

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

REPLY BRIEF OF APPELLANT, STATE OF OHIO

Counsel for Plaintiff-Appellant

TIMOTHY J. MCGINTY
Cuyahoga County Prosecutor

Kristen L. Sobieski (0071523)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

BRIAN MCGRAW
1370 Ontario Street, Suite 2000
Cleveland, Ohio 44113

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I. STATEMENT OF THE CASE AND FACTS

The state of Ohio adds the following to its statements of the case and facts: The trial court proceeded directly from the plea to sentencing. (Tr. 8.) Defense counsel requested a sentence of “time-served,” which the court imposed. (Tr. 9-10.) The state preserved its objection to the sentence by asserting “Can you note the State’s objection. For felony 5’s it’s community control or prison.” (Tr. 10.)

II. LAW AND ARGUMENT

PROPOSITION OF LAW: A TRIAL COURT MAY NOT SENTENCE A CRIMINAL DEFENDANT TO COMMUNITY CONTROL SANCTIONS WITHOUT CONSIDERING A PRESENTENCE INVESTIGATION REPORT.

The record indicates that the state disputed the sentence imposed against Defendant.

Contrary to Defendant’s suggestion, *State v. Adams*, 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988) does not determine the outcome of this appeal. Unlike the defendant in *Adams* who was sentenced to a term of imprisonment, the Defendant herein received a community control sanction. According to Ohio Crim.R. 32.2, that distinction makes all of the difference.

Twenty-five years ago in *Adams* this Court determined “The decision to order a presentence report 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.” *Id.* at ¶ 4 of the syllabus. That point of law is still good because Criminal Rule 32.2 does grant trial courts discretion in ordering presentence investigation reports when sentencing felony offenders to prison.

However when it comes to sentencing felony offenders to community control sanctions, Crim.R. 32.2 requires “the court shall * * * order a presentence investigation and report before

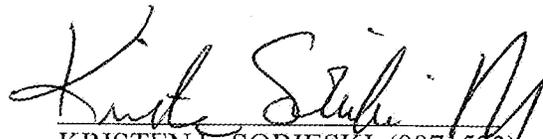
imposing community control sanctions or granting probation.” Since Defendant received a sort of community control sanction—and not a prison term—the trial court had absolutely no discretion to disregard the mandate of Crim. R. 32.2. A presentence investigation was required by law, yet none was prepared. Thus *Adams* is clearly distinguishable from the case at bar.

III. CONCLUSION

Criminal Rule 32.2 and R.C. § 2951.03(A)(1) mandate trial courts order and consider written presentence investigation reports prior to imposing community control sanctions. Where a trial court fails to comply with this statute and rule of procedure, the resulting error is reversible on appeal.

Respectfully Submitted,

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR

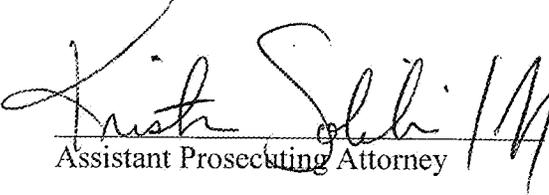


KRISTEN L. SOBIESKI (0071523)
ASSISTANT PROSECUTING ATTORNEY
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
ksobieski@prosecutor.cuyahogacounty.us

IV. 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 25th day of July 2013, by regular United States Mail to counsel for Defendant-Appellant Lashawn Amos:

Brian R. McGraw, Esq.
McGraw and McGraw Co., L.P.A.
1370 Ontario Street, Suite 2000
Cleveland, Ohio 44113


Assistant Prosecuting Attorney

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)