.C. 2929.15(A)(1) ("the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to sections R.C. 2929.16 [residential sanctions] \* \* \*.") "A residential sanction that may be imposed pursuant to R.C. 2929.16 includes a term of up to six months in a community-based correctional facility or jail." *State v. Farner*, 5th Dist. No. 2011-COA-025, 2012-Ohio-317, ¶ 12.

{¶14} Financial sanctions also fall within the domain of community control sanctions. See *State v. Bates*, 8th Dist. No. 77522, 2000 WL 1643596 (Nov. 2, 2000), at \*1; R.C. 2929.18. Financial sanctions are judgments that may be enforced under R.C. 2929.18 by using a number of statutory proceedings similar to those that a judgment creditor would employ. See *State v. Lopez*, 2d Dist. No. 2002CA81, 2003-Ohio-679, ¶ 11.

{¶15} Richmond's fine and jail sentence are therefore permissible community control sanctions. The issue remains, however, whether probation

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department supervision is required when a defendant is granted credit for time served and has an outstanding financial sanction. The state contends that Richmond's sentence is unquestionably at odds with the binding language of R.C. 2929.15(A)(2)(a), and that the trial court abused its discretion when it ignored this required community control sanction condition.

{¶16} This court recently issued the en banc decision of *State v. Nash*, 8th Dist. No. 96575, 2012-Ohio-3246, where the majority of the court held that when a defendant is placed on community control sanctions, probation department supervision is "only necessary where there is a condition that must be overseen or a term during which a defendant's conduct must be supervised." *Id.* at ¶ 8. In support of our decision, we referenced the language contained in R.C. 2929.11, noting the broad sentencing discretion of the trial court, as well as the overriding purposes of felony sentencing, "to punish the offender using the minimum sanctions \* \* \* without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). In light of our decision in *Nash*, the argument that probation supervision is required is without merit.

{¶17} This cause is reversed and remanded for proceedings consistent with this opinion.

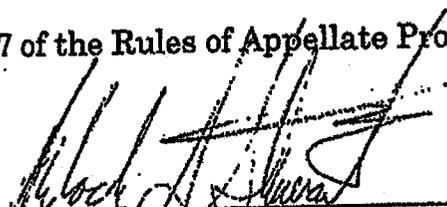
It is ordered that appellant recover of appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

NO 759 MO 246

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

  
MELODY J. STEWART, PRESIDING JUDGE

KENNETH A. ROCCO, J., CONCURS;

MARY J. BOYLE, J., CONCURS IN PART AND  
DISSENTS IN PART WITH SEPARATE OPINION

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶18} Our court recently issued the en banc decision of *State v. Nash*, 8th Dist. No. 96575, 2012-Ohio-3246, as referenced by the majority in this opinion. Because I joined the Honorable Judge Sean Gallagher and the Honorable Judge Colleen Conway Cooney in their dissents in en banc *Nash*, I likewise dissent in part as it relates to Richmond's sentence not being a valid one.

{¶19} I agree with the majority that a written presentence investigative report is statutorily mandated to be prepared and considered before a trial court can sentence one to community control sanctions. Because the trial court failed to do so, as the majority found, Richmond's sentence is vacated, as it is not

VOL 0759 #0247



Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO.  
97531

LOWER COURT NO.  
CP CR-554731

COMMON PLEAS COURT

-vs-

CHRISTOPHER RICHMOND

Appellee

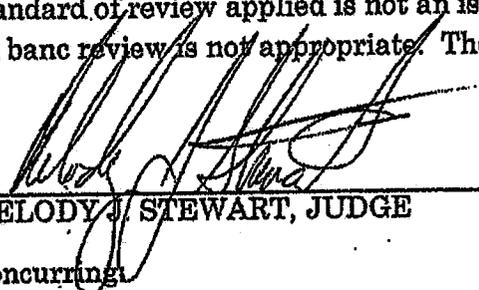
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Date 11/08/2012

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. Amos*, 8th Dist. No. 97719, 2012-Ohio-3954, 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:

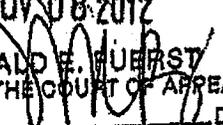
PATRICIA A. BLACKMON, A.J.,  
MARY J. BOYLE, J.,  
FRANK D. CELEBREZZE, JR., J.,  
EILEEN A. GALLAGHER, J.,  
LARRY A. JONES, J.,  
KATHLEEN ANN KEOUGH, J.,  
MARY EILEEN KILBANE, J.,  
KENNETH A. ROCCO, J., and  
JAMES J. SWEENEY, J.

Dissenting:

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

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GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
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