

[Cite as *State v. Disanza*, 2009-Ohio-5364.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92375

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

LEE DISANZA

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516089

BEFORE: Stewart, J., Kilbane, P.J., and Sweeney, J.

RELEASED: October 8, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals the trial court's imposition of community control sanctions upon defendant-appellee, Lee Disanza, without first ordering a presentence investigation report. For the reasons set forth below, we reverse.

{¶ 2} On October 1, 2008, the Cuyahoga County Grand Jury indicted Disanza on one count of possession of drugs. On October 28, 2008, Disanza entered a plea of guilty to the indictment. The trial court accepted his guilty plea and immediately sentenced him to two days in jail, with credit for time served, a \$100 fine, \$100 in court costs, and a six-month driver's license suspension.

{¶ 3} The state now timely appeals and presents two assignments of error for our review. In the first assignment of error, the state argues that the trial court erred in imposing community control sanctions without ordering a presentence investigation report, in violation of Crim.R. 32.2 and R.C. 2951.03.

{¶ 4} We note that no one representing the state was present at the sentencing hearing and therefore the state did not object to the imposition of community control sanctions. Accordingly, we review only for plain error.

{¶ 5} Crim.R. 52(B) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection.” *State v. Smith*, Cuyahoga App. No. 88371, 2008-Ohio-3657,

discretionary appeal not allowed by 120 Ohio St.3d 1506, 2009-Ohio-361. Moreover, plain error does not exist unless appellant demonstrates that the outcome of the trial clearly would have been different but for the trial court's alleged error. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of the syllabus.

{¶ 6} Disanza was convicted of possession of drugs in violation of R.C. 2925.11(A), a felony of the fifth degree. According to R.C. 2929.14(A)(5), the sentence for a felony of the fifth degree is a definite prison term of six, seven, eight, nine, ten, eleven, or twelve months. Where a prison term is not mandated by statute, the trial court may elect to impose community control sanctions instead. R.C. 2929.13.

{¶ 7} R.C. 2951.03(A)(1) provides in part, "[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. * * *" Likewise, Crim.R. 32.2 states "[i]n felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation."

{¶ 8} Thus, while the trial court could immediately sentence appellant to a definite term of imprisonment, it was required to first order and consider a presentence investigation report before imposing community control sanctions. See *State v. Pickett*, Cuyahoga App. No. 91343, 2009-Ohio-2127; *State v. Walker*, Cuyahoga App. No. 90692, 2008-Ohio-5123; *State v. Mitchell* (2001), 141 Ohio App.3d 770, discretionary appeal not allowed, 92 Ohio St.3d 1443. The trial court committed plain error when it imposed community control sanctions for a felony conviction without first considering a presentence investigation report. *Pickett* at ¶9; *Walker* at ¶10 .

{¶ 9} We are not persuaded by Disanza's argument that the written case information form prepared by the Cleveland Police Department when he was arrested, constitutes the "presentence investigation report" required by rule and statute. The case information form states the circumstances of the arrest and provides Disanza's personal identification information such as name, address, date of birth, and social security number. However, R.C. 2953.01 states that in addition to the circumstances of the offense, the officer making the report shall inquire into "the criminal record, social history, and present condition of the defendant, all information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, and any other matters specified in Criminal Rule 32.2." Crim.R. 32.2 states that the report shall state, "the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's

social history, employment record, financial ability and means, personal characteristics, family situation, and present physical and mental condition, as may be helpful in imposing or modifying sentences or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. * * *” Thus, the case information form does not contain the information required by statute and rule.

{¶ 10} The state’s first assignment of error is sustained.

{¶ 11} Since the first assignment of error is dispositive, we find moot the second assignment of error, in which the state challenges the termination of community control sanctions before a significant period of time elapsed. Accordingly, judgment is reversed and the case is remanded for resentencing.

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

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

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, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR

