ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	No. 12-2156
Appellee,	:	
v.	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Case No. 97531
CHRISTOPHER RICHMOND,	:	
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CHRISTOPHER RICHMOND

TIMOTHY J. McGINTY
Cuyahoga County Prosecutor
1200 Ontario 9th Floor
Cleveland, Ohio 44113
216/443-7800
216/443-7806 (fax)
Counsel for Appellee State of Ohio

ROBERT L. TOBIK (0029286)
Cuyahoga County Public Defender
JOHN MARTIN (0020606)
Assistant Public Defender (of record)
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
216/443-7583
216/443-3632 (fax)
Counsel for Appellant Christopher Richmond

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EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT GENERAL AND GREAT PUBLIC INTEREST

Every year, courts in Ohio spend millions of dollars having their probation officers prepare pre-sentence investigations in felony cases. But there are times, particularly now that HB 86 mandates community control sanctions for a number of low-level felony offenders, when PSIs are not necessary before imposing community control. After all, if judges are aware of a defendant's criminal record, and if both sides have been given the opportunity to address the judge at sentencing, then, in at least some low-level cases, it may well be that the prosecutor representing the State of Ohio, recognizing the State's responsibility to be stewards of government funds, will not object to proceeding with sentencing without a PSI. The converse is already the law in Ohio – a trial judge can impose a sentence of prison without considering a PSI. *State v. Adams,* 37 Ohio St.3d 295, 525 N.E.2d 1361 (1988).

In the instant case, the trial court had just taken a plea of guilty for a low-level felony by a person who had already served 30 days in jail. Rather than have the person sit even longer in jail while a PSI was prepared, the trial court proceeded to immediate sentencing – without objection by either party. Not surprisingly, community control sanctions were imposed and the person was released. In acting in this fashion, the trial court promoted the speedy administration of justice, as required by R.C. 2901.04. But the Eighth District reversed the sentence simply because a PSI had not been ordered. The Eighth District has effectively held that community control sanctions can never be imposed for a felony in the absence of a PSI.

By accepting this case, this Court can clarify that Crim. R. 32.2, which mandates consideration of a PSI in cases where a sentence of community control sanctions has been imposed, does not require reversal of a community control sanctions sentence unless at least one

of two circumstances arise: (1) the State of Ohio objected to going forward without a PSI, or (2) the most exigent of circumstances are present; the "most exigent of circumstances" standard is that used by this Court in *Adams.* This is an issue that is capable of recurring every day in every common pleas court in Ohio.

The instant case presents the same issue that is currently the subject of a State's appeal, filed on December 14, 2012 in *State v. LaShawn Amos,* OSC Case No. 12-2093. The common issue can be summarized as follows:

> **In the absence of a prosecutor's objections, can a trial court ever sentence a defendant to community control sanctions without first considering a pre-sentence investigation report?**

This Court is asked to accept both *Amos* and the instant case. The cases could also be argued at the same time, thereby expediting a consolidated resolution.

STATEMENT OF THE CASE AND FACTS

The defendant pled guilty to a fifth-degree felony for harassment by an inmate. After the plea was taken, and with the prosecutor present, the trial court sentenced the defendant to 30 days in jail and a $200 fine. Because the defendant had already served 30 days in jail, he was released the same day. The sentence took place without a PSI having been prepared. The State did not object to proceeding to sentencing without a PSI.

On appeal, the Eighth District reversed, holding that it was reversible error to impose a sentence of community control sanctions without a PSI.

The Eighth District denied a motion for rehearing en banc on November 8, 2012.

This timely appeal follows.

ARGUMENT

Proposition of Law I:

When neither party requests 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 of circumstances.

Confronted with a low-level felony for which the defendant had already served 30 days in jail, the State could not even show that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore,* 5 Ohio St. 3d 217, 219 (1983). Yet the sentence in this case has been reversed because the trial court failed to have a PSI prepared – even though neither party requested it.

> 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.

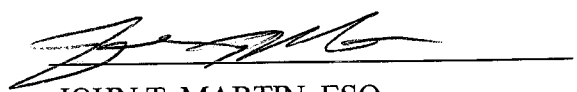
Adams, at syllabus, par. 4.

While this Court's analysis in *Adams* concerned the imposition of a prison term without consideration of a PSI, this Court's analysis is equally applicable to the situation *sub judice.* Moreover, not requiring a PSI in cases, such as the instant case, where a community control sanction was clearly warranted, is in keeping with judicial economy. *See generally,* R.C. 2901.04.

CONCLUSION

Wherefore, this Court should accept jurisdiction over the instant case.

Respectfully submitted,



JOHN T. MARTIN, ESQ.
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served upon Timothy J. McGinty, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 24th day of December, 2012.

JOHN T. MARTIN, ESQ.
Assistant Public Defender
Counsel for Appellant

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO. 97531

LOWER COURT NO. CP CR-554731

COMMON PLEAS COURT

-vs-

CHRISTOPHER RICHMOND

Appellee

MOTION NO. 458452

Date 11/08/12

Journal Entry

Motion by Appellant for en banc hearing is denied. See separate journal entry of this same date.

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Judge FRANK D. CELEBREZZE, JR., Concurs

Presiding Judge
MELODY J. STEWART

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO. 97531 | LOWER COURT NO. CP CR-554731

COMMON PLEAS COURT

-vs-

CHRISTOPHER RICHMOND

Appellee

MOTION NO. 458452

Date 11/08/2012

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find that although the panel in this appeal applied a different standard of review than the panel in *State v. Amos*, 8th Dist. No. 97719, 2012-Ohio-3954 , the standard of review applied is not an issue that is dispositive of these appeals. Therefore, en banc review is not appropriate. The application for en banc consideration is denied.

MELODY J. STEWART, JUDGE

Concurring:

PATRICIA A. BLACKMON, A.J.,
MARY J. BOYLE, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
KENNETH A. ROCCO, J., and
JAMES J. SWEENEY, J.

Dissenting:

MARY J. BOYLE, J.,
COLLEEN CONWAY COONEY, J., and
SEAN C. GALLAGHER, J.,

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97531

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

CHRISTOPHER RICHMOND

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-554731

BEFORE: Stewart, P.J., Boyle, J., and Rocco, J.

RELEASED AND JOURNALIZED: August 30, 2012

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor

BY: Andrew Rogalski
T. Allan Regas
Assistant County Prosecutors
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Robert L. Tobik
Cuyahoga County Public Defender

BY: John T. Martin
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113

MELODY J. STEWART, P.J.:

{¶1} Plaintiff-appellant, the state of Ohio, appeals from the trial court's sentence of 30 days in county jail and a $200 fine imposed on defendant-appellee, Christopher Richmond. For the following reasons, we reverse.

{¶2} After Richmond pleaded guilty to an amended indictment of harassment by inmate, a fifth degree felony, the trial court sentenced him to the above-noted sentence with credit for time served and ordered him to be released.

{¶3} The state, in its sole assignment of error, argues that because Richmond pleaded guilty to a fifth degree felony, under Ohio law the trial court is limited to a choice between sentencing Richmond to one or more community control sanctions or a prison sentence of 6-12 months. The state contends that Richmond was not placed under a community control sanction because no presentence investigation report was prepared, and that 30 days of incarceration in the county jail does not fulfill the statutory minimum term of imprisonment. The state complains that the sentence was therefore not authorized by law and requests this court to reverse and remand for resentencing.

{¶4} Sentences are reviewed by applying a two-prong test as set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First, we must review whether the trial court complied with all applicable rules and

statutes in imposing the sentence to conclude whether the sentence is contrary to law. *Kalish* at ¶ 4. If the sentence is in conformance with the law, we then review the trial court's decision under an abuse-of-discretion standard. *Id.*

{¶5} We note that a prosecutor was present at Richmond's sentencing hearing, but did not object when the trial court sentenced Richmond without the benefit of a presentence investigation report. Accordingly, the state has waived all but plain error.

{¶6} In the absence of objection, this court may notice plain errors or defects that affect substantial rights, pursuant to Crim.R. 52(B). Plain errors are obvious defects in proceedings due to a deviation from legal rules. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16.

{¶7} We have reviewed the record and begin our analysis with determining whether a sentence that is rendered without the benefit of a statutorily-mandated presentence investigation report is authorized by law.

{¶8} R.C. 2951.03(A)(1) states, in pertinent part, that "[n]o 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." *See also* Crim.R. 32.2 ("[i]n felony cases the court shall * * * order a presentence investigation and report before imposing community control sanctions or granting probation").

{¶9} This court has previously held that a trial court must order and then review a presentence investigation report prior to considering the imposition of community control sanctions. *State v. Mitchell*, 141 Ohio App.3d 770, 753 N.E.2d 284 (8th Dist.2001), discretionary appeal not allowed, 92 Ohio St.3d 1443, 751 N.E.2d 482; *State v. Ross*, 8th Dist. No. 92461, 2009-Ohio-4720. We have also held that, in the absence of objection, a trial court's imposition of community control sanctions before taking into account a presentence investigation report constitutes plain error. *State v. Disanza*, 8th Dist. No. 92375, 2009-Ohio-5364; *State v. Walker*, 8th Dist. No. 90692, 2008-Ohio-5123; *State v. Pickett*, 8th Dist. No. 91343, 2009-Ohio-2127.

{¶10} Similar to the cases cited, in this case, the trial court deviated from the requirements mandated by law; namely, to obtain and consider a presentence investigation report prior to ordering a community control sanction. Therefore, we must again reverse the trial court and order it to comply with the sentencing obligations mandated by law.

{¶11} The state also asserts that supervision is obligatory when community control sanctions are imposed. Therefore, the state argues that Richmond's sentence was not a valid community control sanction.

{¶12} When a trial court sentences a defendant to community control sanctions, R.C. 2929.15(A)(2)(a) states that the court:

> [s]hall place the offender under the general control and supervision of a department of probation in the county that serves the court for the purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer.

{¶13} Community residential sanctions are a form of community control sanctions, and the time that Richmond spent in jail constitutes a permissible community residential sanction under R.C. 2929.16(A)(2). *See* R.C. 2929.15(A)(1) ("the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to sections R.C. 2929.16 [residential sanctions] * * *.") "A residential sanction that may be imposed pursuant to R.C. 2929.16 includes a term of up to six months in a community-based correctional facility or jail." *State v. Farner*, 5th Dist. No. 2011-COA-025, 2012-Ohio-317, ¶ 12.

{¶14} Financial sanctions also fall within the domain of community control sanctions. *See State v. Bates*, 8th Dist. No. 77522, 2000 WL 1643596 (Nov. 2, 2000), at *1; R.C. 2929.18. Financial sanctions are judgments that may be enforced under R.C. 2929.18 by using a number of statutory proceedings similar to those that a judgment creditor would employ. *See State v. Lopez*, 2d Dist. No. 2002CA81, 2003-Ohio-679, ¶ 11.

{¶15} Richmond's fine and jail sentence are therefore permissible community control sanctions. The issue remains, however, whether probation

department supervision is required when a defendant is granted credit for time served and has an outstanding financial sanction. The state contends that Richmond's sentence is unquestionably at odds with the binding language of R.C. 2929.15(A)(2)(a), and that the trial court abused its discretion when it ignored this required community control sanction condition.

{¶16} This court recently issued the en banc decision of *State v. Nash*, 8th Dist. No. 96575, 2012-Ohio-3246, where the majority of the court held that when a defendant is placed on community control sanctions, probation department supervision is "only necessary where there is a condition that must be overseen or a term during which a defendant's conduct must be supervised." *Id.* at ¶ 8. In support of our decision, we referenced the language contained in R.C. 2929.11, noting the broad sentencing discretion of the trial court, as well as the overriding purposes of felony sentencing, "to punish the offender using the minimum sanctions * * * without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). In light of our decision in *Nash*, the argument that probation supervision is required is without merit.

{¶17} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

KENNETH A. ROCCO, J., CONCURS;

MARY J. BOYLE, J., CONCURS IN PART AND
DISSENTS IN PART WITH SEPARATE OPINION

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶18} Our court recently issued the en banc decision of *State v. Nash*, 8th Dist. No. 96575, 2012-Ohio-3246, as referenced by the majority in this opinion. Because I joined the Honorable Judge Sean Gallagher and the Honorable Judge Colleen Conway Cooney in their dissents in en banc *Nash*, I likewise dissent in part as it relates to Richmond's sentence not being a valid one.

{¶19} I agree with the majority that a written presentence investigative report is statutorily mandated to be prepared and considered before a trial court can sentence one to community control sanctions. Because the trial court failed to do so, as the majority found, Richmond's sentence is vacated, as it is not

authorized by law. However, I disagree with the majority that probation supervision is not required and would follow *State v. Eppinger*, 8th Dist. No. 92441, 2009-Ohio-5233.