

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	No. 2012-2156
Appellee,	:	
v.	:	On Appeal from the
	:	Cuyahoga County Court of Appeals,
	:	Eighth Appellate
CHRISTOPHER RICHMOND,	:	District, Case No. 97531
Appellant.	:	

REPLY BRIEF OF APPELLANT CHRISTOPHER RICHMOND

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ARGUMENT

In Reply in Support of 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.

This case is more about appellate review than it is about sentencing. The real issue is not whether a trial court must consider a pre-sentence investigation report (PSI) before imposing a community control sanction – Crim. R. 32.2 and R.C. 2951.03 both answer this question affirmatively. Thus, to the extent that the State argues that the sentence was imposed in a manner “contrary to law,” and that the trial court erred in this regard, the State is correct.

But first principles of appellate review dictate that, after error is found, courts of appeals must then ask themselves, “now what do we do about this error?” And those same first principles answer this question by telling courts of appeals not to reverse unless the error falls into one of three categories:

- structural error,
- plain error,
- not-harmless error.

The State's Brief of Appellee, other than concluding that the trial court's error was “plainly erroneous,” (State's Brief of Appellee, at 13) does not set forth why the error in this case is plain error, *i.e.*, why the sentence would have been different had a PSI been prepared and considered. (See Mr. Richmond's Brief of Appellant at 3-4, discussing plain error standard and the absence of plain error in this case). Certainly, the prosecutor at sentencing provided no allocution or proffer of evidence that would have demonstrated how or why a PSI would have made a difference. (T. *passim*).

That the State has not addressed how, if at all, it was prejudiced is consistent with the radical view espoused by the State that “[t]he mandatory duty to order a presentence investigation prior to placing a felony offender on community control is absolute.” (State’s Brief of Appellee, at 12). The State goes on to suggest that, even if the parties jointly waive the PSI, a sentence of community control sanctions is precluded without one. *Id.*

The State wants this Court to examine Crim. R. 32.2’s requirement of a PSI without examining Crim. R. 52’s requirement that errors (even if fully preserved by a contemporaneous objection) will not result in a reversal unless they affect a substantial right.¹ And the State cannot show how its rights (which are statutory and not constitutional) have been violated by the failure in this case to consider a PSI. In this case, the State cannot jump over the lowest hurdle to reversal – a demonstration that the error was not harmless.

The State’s argument that a violation of Crim. R. 32.2 (even if invited jointly by the parties) requires reversal is contrary to this Court’s treatment of other sentencing procedural errors. This Court has recognized that the failure of a trial court to invite a defendant to allocute at sentencing, as guaranteed by Crim. R. 32(A)(1),² does not automatically require reversal of the

¹ Crim. R. 52 provides:

(A) Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

² Crim. R. 32 provides:

(A) Imposition of sentence. Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

sentence imposed. *State v. Campbell*, 90 Ohio St.3d 320, 326, 738 N.E.2d 1178 (2000) (will not reverse for failure to invite allocution if the error was invited or harmless); *State v. Reynolds*, 80 Ohio St.3d 670, 687 N.E. 2d 1358 (1998) (failure to allocute did not require reversal of death sentence where defendant had made statements in mitigation prior to sentencing). *See also, State v. Thompson*, 1st Dist. C-120516, 2013-Ohio-1981, 2013 WL 2150662.

If the State is correct about the mandatory nature of a PSI, then it follows that every procedural flaw at sentencing that leads up to the imposition of the sentence will require reversal. If the trial court fails to afford defense counsel the opportunity to allocute and invite the defendant to allocute, as required by Crim. R. 32(A)(1), the sentence will be reversed. If the trial court fails to afford the prosecutor the opportunity to allocute, as required by Crim. R. 32(A)(2), the sentence will be reversed. If the trial court fails to hear from the victim, as required by Crim. R. 32(A)(3) the sentence will be reversed as a matter of law. Is this Court prepared to convert mechanisms intended to ensure that judges make good sentencing decisions into traps that will lead to an appellate reversal and remand for the same sentence to be re-imposed? This Court has already answered this question negatively in *Campbell* and *Reynolds*. This Court should decline the State's invitation to reach a different answer in this case.

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

CONCLUSION

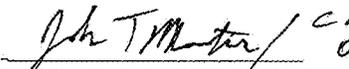
Wherefore, the decision of the Eighth District Court of Appeals should be reversed and the trial court's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant Christopher Richmond was served upon Timothy J. McGinty, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 6th day of August, 2013.

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