ORIGINAL

NO. 12-2093

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO,

Plaintiff-Appellant

-vs-

LASHAWN AMOS,

Defendant-Appellee

MERIT BRIEF

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STATEMENT OF THE CASE AND FACTS

Defendant/appellee Lashawn Amos was charged by information in Cuyahoga Common Pleas Court on two counts. On December 6, 2011, he entered a guilty plea to drug trafficking (count 1), a fifth degree felony. The second count (Drug Possession F-5) was nolled as part of the plea agreement. The Court went through a complete Criminal Rule 11 colloquy (T. 3-8).

The Court proceeded directly to sentencing. The Court was advised that the matter involved a single, $20 dollar cocaine buy. The Court was further advised that Amos, who was in jail at the time of the plea/sentence, had spent 35 days in jail. The Court sentenced Amos to 30 days in jail, gave him credit for time served, and a $150 fine (T. 9-10). The trial court ordered Amos' immediate release, essentially terminating the case (except for the payment of the fine).

Counsel for the state objected to the sentence, claiming it was invalid, stating that "For felony 5's, it's community control or prison" (T. 9-10). Contrary to the State's Merit Brief, the State's objection to the sentence was not directly related to the court's failure to have a presentence report completed prior to the sentencing.

The state appealed the sentence and the Eighth Appellate District affirmed the sentence. *State v. Amos*, 8th Dist. No. 97719, 2012-Ohio-3954. The State sought the jurisdiction of this Court and it was granted. 134 Ohio St. 3d 1484 (2013).

LAW AND ARGUMENT

In opposition to the Appellant's Proposition of Law

A TRIAL COURT MY NOT SENTENCE A CRIMINAL DEFENDANT TO COMMUNITY CONTROL SANCTIONS WITHOUT CONSIDERING A PRESENTENCE INVERSTIGATION REPORT.

1. Summary of the State's Argument

The State is arguing that Amos' sentence was invalid because it was not preceded by a presentence investigation report. Explaining further, the State argues that the sentence imposed is a "community control" sentence and such sentence must be preceded by a presentence investigation report. The formulation of this argument differs significantly from the objection offered in the trial court (and in the Appellant's brief in the 8th District). As stated succinctly by the prosecutor in the courtroom at the time of his sentence "For felony 5's it's community control or prison" (T. 10).

The 8th District held in *Amos* that the sentence was valid, relying primarily on the recent 8th District en banc decision in *State v. Nash*, 8th Dist. No. 96575, 2012-Ohio-3246. In *Nash*, the full 8th District held 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." The 8th District was making important distinctions between the terms "community control", "probation" and "supervision" and explained that the terms have distinctively different meanings.

Further, the 8th District concluded in *Amos* that the failure to have a presentence

investigation report prior to imposing a "time served" sentence did not invalidate the sentence because the prosecutor DID NOT request a presentence report and because State v. Adams (1988) 37 Ohio St. 295 states that the failure to order the report will not invalidate the sentence because no presentence report was requested by either party.

In summary, the State argues that a trial judge, considering the facts of a simple low level felony, and having handled perhaps thousands of similar cases, having determined that the punishment already meted out is sufficient, MUST order a presentence report, which typically has the effect of further incarcerating the defendant for an additional 25-30 while the report is being prepared.

2. Exploring and Explaining *Amos, Richmond* and *Nash*

The state has referenced State v. Richmond, 8th Dist. No. 97531, 2012-Ohio-3946, decided in the same district, on the same day. In that matter, Richmond pled guilty to a fifth degree felony and was sentenced to 30 days "time served" and a $200 fine. The State argued on appeal that a fine and "time served" was not a proper sentence. The 8th District panel disagreed with the State, relying (again) on Nash, and concluding that a sentence of this type was proper and did not require probation "supervision". However, the Richmond panel did conclude that the failure to consider a presentence report when imposing a "community control" sentence constitutes plain error (and in this case, there was no objection to the sentence or any specific request for a presentence report).

In summary, Nash holds that "community control" sentences do not require probationary supervision and that a "time served" sentence (without subsequent probation supervision) is permissible. Amos relies upon Nash and further states that a

"time served" sentence is not erroneous even without a presentence investigation where no request for a presentence investigation report is made. *Richmond* appears to be in conflict with *Amos*, upholding a "time served" sentence but requiring that it be preceded by presentence investigation report.

3. Ohio Law re: Philosophy of Sentencing and Presentence Reports

2929.11 Purposes of felony sentencing.

> (A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. **The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.** To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.
>
> (B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

- Emphasis added

The recent addition to the State's overarching criminal philosophy in 2929.11 places an affirmative responsibility on trial judges to consider the financial impact of their actions. It is clear in the *Amos* matter (and similar related cases) that the trial judge's motivation is to assess the conduct (and all other related issues) in a timely fashion and, if possible, mete out a just and fair sentence without placing additional financial burdens on state, county and local governments.

If the State's position is upheld on the issue, the net result in these cases will likely be that a defendant, who has been adjudged to have served a sufficient punishment considering 2929.11 (35 days) for the offense committed, will be held in the local jail for an additional 25-30 days while a presentence report is being prepared-with the attendant costs (food, housing, payment of jail staff). It is unlikely that such a defendant will be granted a bond while the investigation occurs as the trial judge's decision appears to be motivated, in part, by an understanding of the typical defendant who comes before the court and an expectation that court supervision (both bond and post sentence supervision) is likely to be problematic. Given that 2929.11 is a statute that sets the philosophy for the overall imposition of criminal punishments, the directive to watch the purse strings is powerful and this statute should be read in conjunction with the more detailed rules/laws.

Criminal Rule 32.2 states:

> 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.

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.

While the language of this rule and statute appear to be straightforward, a closer examination suggests otherwise. Initially, counsel would argue that the 8th District properly points out that the State did not request a presentence investigation and merely objected to the sentence more generally and that the 8th District properly invoked *Adams*.

However, the language of Rule 32.2 and 2951.03 reflect a common confusion in criminal law in Ohio between terms such as "community control" and "probation" and "supervision". While both the rule and the statute use the term "community control" and the sentence imposed on *Amos* is of a type that has been deemed to fall under the category of a "community control" sentence per *Nash*, the intention of this rule and statute contemplate a sentence in which ongoing "supervision" is the result. In the statute (2951.03), the language "shall be **placed** under a community control sanction" (emphasis added) contemplates an ongoing relationship between the defendant and a court entity (the Probation Department). A defendant given "time served" is not being "placed under a community control sanction". Rather his relationship with the Court is coming to an end. "Time served" is legal per Nash, but the language in 2951.03 suggests an ongoing relationship. But, the defendant is leaving jail and going home. The case is over.

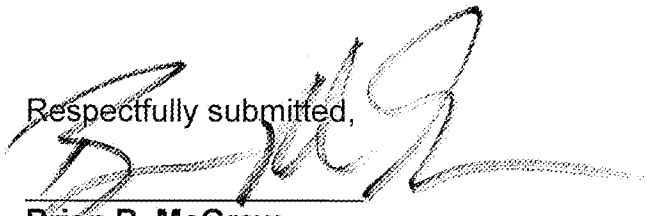
Counsel believes that it would be appropriate, under the changing circumstances of Ohio law under 2929.11 and the increased scrutiny of the cost of administering criminal justice, that a more appropriate reading of this rule and statute is to conclude that the statutory intent regarding the requirement of a presentence report involves cases where some sort of ongoing SUPERVISION is necessary. That's the intent of the language in the rule and the statute. Should a trial judge conclude, as in this case, that 35 days in jail (and a fine) is sufficient, it would be a poor use of resources and an odd requirement that the defendant remain in jail for 25-30 more days while a report is prepared that will essentially have no meaning or effect...essentially, a waste of jail and probation department resources. Therefore, the statute and rule should be read to mean that, if

the trial court wants to invoke a sentence where SUPERVISION is required, that a presentence report is necessary.

CONCLUSION

This Court should uphold the 8th Appellate District's decision and further consider giving guidance to courts and lawyers of the proper meaning and interpretation of Rule 32.2 and 2951.03.

Respectfully submitted,



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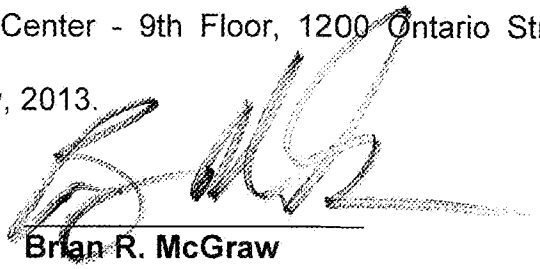
CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served upon Kristen Sobieski, assistant Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this _____ day of July, 2013.



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