

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-10-044

Appellee

Trial Court Nos. CRB 1000942-A
CRB 1000942-C

v.

Christopher Posey

DECISION AND JUDGMENT

Appellant

Decided: March 16, 2012

* * * * *

Mark Mulligan, Ottawa County Prosecuting Attorney, and
Joseph Gerber, Assistant Prosecuting Attorney, for appellee.

Ron Nisch, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Ottawa County Municipal Court, following appellant’s no contest plea to two counts of assault. Because we conclude that the trial court erred in denying appellant access to the presentence investigation (“PSI”) report, we reverse and remand.

{¶ 2} Appellant, Christopher Posey, was initially charged with three counts of assault, in violation of R.C. 2903.13(A). Ultimately one count was dismissed, and appellant pled no contest to the remaining two counts. The court found him guilty on both counts and ordered a PSI report. At sentencing, under the court’s “standard” procedure, it did not permit appellant or his counsel to view that report. Appellant was fined and sentenced to a term of 180 days, with 90 days suspended as to each count, to be served consecutively.

{¶ 3} Appellant now appeals from that judgment, arguing the following sole assignment of error:

The trial court’s sentencing of Appellant without providing him or his counsel any access to a presentence investigation report violated the mandatory requirements of R.C. Sec. 2951.03 and Appellant’s Due Process rights.

{¶ 4} A PSI report serves to inform the sentencing judge of relevant aspects of the defendant's history, so that the court will sentence the defendant in an informed, responsible, and fair manner. *State v. Liming*, 2d Dist. No. 03CA43, 2004-Ohio-168, ¶ 41, citing *Machibroda v. United States*, 360 F.Supp. 780 (N.D.Ohio 1973). The report and its contents are governed by Crim.R. 32.2 and R.C. 2951.03. The court, “at a reasonable time before imposing sentence *shall* permit the defendant or the defendant's counsel to read the report.” R.C. 2951.03(B)(1). (Emphasis added.) Thus, under R.C. 2951.03(B)(1), if a court considers a PSI before sentencing a defendant, it must permit

the defendant to read and respond to the PSI. *Cleveland v. Go Invest Wisely, L.L.C.*, 8th Dist. Nos. 95189, 95192, 95195, 95190, 95193, 95196, 95191, 95194, 95197, 95198, 95201, 95204, 95199, 95202, 95205, 95200, 95203, 95206, 2011-Ohio-3410, ¶ 23.

{¶ 5} Under the statute, the defendant is not permitted to read certain information, such as any sentence recommendation, a diagnostic opinion if it might seriously disrupt a program of rehabilitation for the defendant, promised confidentiality for information sources, and any other information that, if disclosed, might cause physical or other harm to the defendant or other persons. R.C. 2951.03(B)(1)(a-d). If the court determines, however, that any information should not be disclosed, in lieu of permitting defendant or his counsel to view the report, 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 * * * counsel to comment upon the * * * report.” R.C. 2951.03(B)(3). (Emphasis added.) Therefore, the legislature clearly mandated that a defendant or his counsel have access to the factual information in the PSI report prior to sentencing.

{¶ 6} In this case, the trial court stated it was “prepared to proceed [with the sentencing hearing], having conducted a pre-sentence investigation.” When the court later asked if defendant or his counsel wanted to state anything in mitigation, counsel replied, “Your Honor, we weren’t able to see the pre-sentence investigation and I understand that is standard for the Court.” Counsel then argued the mitigating factors which related to appellant’s criminal history and current work status. At no time during

the sentencing hearing did the court make a determination that the PSI report was being withheld from counsel or appellant because of any of the statutory factors, nor did the court provide an oral or written summary of the factual content of the PSI report. Consequently, appellant was denied the opportunity of determining whether any factual errors existed in the report and to refute such errors. In addition, the record indicates that the trial court did, in fact, consider the PSI report in imposing sentence.

{¶ 7} As a result, we conclude that the trial court's "standard" procedure of automatically denying all defendants and defense attorneys access to a PSI report does not comply with the statutory due process and requirements provided by R.C. 2951.03(B)(3). Pursuant to the statute, the trial court must give access to the PSI report, or, in the alternative, must provide a summary if it determines full disclosure of the report would be harmful or wholly confidential. Therefore, the trial court erred in denying appellant access to the PSI report prior to sentencing.

{¶ 8} Accordingly, appellant's assignment of error is well-taken.

{¶ 9} The judgment of the Ottawa County Municipal Court is reversed and this case is remanded for re-sentencing consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
