

COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
MORGAN J. CURTIS	:	Case No. CT2009-0032
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Case No. CR2009-0056

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: December 31, 2009

APPEARANCES:

For Plaintiff-Appellee

RON WELCH  
27 North Fifth Street  
P.O. Box 189  
Zanesville, OH 43702-0189

For Defendant-Appellant

EMILY STRANG TARBERT  
825 Adair Avenue  
Zanesville, OH 43701

*Farmer, P.J.*

{¶1} On March 18, 2009, the Muskingum County Grand Jury indicted appellant, Morgan Curtis, on one count of possession of marijuana in violation of R.C. 2925.11(A), one count of receiving stolen property in violation of R.C. 2913.51(A), and one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2).

{¶2} On May 27, 2009, appellant pled guilty as charged. After a presentence investigation, the trial court conducted a sentencing hearing on July 13, 2009. Rather than following the state's recommendation of six months, the trial court imposed an aggregate sentence of eighteen months. The trial court memorialized the sentence via sentencing entry filed July 20, 2009.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT BY FAILING TO MAKE FINDINGS PURSUANT TO R.C. §2951.03(B)(5)."

II

{¶5} "THE DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO INTRODUCE TESTIMONY OR OTHER EVIDENCE TO DISPROVE AN ALLEGED FACTUAL INACCURACY OF THE PRESENTENCE INVESTIGATION."

I

{¶6} Appellant claims the trial court erred in sentencing him by failing to make findings pursuant to R.C. 2951.03(B)(5). We agree.

{¶7} R.C. 2951.03(B)(5) states the following:

{¶8} "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:

{¶9} "(a) Make a finding as to the allegation;

{¶10} "(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."

{¶11} During the sentencing hearing, defense counsel informed the trial court of the following:

{¶12} "MR. RUSSO: Thank you, Your Honor. Mr. Curtis understands that he's here today for sentencing, and prior to today we've had the opportunity to review his presentence investigation report, and I do have one issue with regard to that report. It was noted that Mr. Curtis had failed a drug test and tested positive for marijuana during his interview. And Mr. Curtis continues to, until today, assert that he has not used marijuana for over three to four months and he believes that the test results were faulty, and that that test had not been sent out for confirmation, so I would ask that the Court take that into account in sentencing today." July 13, 2009 T. at 3-4.

{¶13} In sentencing appellant to eighteen months, the trial court noted the following:

{¶14} "The State has recommended that you be sentenced to six months in prison. I will note I have received the presentence investigation and reviewed it

thoroughly. I will also note, Mr. Curtis, that once a firearm is involved with drugs and a loaded firearm on your person, it takes everything to a different level, and based upon that, I'm not inclined to follow the State's recommendation." Id. at 6.

{¶15} We find the above cited statements from defense counsel clearly demonstrates appellant alleged a factual inaccuracy in his presentence investigation report which triggered the application of R.C. 2951.03(B)(5). Based upon this court's opinion in *State v. Rhoades*, Muskingum App. No. CT2008-0085, 2007-Ohio-???, we find the trial court failed to meet the requirements of R.C. 2951.03(B)(5).

{¶16} Furthermore, via a stipulation filed November 20, 2009, the state agrees that appellant should be resentenced by the trial court.

{¶17} Assignment of Error I is granted.

## II

{¶18} Based upon our decision in Assignment of Error I, this assignment is moot.

{¶19} The judgment of the Court of Common Pleas of Muskingum County, Ohio  
is hereby reversed.

By Farmer, P.J.

Gwin, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES

SGF/db 1221

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MORGAN J. CURTIS

Defendant-Appellant

:  
:  
:  
:  
:  
:  
:  
:  
:  
:

JUDGMENT ENTRY

CASE NO. CT2009-0032

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio is reversed, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES