[Cite as *State v. Bradley*, 2007-Ohio-6583.]

[Please see 2008-Ohio-720.]

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 06CA31
vs.	:	T.C. CASE NOS.06CR234 06CR06
KEVIN L. BRADLEY	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 7th day of December, 2007.

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GRADY, J.:

{¶ 1} Defendant, Kevin Bradley, appeals from his conviction and sentence for vandalism, aggravated possession of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, and solicitation of attempted perjury.

{¶ 2} As a result of a police chase of Defendant's vehicle

by Mechanicsburg police, Defendant was indicted in Champaign County Case No. 04CR06 on one count of failure to comply with an order or signal of a police officer, one count of felonious assault, one count of assault on a peace officer, and one count of vandalism. Drugs were found by police inside Defendant's vehicle. Subsequently, Defendant was indicted under the same case number, 04CR06, on twelve additional charges, all of which involve various drug offenses.

{¶ 3} Defendant's jury trial commenced on Monday, May 17, 2004. During the trial the State learned that just a few days before his trial began, on Friday, May 14, 2004, Defendant had placed three phone calls from the Logan County jail to his sister, Mindy, and his son, Drew. Those phone calls were recorded by the jail and the tapes of those phone calls were played for the jury over Defendant's objection. In those phone calls Defendant made numerous threats and blamed his son for causing him to go to jail. Defendant demanded that his son testify falsely to provide a defense for Defendant.

{¶ 4} At the conclusion of the trial the jury acquitted Defendant of one of the drug offenses, count thirteen, but found him guilty on the other fifteen charges. The trial court imposed a combination of concurrent and consecutive prison terms totaling twenty-seven and one-half years. On

direct appeal we reversed Defendant's convictions and sentences because he appeared before the jury during trial wearing jail clothing without a knowing, intelligent and voluntary waiver of his right not to be tried in jail clothing. *State v. Bradley* (Dec. 9, 2005), Champaign App. No. 2004-CA-15, 2005-Ohio-6533. The State unsuccessfully sought to appeal our decision to the Ohio Supreme Court.

{¶ 5} After the Ohio Supreme Court denied the State's appeal, the State indicted Defendant in Case No. 06-CR-234 on additional charges including three counts of solicitation of perjury and three counts of intimidation of a witness in a criminal proceeding, arising out of the telephone calls Defendant made on May 14, 2004, to his sister and son from the Logan County jail. These new charges subjected Defendant to potentially over sixteen years additional prison time. Defendant waived his right to counsel and elected to represent himself. Defendant subsequently negotiated a plea with the State. Pursuant to that plea agreement, Defendant pled guilty in Case No. 04-CR-06 to vandalism, aggravated possession of drugs, and illegal assembly or possession of chemicals for the manufacture of drugs, and in Case No. 06-CR-234, Defendant pled guilty to solicitation of attempted perjury. In exchange, the State dismissed the other pending charges.

Under this plea agreement the maximum possible sentence Defendant faced was eight and one-half years, less than one third of the sentence originally imposed by the trial court in Case No. 04-CR-06. Except for the sentence imposed in Case No. 06-CR-234 for solicitation of attempted perjury, the trial court imposed the maximum sentence on each of the offenses in Case No. 04-CR-06. With respect to the vandalism and the illegal assembly or possession of chemicals for the manufacture of drugs, the court's maximum sentence constituted harsher sentences than originally imposed by the trial court for those same crimes. The trial court ordered all sentences to be served consecutively, for a total aggregate sentence of eight years.

{¶ 6} Defendant has timely appealed to this court from his convictions and sentences.

FIRST ASSIGNMENT OF ERROR

{¶ 7} "APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE POST-APPEAL VINDICTIVE PROSECUTION OF THE CRIMINAL CHARGES IN CASE NUMBER 2006CR234."

{¶ 8} Defendant argues that the perjury and witness intimidation charges brought against him in Case No. 06CR234 after he successfully appealed his convictions in Case No. 04CR06 violated his rights to due process and a fair trial,

because those later charges were the result of prosecutorial vindictiveness. Defendant claims that the procedural history and sequence of events in this case suggest a reasonable likelihood of vindictiveness that requires a presumption of vindictiveness to be applied in this case. *Thigpen v. Roberts* (1984), 468 U.S. 27, 30, 104 S.Ct. 2916, 82 L.Ed.2d 23; *Blackledge v. Perry* (1974), 417 U.S. 21, 27-28, 94 S.Ct. 2098, 40 L.Ed.2d 628. Defendant further claims that the State has failed to rebut that presumption of vindictiveness.

{¶ 9} A rebuttable presumption of vindictiveness may arise when a trial court imposes a harsher sentence upon reconviction after a defendant has successfully appealed his conviction, *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, or when the State brings additional or more serious charges that subject Defendant to an increased punishment following his successful appeal of his conviction. *Blackledge v. Perry, supra; Thigpen v. Roberts, supra*. With respect to post appeal increases by the prosecutor in the number or severity of the charges, the presumption arises when the sequence of events in the case poses a danger that the State might be retaliating against the accused for lawfully attacking his conviction and suggests a realistic likelihood of vindictiveness. *Blackledge; Thigpen*.

{¶ 10} After the State indicted Defendant on the additional charges in Case No. 06CR234, Defendant filed a motion to dismiss the charges based upon a claimed speedy trial violation. Defendant also contended in his motion to dismiss that the charges brought against him in Case No. 06CR234 were presumptively vindictive. Throughout the subsequent proceedings and discussions held in the trial court on Defendant's motion to dismiss, Defendant included as grounds for his motion to dismiss his argument that the additional charges in Case No. 06CR234 represent vindictive retaliation by the prosecutor for Defendant's successful appeal of his convictions. The State extensively discussed that specific issue in responding to Defendant's claims that the charges should be dismissed. The trial court did not resolve that specific issue, however, even though it overruled Defendant's motion to dismiss the charges.

{¶ 11} The State argues that Defendant waived for appellate review purposes his claim of vindictive prosecution because Defendant sought dismissal of the charges prior to trial based upon a claimed speedy trial violation, not vindictive prosecution grounds. Crim.R. 12(C)(1),(H). Throughout the proceedings and discussions held in the trial court relating to Defendant's motion to dismiss, particularly on August 24,

2006, Defendant's arguments setting forth the legal and factual basis for his motion to dismiss included a claim that the additional charges brought against him in Case No. 06CR234, after he had successfully appealed his convictions, constituted vindictive retaliation/prosecution by the State. The State extensively addressed that issue in its response to Defendant's claim. Therefore, that issue was raised with sufficient particularity to put the State and the trial court on notice that vindictive prosecution was an issue to be decided, which satisfies Crim.R. 47. *State v. Shindler,* 70 Ohio St.3d 54, 1994-Ohio-452. Defendant has preserved for appellate review the issue of vindictive prosecution/retaliation by the State.

{¶ 12} Assuming for the sake of argument that the procedural history and sequence of events in this case, which we previously set out, suggests a realistic likelihood of vindictiveness with respect to the perjury and witness intimidation charges in Case No. 06CR234 that is sufficient to raise a rebuttable presumption of vindictiveness, the State has presented evidence sufficient to rebut that presumption. In that regard we note that the State first learned about the conduct that forms the basis for the additional charges in Case No. 06CR234 either on Sunday, May 16, 2004, one day prior

to the commencement of Defendant's trial, or on Tuesday, May 18, 2004, during the second day of Defendant's trial. In either case, the State did not realistically have time to indict Defendant on the additional charges and prosecute him for those offenses during the initial trial that began on May 17, 2004. Contrary to Defendant's assertion, the State did not possess the facts and evidence necessary to prosecute the additional charges during Defendant's initial trial.

{¶ 13} As the most important of several reasons offered by the State for why it brought the additional charges in Case No. 06CR234 only after Defendant appealed his original convictions and won a retrial, the State expressed concern over the welfare of one of its witnesses, Defendant's son Drew Bradley, and the negative impact that would result from forcing Defendant's son to testify against his father a second time, in view of the fact that Drew was very emotional on the witness stand and reluctant to testify against his father's interest during the original trial. However, the State pointed out that after Defendant appealed and won a reversal of his convictions, necessitating a retrial, it was inevitable that Defendant's son would have to testify again. At that point the restraint primarily responsible for the State's decision not to prosecute the perjury and witness intimidation

offenses no longer existed.

{¶ 14} **We conclude that the explanation the State offered on the record for why it brought the perjury and witness intimidation charges in Case No. 06CR234 only after Defendant appealed his convictions and won a reversal and remand for a new trial is reasonably sufficient to rebut any presumption of vindictiveness that might otherwise arise from the sequence of events in this case. Defendant has not demonstrated vindictive prosecution/retaliation by the State.**

{¶ 15} **Defendant's first assignment of error is overruled.**

SECOND ASSIGNMENT OF ERROR

{¶ 16} **"APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN FOLLOWING THE SUCCESSFUL APPEAL OF THE ORIGINAL CONVICTIONS, THE SAME SENTENCING JUDGE IMPOSED INCREASED SENTENCES FOR APPELLANT'S CRIMES OF CONVICTION AND BASED SUCH INCREASES ON VINDICTIVE AND BIASED REASONS."**

{¶ 17} **Defendant argues that his due process rights were violated when following his successful appeal of his convictions the same judge resentenced him to harsher sentences on some of Defendant's offenses, which raises a presumption of vindictive retaliation under *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656.**

{¶ 18} **In *State v. Davis* (March 9, 2007), Clark App. No.**

2006CA69, 2007-Ohio-1030, this court stated:

{¶ 19} "{¶ 25} 'The Supreme Court has held that a trial court violates the Due Process Clause of the Fourteenth Amendment when it re-sentences a defendant to a harsher sentence, motivated by vindictive retaliation. *North Carolina v. Pearce* (1969), 395 U.S. 711, 724, 89 S.Ct. 2072, 2080. 711, 724,

{¶ 20} 89 S.Ct. 2072, 2080. Further, a presumption of vindictiveness arises when the same judge re-sentences a defendant to a harsher sentence following a successful appeal. *Id.* at 726, 89 S.Ct. at 2081. In order to overcome the presumption, the trial court must make affirmative findings on the record regarding conduct or events that occurred or were discovered after the original sentencing. *Id.; Wasman v. United States* (1984), 468 U.S. 559, 104 S.Ct. 3217. This means that a trial court may impose an enhanced sentence, but it must demonstrate that it was not motivated by vindictiveness toward the defendant for exercising his rights. *Pearce,* 395 U.S. at 723, 89 S.Ct. at 2079.'

{¶ 21} "{¶ 26} Pearce requires that the trial court make findings based upon objective information concerning identifiable conduct on the part of the defendant. 395 U.S. at 726, 89 S.Ct. 2072. 'Relevant conduct or events' sufficient to

overcome the presumption of vindictiveness are those that throw 'new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities."' *Wasman v. United States,* 468 U.S. at 570-71, 104 S.Ct. 3217 (quoting *Williams v. New York* (1949), 337 U.S. 241, 245, 69 S.Ct. 1079). Thus, a court imposing an enhanced sentence on remand must 'detail the reasons for an increased sentence or charge' so that appellate courts may 'ensure that a non-vindictive rationale supports the increase.' *Id.* at 572, 104 S.Ct. 3217."

{¶ 22} Following the entry of Defendant's guilty pleas, the same judge that had originally sentenced Defendant resentenced him to harsher sentences than were originally imposed on two offenses in Case No. 04CR06, i.e. the vandalism charge (count four) which was increased from six to twelve months, and the illegal assembly or possession of chemicals for the manufacture of drugs charge (count fifteen) which was increased from four to five years. In order to rebut the presumption of vindictiveness that arises when a defendant's sentence is increased by the same sentencing authority after a successful appeal, the trial court was required to place on the record the reasons for the increased sentence in order to demonstrate that a non-vindictive rationale supports the sentence. The trial court did that here.

{¶ 23} The trial court articulated its reasons at the sentencing hearing on September 13, 2006, for the more onerous sentence it imposed on some of the offenses:

{¶ 24} "Considering the totality of the sentences that were imposed previously and the sentences that are imposed now, the Court believes it has the authority to impose maximum and consecutive sentences. The Court believes that the position stated by the prosecutor is a correct one.

{¶ 25} "That the sentence in the previous case was imposed in view of all the convictions. The Court has the same responsibility now to decide what sentence to impose when considering matters before the Court." (T. 18-19).

{¶ 26} "The reduction in possible prison time in the present situation compared to what was originally imposed is of significant reduction. The Court had to think long and hard about authorizing the plea to take affect.

{¶ 27} "The Court realizes that from the statements that were made after the negotiations were completed – By statements, I mean the ones on the record – that each side gave up something in the negotiation process to reach the position that was reached.

{¶ 28} "The Court also is giving up something in authorizing the plea to be accepted because the Court believed

in the sentence that it imposed originally or the Court wouldn't have imposed it then, so it required the Court to look freshly at what the result is. After considering all of that information, Case No. 2004-CR-06, COURT FOUR, vandalism, fifth degree felony. Sentence is twelve months to the Ohio Department of Corrections. Fine is $500.

{¶ 29} "Same case, amended COUNT SIX is aggravated possession of drugs, fifth degree felony. Sentence is twelve months to the Ohio Department of corrections. Fine is $500.

{¶ 30} "COUNT FIFTEEN, illegal assembly or possession of chemicals for the manufacture of drugs, third degree felony. Sentence is five years to the Ohio Department of Corrections. Fine is $500.

{¶ 31} "Case number 2006-CR-234, solicitation of attempt to perjury, fourth degree felony. Sentence is twelve months to the Ohio Department of Corrections. Fine is $500. Fines are concurrent. Confinement is consecutive, and that makes eight years." (T. 20-21).

{¶ 32} The significant event that occurred in this case after Defendant's original sentencing was that the number of charges Defendant was facing was greatly reduced from fifteen down to four as a result of a negotiated plea agreement. In articulating the reasons for imposing a more severe sentence

for some of the offenses based upon that new event, the trial court expressed concern that Defendant' guilty pleas to substantially fewer charges would not permit an adequate aggregate penalty that complies with the purposes and principles of felony sentencing, and therefore the court would impose more onerous sentences for the individual offenses to which Defendant entered guilty pleas, in consideration of the charges the State dismissed pursuant to the plea agreement.

{¶ 33} The purposes and principles of felony sentencing are set forth in R.C. 2929.11(A):

{¶ 34} "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. 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."

{¶ 35} With respect to complying with R.C. 2929.11(A), R.C. 2929.12(A) provides:

{¶ 36} "(A) Unless otherwise required by section 2929.13 or

2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing."

{¶ 37} In sentencing, a trial court may consider charges that did not result in a conviction, including charges that were dismissed by the State pursuant to a plea agreement. ***State v Wiles*** **(1991), 59 Ohio St.3d 71, 78;** ***State v Williams*** **(June 14, 2002), Montgomery App. No. 19026, 2002-Ohio-2908, at ¶ 8. The trial court did that here in attempting to fashion a sentence that complies with the principles and purposes of felony sentencing. We additionally note that with respect to sentencing proceedings such as this one that occur after** ***State v. Foster***, **109 Ohio St.3d 1, 2006-Ohio-856, the trial court has full discretion to impose any**

sentence within the applicable statutory range, including maximum and consecutive sentences. *Id.* Of course, the reason for any increased sentence must be affirmatively stated on the record, and the trial court did that here.

{¶ 38} Although on remand following his successful appeal of his convictions, Defendant pled guilty pursuant to a plea agreement to far fewer offenses than he was originally convicted of, the scope and extent of his involvement in criminal conduct did not change. Under those circumstances, the trial court reasonably was concerned with the aggregate sentence it imposed in relation to the purposes and principles of felony sentencing. Accordingly, in fashioning its sentence the court elected to consider the many charges that had been dismissed as part of the plea agreement. The trial court had discretion with respect to each offense to impose any sentence up to the statutory authorized maximum, *Foster*, and in our view the court in its discretion could impose increased sentences in order to achieve the purposes and principles of felony sentencing, so long as the record demonstrates that a non-vindictive rationale supports the increased sentence. That is the case here. This record is sufficient to rebut any presumption of vindictiveness that arises from the trial court's increased sentences.

{¶ 39} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 40} "THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY IMPOSING MAXIMUM AND CONSECUTIVE SENTENCES WHERE THE RECORD CLEARLY ESTABLISHES THAT THE WORST FORM OF THE OFFENSE WAS NOT COMMITTED, APPELLANT IS NOT THE WORST FORM OF OFFENDER, A PRESUMPTION IN FAVOR OF A PRISON TERM WAS NOT PRESCRIBED TO ANY OF THE SPECIFIC OFFENSES BY THE LEGISLATURE, AND THE TRIAL COURT BASED SAID SENTENCES ON UNCONSTITUTIONAL REASONS AND UNAUTHORIZED LAW."

{¶ 41} Defendant argues that the trial court abused its discretion in imposing maximum and consecutive sentences because those high-end sentences are inconsistent with the seriousness and recidivism factors in R.C. 2929.12 that apply in this case and favor Defendant.

{¶ 42} After *Foster*, the appellate court standard of review on sentencing issues is an abuse of discretion. *State v. Slone* (Jan. 12, 2007), Greene App. No. 2005CA79, 2006-Ohio-130. That standard connotes more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151. Ordinarily, a trial court

does not abuse its discretion when it imposes a sentence within the permissible range authorized by R.C. 2929.14(A). *State v. Cowen*, 167 Ohio App.3d 233, 2006-Ohio-3191 at ¶ 22.

{¶ 43} Although after *Foster* trial courts are not required to make any findings or give reasons before imposing any sentence within the authorized statutory range, including maximum and consecutive sentences, courts nevertheless are still required to comply with the sentencing laws unaffected by *Foster,* such as R.C. 2929.11 and 2929.12, which require consideration of the purposes and principles of felony sentencing and the seriousness and recidivism factors. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855. A sentencing court does not have to make any specific findings to demonstrate its consideration of the seriousness and recidivism factors in R.C. 2929.12. *State v. Arnett* (2000), 88 Ohio St.3d 208, 215. Rather, a court can meet its obligation with a simple recitation that it has considered the applicable factors. *State v. Dunn* (August 19, 2005), Montgomery App. No. 20765, 2005-Ohio-4507.

{¶ 44} The trial court in this case indicated that it had taken into account and applied the purposes and principles of felony sentencing, R.C. 2929.11, and that it had considered and balanced the seriousness and recidivism factors in R.C.

2929.12. Not surprisingly, the trial court's conclusion about those matters differed from Defendant's assessment. The court concluded that the more serious factors outweigh the less serious factors, and that the recidivism more likely factors outweigh the recidivism less likely factors, despite the court's complimentary statements it made concerning Defendant's intellect, his desire for positive change and his apparent remorse. Even Defendant's own discussion of the R.C. 2929.12 factors at the sentencing hearing acknowledges that one or more of the recidivism more likely factors apply in this case, especially Defendant's very extensive criminal record. R.C. 2929.12(D)(2). Furthermore, the presentence investigation in this case concluded that four out of five recidivism likely factors apply in this case, R.C. 2929.12(D)(1),(2),(3) and (5), while none of the recidivism unlikely factors apply.

{¶ 45} Defendant further argues that the trial court's decision to impose maximum and consecutive sentences in this case was based upon the sentencing package doctrine, which has no application to Ohio sentencing laws. See: *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245. As support for this claim, Defendant relies upon the following isolated statement by the trial court:

{¶ 46} "Considering the totality of the sentences that were imposed previously and the sentences that are imposed now, the Court believes it has the authority to impose maximum and consecutive sentences."

{¶ 47} When the sentencing proceedings are considered as a whole and the trial court's statements are viewed in their proper context, it becomes apparent that the trial court did not rely upon the sentencing package doctrine. Rather, the trial court expressed both its understanding that after *Foster* it had the discretion to impose any sentence with the authorized statutory range, including maximum and consecutive sentences, and its belief that such high-end sentences would be necessary in this case to achieve an aggregate sentence that complies with the purposes and principles of felony sentencing, given the substantial number of offenses Defendant had been previously convicted of which were subsequently dismissed as part of the plea bargain. No abuse of discretion on the part of the trial court has been demonstrated.

{¶ 48} As a final matter, and in connection with the sentence the court imposed, Defendant has moved to strike from our consideration a Presentence Investigation Report ("PSI") and Supplemental PSI to which the State refers in its brief. Defendant argues that we should not consider those matters

because the trial court erroneously denied him access to those reports, to which defendants are entitled pursuant to R.C. 2951.03(B)(3).

{¶ 49} **R.C. 2951.03(B)(1) provides that if a PSI is prepared, the court "shall permit the defendant or the defendant's counsel to read the report," except with respect to information concerning certain specific matters that the PSI might contain. R.C. 2951.03(B)(2) provides that prior to sentencing the court shall permit the defendant and his counsel to comment on the PSI, and may allow them to introduce evidence to challenge any alleged factual inaccuracies in it.**

{¶ 50} **R.C. 2951.03(B)(3) provides that if the court determines that any of the information in the PSI should not be disclosed to a defendant or his counsel, then, in lieu of making the PSI available, the court "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 on the oral or written summary of the report." R.C. 2951.03(C) confers discretion on the trial court deciding to withhold and/or summarize information in the PSI, and provides: "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."

{¶ 51} At the sentencing hearing on September 13, 2006, at which the Defendant was unrepresented, the following colloquy took place:

{¶ 52} "MR. SELVAGGIO: Judge, thank you, if it pleases the Court and Mr. Bradley. Judge, pursuant to the plea agreement the State just notes that for sentencing purposes we'd ask for the PSI to speak for itself. We agree to remain silent otherwise.

{¶ 53} "THE COURT: Thank you. Mr. Bradley, anything you wish to say before sentence is pronounced?

{¶ 54} "THE DEFENDANT: Yes, Your Honor. First of all, I've never seen the PSI except for what I filled out so I don't know if there is any inaccurate information in it or anything like that. I don't know if there is anything that would be detrimental to me.

{¶ 55} "THE COURT: The only thing that the Court has in its current PSI is what's called the offender's version and then the underlying information such as name, date of birth, and social security number. You have a rather significant file with previous PSIs. By statute, PSIs are to be provided to either counsel but not to the defendant, so your self-representation raises certain difficulties in the process, but

at any rate the current PSI only has what you wrote.

{¶ 56} "THE DEFENDANT: Okay. Thank you, sir. Yes, I have a number of issues. Probably six issues in all.

{¶ 57} "THE COURT: Excuse me. Let me stop you just a minute. It has what you wrote and then it says that you were hesitant to complete your version of the instant offense because you completed the entire questionnaire.

{¶ 58} "The officer said that after a discussion you agreed to give your version of events, and that's what's in here is your version and his explanation of how you came about to giving your version.

{¶ 59} "THE DEFENDANT: Yes. I asked him and requested – I requested personally to the DRC and I asked the police to request the DRC conduct report from the last two-and-a-half years of incarceration for your consideration in the PSI, so evidently that hasn't been supplied.

{¶ 60} "THE COURT: That is true.

{¶ 61} "THE DEFENDANT: Well, I'd like to state for the record that I have an impeccable prison record. I have not been wrote up or disciplined for anything at any time for the last two-and-a-half years.

{¶ 62} "THE COURT: So noted." (T. pp. 2-4).

{¶ 63} The trial court erred when it construed R.C.

2951.03(B) to prevent the court from providing access to the PSI to the Defendant. Per division (1) of that section, the court "shall permit the defendant or defendant's counsel to read the report." If a defendant is unrepresented, the right is the defendant's, and cannot be denied because he lacks counsel who might read the PSI instead. The same applies to any written or oral summary the court might prepare pursuant to R.C. 2951.03(B)(2). And, in either event, the defendant as well as his counsel may comment on the PSI or the summary in their presentations to the court. R.C. 2951.03(B)(2), (3). Denying an unrepresented defendant the right to read either prevents his exercise of that statutory right.

{¶ 64} Nevertheless, the issue before us is whether the Defendant's motion to strike the two PSI's should be granted. On this record, that is not warranted. Defendant was made aware by the court of the contents of the PSI that was before the court. The only substantive information in it was a statement the Defendant had prepared. He was permitted to comment on it, and did. There is no indication that the trial court relied on the Supplemental PSI to which the State refers, and we need not consider it in reviewing the error assigned. Therefore, the motion to strike is Denied.

{¶ 65} Defendant's third assignment of error is overruled.

The judgment of the trial court will be affirmed.

BROGAN, J. And DONOVAN, J., concur.

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