

ORIGINAL

NO. 12-2156

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO,

Plaintiff-Appellee

-vs-

CHRISTOPHER RICHMOND

Defendant-Appellant

MERIT BRIEF OF APPELLEE

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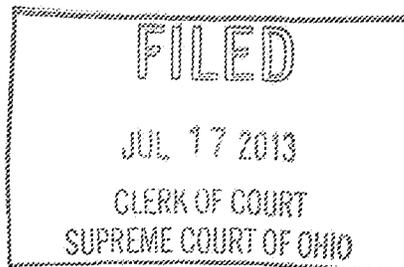


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I. STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Christopher Richmond was charged in Cuyahoga County by information with the following offenses:

Count 1, Harassment by Inmate in violation of R.C. 2921.38(B), a felony of the fifth degree, alleging that Richmond unlawfully did, with intent to harass, annoy, threaten or alarm Lt. Kracker, a law enforcement officer, cause or attempt to cause the law enforcement officer to come into contact with blood, semen, urine, feces, or another bodily substance by throwing or expelling the bodily upon the law enforcement officer, or in another manner; and,

Count 2, Inciting Violence in violation of R.C. 2917.07(A)(1), a misdemeanor of the first degree, alleging that Richmond knowingly engaged in conduct designed to urge or incite another to commit any offense of violence, when the conduct takes place under circumstances that create a clear and present danger that any offense of violence will be committed and the offense of violence that the other person is being urged or incited to commit is a misdemeanor.

These charges arose after the September 18, 2011 incident at the Maple Leaf Tavern in Mayfield Heights, Cuyahoga County, Ohio. The facts of the case that the State of Ohio was prepared to prove at trial are: that police received a report of a man with a gun inside the bar. When police arrived on scene, Defendant and another male were fighting. An employee of the bar had used pepper spray in an attempt to stop the fight. While the second male was taken outside and arrested, Defendant remained inside the bar. Defendant was escorted to a corner area where he was placed in handcuffs. Defendant fell to the ground and began weeping and calling out. When Defendant was taken outside and seated on the ground, Defendant continued to call out and taunt people around him. Defendant refused to calm down, speak in a reasonable tone, or explain his statements that he was “the victim.” When Mayfield Heights Police Lieutenant

James Kracker attempted to speak with Defendant, Defendant spat in an upward direction spraying Kracker in the face and uniform.

After pretrial conferences and discovery was provided, a negotiated plea agreement was reached by the parties. On October 25, 2011, Defendant entered a plea of guilty to Count 1 and, in exchange, Count 2 was dismissed.

The trial court proceeded to immediately sentence Defendant to 30 days in jail and a \$200 fine. Defendant was given credit for time served and was released that day. No presentence investigation report was prepared or considered by the court before imposition of the sentence.

The State sought review in the Eighth District Court of Appeals arguing that because Defendant pleaded guilty to a felony offense, Ohio law required the trial court to obtain and consider a presentence investigation report prior to imposing any community control sanctions.

Under a plain error analysis, the appellate court found:

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”).

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.

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.

State v. Richmond, 8th Dist. No. 97531, 2012-Ohio-3946, at ¶ 8-10, *appeal allowed*, 134 Ohio St. 3d 1484 (2013).

On the same day this decision was released, the Eighth District also released its opinion in *State v. Amos*, 8th Dist. No. 97719, 2012-Ohio-3954, *appeal allowed*, 134 Ohio St.3d 1484 (2013). Unlike *Richmond*, the *Amos* court did not find plain error and instead affirmed a sentence where the trial court sentenced the felony offender to community control sanctions without first obtaining a presentence investigation report. The State sought *en banc* consideration of *Richmond* and *Amos* in the appellate court, but the motions were denied. The State successfully petitioned this Court for jurisdiction in *Amos* in which this Court will review the following proposition of law:

The Defendant successfully petitioned this Court for jurisdiction in *Richmond*. Presently the State of Ohio submits its merit brief of appellee. A motion to consolidate *Amos* and *Richmond* for purposes of oral argument is separately filed by the State.

II. LAW AND ARGUMENT

DEFENDANT'S PROPOSITION OF LAW:

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.

OHIO LAW PROHIBITS TRIAL COURTS FROM IMPOSING COMMUNITY CONTROL SANCTIONS FOR FELONY OFFENSES WITHOUT CONSIDERING A PRESENTENCE INVESTIGATION REPORT.

Contrary to the concept supposed by Defendant's proposition of law, it is not incumbent upon the parties to request a presentence investigation report prior to sentencing. Ohio laws

requires trial courts to obtain and consider presentence reports before imposing community control sanctions on fifth degree felony offenses. The duty on the court is mandatory and binding. Whether or not the parties request a presentence report is irrelevant to the determination that community control sanctions are not lawfully imposed for felony violations when the trial court fails to consider a presentence investigation report.

- a. Imposing a sentence of time served without first considering a presentence investigation report renders the sentence contrary to law.

Defendant pled guilty to “harassment with bodily substance” in violation of R.C. § 2921.38(B), a felony of the fifth degree. As such, the available options for sentencing were either a prison term or community control sanctions.

Although the trial court was not required to impose a prison term, it could have imposed a prison sentence of six, seven, eight, nine, ten, eleven, or twelve months for this drug trafficking offense. R.C. § 2929.14(A)(5). If a trial court is disinclined to impose a prison term, it may impose community control sanctions as authorized under R.C. §§ 2929.16, 2929.17, and 2929.18. See, R.C. § 2929.15(A)(1). However community control sanctions are only available as a sentencing option if a presentence investigation report is first considered. *State v. Mitchell*, 141 Ohio App.3d 770, 773, 753 N.E.2d 284, (2001), discretionary appeal denied 92 Ohio St.2d 1443, 751 N.E.2d 482. In this case, despite the predicate presentence investigation report, the trial court sentenced Defendant to the community control sanctions of 30 days in the county jail with credit for time served and a \$200 fine. (Journal Entry, 10/25/2011.)

Ohio law dictates that prior to imposing any community control sanction a sentencing court must first obtain a presentence investigation report. “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.” Crim.R. 32.2, Presentence investigation.

“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.” R.C. § 2951.03(A)(1), Presentence investigation reports; confidentiality. As the Eighth District has stated previously, “Community control sanctions, in general, are inapplicable * * * due to the absence of a predicate presentence investigation report made prior to sentencing. * * * Thus, the court’s only viable option at the time of sentencing was a period of incarceration.) *State v. Mitchell*, supra, 141 Ohio App.3d at 771-772. Accordingly, a presentence investigation report was mandatory under the circumstances of Defendant’s case.

Here the trial court failed in its clear and unequivocal duty to consider a presentence report before imposing any community control sanction. Consequently, the sentence imposed against Defendant is contrary to law.

Upon review of this matter the Eighth District rightly determined that a trial court has no discretion in ordering and considering a presentence investigation report prior to sentencing a felony offender to community control sanctions. *State v. Richmond*, 8th Dist. No. 97531, 2012-Ohio-3946. The appellate court correctly found that the trial court’s error was fundamental, plain and prejudicial. *Id.* at ¶ 9-10. This holding must now be affirmed and adopted by this Supreme Court.

Trial courts must abide by statutes as written, unless the statute is ambiguous. *State v. Hairston* (2004), 101 Ohio St.3d 308, 804 N.E.2d 471. In *Hairston* this Supreme Court set forth the standard for statutory construction and interpretation. When a court examines a statute, it must give effect to the statute’s intent. *Id.* at 473-74, quoting *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, ¶ 1 of the syllabus. A trial court may only interpret a statute when the statute is ambiguous. *Id.* at 474.

But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.

Id., quoting *Slingsluff* at ¶ 2 of the syllabus. If a statute is ambiguous, the court must decide the lawmakers' intent. If the statute is not ambiguous, then no decision on intent is needed, rather the law must be applied as written. *Id.*

Here the statute and criminal rule in question plainly required the trial court to consider a presentence investigation report before sentencing Defendant, a felony offender, to community control sanctions. Since the trial court neither ordered the preparation of nor considered any presentence investigation report before sentencing Defendant to time served, the sentence imposed is contrary to law. Crim. R. 32.2 and R.C. § 2951.03(A)(1).

Every appellate district in the State of Ohio has recognized the duty of trial courts to obtain a presentence investigation report before imposing community control sanctions against felony offenders:

DISTRICT	CASE	DESCRIPTION
1	<i>State v. Kane</i> , 1 st 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	<i>State v. Lattimore</i> , 1 st 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"

1	<i>State v. Sawyer</i> , 1 st Dist. No. C-080433 2010-Ohio-1682, ¶10	“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.
2	<i>State v. Brooks</i> , 2 nd 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”).
2	<i>State v. Driscoll</i> , 2 nd 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.E2d 94, syllabus”).
3	<i>State v. Barnhart</i> , 3 rd Dist. No. 2-97-07, (Aug 13, 1997).	After reviewing the presentence investigation report, the court refused to give defendant community control sanctions as he had no remorse.
4	<i>State v. Blanton</i> , 4 th Dist. No. 11CA26, 2012-Ohio-6082, ¶¶ 14-15.	“R.C. 2951.03(A)(1) states 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.’ Likewise, Crim.R. 32.2 states that ‘[i]n felony cases the court shall * * * order a presentence

		investigation and report before imposing community control sanctions or granting probation.” *** “Because there is no record that the court considered a presentence investigation before sentencing Blanton to community control for his felony conviction, this portion of his sentence is also clearly and convincingly contrary to law.”
5	<i>State v. Ewert</i> , 5 th 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”
5	<i>State v. Kvintus</i> , 5 th Dist. No. CA 58, 2010-Ohio-427, ¶ 51	(“The Ohio Supreme 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	<i>State v. Zimmerman</i> , 6 th 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	<i>State v. Brown</i> , 6 th 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”
7	<i>State v. Williams</i> , 7 th Dist. No. 11 MA 131, 2012-Ohio-6277, ¶ 70.	“Crim.R. 32.2 instructs that in a felony case, a trial court shall order a PSI before it grants probation. But ‘a trial court is not required to order and consider a presentence investigation where probation is not granted.’ <i>State v. Hendking</i> , 8th Dist. Nos. 75179, 75180, 2000 WL 126733, *7 (Feb. 3, 2000). The trial court specifically found that Williams was not eligible for

		probation or community control sanctions and thus, it appears that the trial court was not required to consider a PSI.”
8	<i>State v. Berlingeri</i> , 8 th 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	<i>State v. Lee</i> , 8 th 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	<i>State v. Peck</i> , 8 th 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	<i>State v. Disanza</i> , 8 th 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 first to 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”
8	<i>State v. Mitchell</i> , 8 th Dist. No.	
9	<i>State v. Reglus</i> , 9 th 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”
10	<i>State v. Roberts</i> , 10 th Dist. No. 10AP-223, 2010-Ohio-4324, ¶¶ 9-10.	“Crim.R. 32.2 provides that ‘[i]n felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation

		<p>and report before imposing community control sanctions or granting probation.’ Similarly, R.C. 2951.03(A)(1) provides, in relevant 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.’ Appellant argues that the trial court did not order a presentence investigation before imposing the sentence of five years of community control, and that this failure renders his sentence void. {¶ 10} A review of the record shows that there is no merit to appellant’s contention that the trial court imposed community control without ordering or receiving a presentence investigation report. The trial court’s February 1, 2008 sentencing entry specifically states that ‘[t]he court ordered and received a pre-sentence investigation.’ Furthermore, at the January 30, 2008 sentencing hearing, the trial court stated, ‘I do have before me a short-form presentence report.’”</p>
11	<i>State v. Montgomery</i> , 11 th Dist. No. 2009-A-0057, 2010-Ohio-4555, ¶ 34	“Crim.R. 32.2 requires a PSI only as a prerequisite to all sentencing proceedings.”
12	<i>State v. Stevens</i> , 12 th Dist. No. CA98-01-001, Sept. 21, 1998 at *2.	“R.C. 2951.03(A)(1) provides: ‘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.’ Restitution, a financial sanction, is a community control sanction. No PSI was prepared. However, Crim.R. 32.2 only requires a PSI before granting probation. See, also,

		<p>R.C. 2947.06 (court on its own motion may request probation office or officer to conduct presentence investigation). Nonetheless, because a community control sanction was imposed in addition to incarceration, preparation and consideration of a PSI was required under R.C. 2951.03. Therefore, the requirement of a presentence investigation report prior to imposition of a financial sanction (R.C. 2951.03) appears to conflict with the court's authority to elect not to order a PSI report when it does not grant probation (Crim.R.32.2).”</p>
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Accordingly the State asks this Court to affirm the Eighth District’s finding that Defendant’s sentence is contrary to law. Simply put, to allow Defendant’s sentence to stand would damage the integrity of the judicial process.

Reviewing criminal sentences under *State v. Kalish*.

Criminal sentences are reviewed under the two-prong test delineated in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First, the reviewing court must look to whether a sentencing court complied with all applicable rules and statutes in imposing a sentence and determine whether the sentence is contrary to law. *Id.* at ¶ 4. (If the sentence is not contrary to law the court then reviews the sentence under an abuse-of-discretion standard. *Id.*) In this case, the Eighth District properly applied *Kalish* and recognized Defendant’s sentence as fundamentally flawed.

Defendant asserts that this Court should be guided by *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988). In *Adams* this Supreme Court reviewed a prison term that was imposed against a felony offender and found:

The decision to order a presentence report generally 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.

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].

Id. at 297-298. *Adams* is clearly distinguished from *Richmond*, as the defendant in *Adams* appealed a sentence of imprisonment. Ohio law differentiates between the discretionary nature of ordering a presentence report when a prison term is imposed, versus the mandatory nature of ordering a presentence report when a community control sanction is imposed. Unlike the situation here, the sentencing court in *Adams* did not violate a clear duty under the law when it declined to order a presentence investigation report. Thus the State requests this Court reject the Defendant's proposition and affirm the Eighth District's decision.

- b. The trial court's duty to order a presentence investigation report before placing a felony offender on community controls sanctions is absolute.

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, held that even if both parties agreed to waive a presentence investigation report, the trial court must order and review one prior to sentencing the defendant to community control sanctions. Similarly the cases cited within the *Richmond* opinion recognize the mandatory duty of trial courts to order and consider a presentence investigation report before sentencing a criminal felony defendant to community control sanctions. See *Richmond*, supra, at ¶ 9 citing *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, *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.

Rather than rely on *Mitchell*, *Ross*, *Walker* and *Pickett*, the Defendant would have this Court apply *Adams*. But, as set forth above, *Adams* is not relevant because that defendant was sentenced to prison—not community control sanctions. See also *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); *State v. Smalcer*, 8th Dist. No. 60863, 1992 WL 125243, *5 (June 4, 1992).

By its decision in *Richmond*, the Eighth District Court of Appeals has preserved the objectives and the integrity of Ohio’s felony sentencing scheme. Presentence investigation reports do not become discretionary where a trial court desires to impose a sentence of “time served” on a felony offender. Justice requires that trial courts be fully informed and consider presentence investigation reports before sentencing felony offenders to anything other than a prison term.

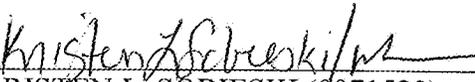
CONCLUSION

Criminal Rule 32.2 and R.C. § 2951.03(A) (1) mandate trial courts order and consider presentence investigation reports prior to imposing community control sanctions. In the face of this absolute requirement, a sentence of time-served for a felony conviction without first considering a presentence report is unlawful and plainly erroneous. The State asks this

Honorable Court to reject the Defendant's proposition of law and affirm the ruling of the Eighth District Court of Appeals in *State v. Richmond*, 8th Dist. No. 97531, 2012-Ohio-3946.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Plaintiff-Appellee the State of Ohio was sent on this 17th day of July 2013, by regular United States Mail to counsel for Defendant-Appellant Christopher Richmond:

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APPENDIX

Crim R 32.2 Presentence investigation

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.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-76, 7-1-98)

2951.03 Presentence investigation reports; confidentiality

(A)(1) 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. If a court orders the preparation of a presentence investigation report pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the officer making the report shall inquire into the circumstances of the offense and the criminal record, social history, and present condition of the defendant, all information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, and any other matters specified in Criminal Rule 32.2. Whenever the officer considers it advisable, the officer's investigation may include a physical and mental examination of the defendant. A physical examination of the defendant may include a drug test consisting of a chemical analysis of a blood or urine specimen of the defendant to determine whether the defendant ingested or was injected with a drug of abuse. If, pursuant to section 2930.13 of the Revised Code, the victim of the offense of which the defendant has been convicted wishes to make a statement regarding the impact of the offense for the officer's use in preparing the presentence investigation report, the officer shall comply with the requirements of that section.

(2) If a defendant is committed to any institution, the presentence investigation report shall be sent to the institution with the entry of commitment. If a defendant is committed to any institution and a presentence investigation report is not prepared regarding that defendant pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the director of the department of rehabilitation and correction or the director's designee may order that an offender background investigation and report be conducted and prepared regarding the defendant pursuant to section 5120.16 of the Revised Code. An offender background investigation report prepared pursuant to this section shall be considered confidential information and is not a public record under section 149.43 of the Revised Code.

(3) The department of rehabilitation and correction may use any presentence investigation report and any offender background investigation report prepared pursuant to this section for penological and rehabilitative purposes. The department may disclose any presentence investigation report and any offender background investigation report to courts, law enforcement agencies, community-based correctional facilities, halfway houses, and medical, mental health, and substance abuse treatment providers. The department shall make the disclosure in a manner calculated to maintain the report's confidentiality. Any presentence investigation report or offender background investigation report that the department discloses to a community-based correctional facility, a halfway house, or a medical, mental health, or substance abuse treatment provider shall not include a victim impact section or information identifying a witness.

(B)(1) If a presentence investigation report is prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the court, at a reasonable time before imposing sentence, shall permit the defendant or the defendant's counsel to read the report, except that the court shall not permit the defendant or the defendant's counsel to read any of the following:

(a) Any recommendation as to sentence;

(b) Any diagnostic opinions that, if disclosed, the court believes might seriously disrupt a program of rehabilitation for the defendant;

(c) Any sources of information obtained upon a promise of confidentiality;

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

(2) Prior to sentencing, the court shall permit the defendant and the defendant's counsel to comment on the presentence investigation report and, in its discretion, may permit the defendant and the defendant's counsel to introduce testimony or other information that relates to any alleged factual inaccuracy contained in the report.

(3) If the court believes that any information in the presentence investigation report should not be disclosed pursuant to division (B)(1) of this section, the court, in lieu of making the report or any part of the report available, shall state orally or in writing a summary of the factual information contained in the report that will be relied upon in determining the defendant's sentence. The court shall permit the defendant and the defendant's counsel to comment upon the oral or written summary of the report.

(4) Any material that is disclosed to the defendant or the defendant's counsel pursuant to this section shall be disclosed to the prosecutor who is handling the prosecution of the case against the defendant.

(5) If the comments of the defendant or the defendant's counsel, the testimony they introduce, or any of the other information they introduce alleges any factual inaccuracy in the presentence investigation report or the summary of the report, the court shall do either of the following with respect to each alleged factual inaccuracy:

(a) Make a finding as to the allegation;

(b) Make a determination that no finding is necessary with respect to the allegation, because the factual matter will not be taken into account in the sentencing of the defendant.

(C) A court's decision as to the content of a summary under division (B)(3) of this section or as to the withholding of information under division (B)(1)(a), (b), (c), or (d) of this section shall be considered to be within the discretion of the court. No appeal can be taken from either of those decisions, and neither of those decisions shall be the basis for a reversal of the sentence imposed.

(D)(1) The contents of a presentence investigation report prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2 and the contents of any written or oral summary of a presentence investigation report or of a part of a presentence investigation report described in division (B)(3) of this section are confidential information and are not a public record. The court, an appellate court, authorized probation officers, investigators, and court personnel, the defendant, the defendant's counsel, the prosecutor who is handling the prosecution of the case against the defendant, and authorized personnel of an institution to which the defendant is committed may inspect, receive copies of, retain copies of, and use a presentence investigation report or a written or oral summary of a presentence investigation only

for the purposes of or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code.

(2) Immediately following the imposition of sentence upon the defendant, the defendant or the defendant's counsel and the prosecutor shall return to the court all copies of a presentence investigation report and of any written summary of a presentence investigation report or part of a presentence investigation report that the court made available to the defendant or the defendant's counsel and to the prosecutor pursuant to this section. The defendant or the defendant's counsel and the prosecutor shall not make any copies of the presentence investigation report or of any written summary of a presentence investigation report or part of a presentence investigation report that the court made available to them pursuant to this section.

(3) Except when a presentence investigation report or a written or oral summary of a presentence investigation report is being used for the purposes of or as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code, the court or other authorized holder of the report or summary shall retain the report or summary under seal.

(E) In inquiring into the information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, the officer making the report shall consider all information that is relevant, including, but not limited to, the materials described in division (B) of section 2151.14, division (C)(3) of section 2152.18, division (D)(3) of section 2152.19, and division (E) of section 2152.71 of the Revised Code.

(F) As used in this section:

(1) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(2) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(3) "Public record" has the same meaning as in section 149.43 of the Revised Code.

CREDIT(S)

(2002 H 510, eff. 3-31-03; 2002 H 247, eff. 5-30-02; 2000 H 349, eff. 9-22-00; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1994 S 186, eff. 10-12-94; 1994 H 571, eff. 10-6-94; 1990 S 258, eff. 11-20-90; 1987 H 73, § 1, 5; 130 v H 686; 1953 H 1; GC 13452-1a)