

IN THE
INDIANA COURT OF APPEALS

No. 79A02-0902-CR-133

ANTHONY MALENCHIK,)	Appeal from the
Appellant,)	Tippecanoe Superior Court 5
(Defendant Below))	
)	
vs.)	No. 79D05-0711-FD-628
)	
STATE OF INDIANA,)	The Honorable
Appellee,)	Les A. Meade
(Plaintiff Below))	

APPELLANT'S SUPPLEMENTAL PETITION TO TRANSFER

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ISSUE PRESENTED FOR REVIEW

On August 10, 2009 the Indiana Supreme Court issued an order for counsel for the parties to file supplemental briefs based on its stated interest in the Appellant's contention that the trial court abused its discretion in relying on scoring models, specifically the LSIR and SASSI, in determining the sentence of Anthony Malenchik. At that time, the Court invited amicus curiae participation.

Appellant Malenchik contends, pursuant to Rhodes v. State, 986 N.E.2d 1193 (Ind.Ct.App. 2008) that use of such scoring models is improper as a matter of law. Malenchik further contends that use of these tests to sentence is improper for the following reasons:

1. Reliance on authority of Rhodes.
2. The tests are subjective and not reliable.
3. The tests are not designed to aid in sentencings and are not relevant.
4. The test results duplicate other factors, which the trial court is already bound to consider.
5. The elements of the tests are discriminatory.
6. Reliance on the tests in this circumstance denies the appellant the right to cross-examine and the right to effective use of counsel.
7. The use of scoring models conflicts with the Indiana Constitution, Article I, Section 18, and is contrary to the spirit of the section that demands reformation. The tests themselves do not contain any acknowledgment of factors favoring reformation.

8. The use of scoring models invades the province of the trial judge, diminishes the judge's responsibility, and denies in part the defendant the opportunity to be sentenced by an elected judge.

9. The acceptance of scoring models may have an adverse fundamental effect on sentencing and is contrary to Indiana's established sentencing scheme, which provides for broad discretion by competent local trial judges deciding sentences within a broad statutory range for each level of felony.

10. Acceptance of scoring models may serve to limit appellate review, as described in Cardwell v. State, 895 N.E.2d 1219 (Ind.2008).

STATEMENT OF THE CASE

Your appellant, Anthony Malenchik, plead guilty on November 17, 2008 to a class D felony, Receiving Stolen Property. He waived jury trial on a count of Habitual Offender and the court found him guilty of having committed two prior unrelated class D felony thefts.

Anthony was sentenced on December 9, 2008. He received the maximum three-year sentence on the theft, followed by a consecutive three year sentence on the habitual count. He received six years out of a possible seven and one-half years he had faced. Four years were ordered executed and two years were suspended to probation. (See Sentencing Order, Appellant's original brief p. 2-4 also see Appellant's Appendix at 70-71).

Anthony appealed the sentence, and the Court of Appeals affirmed in an unpublished opinion on June 5, 2009, 79A02-0902-CR-00103. The Indiana Supreme Court granted transfer on August 10, 2009. At that time this Court invited amicus curiae

participation. To date, the Indiana Bar Association, Criminal Justice and Appellate Practice Section, the Indiana Public Defender Counsel, and the Indiana Public Defender have appeared to generally align with Malenchik. The Indiana Judicial Center and the Indiana Prosecuting Attorneys Council have also appeared.

This Court has scheduled oral arguments for October 22, 2009.

Your Appellant has filed with this brief a Motion to Supplement the Record to include in his green appendix an LSIR form, defendant's LSIR and SASSI worksheets, and the LSIR training manual.

STATEMENT OF THE FACTS

Anthony Malenchik was sentenced December 9, 2008 to six years in the Department of Corrections with four years executed. He was sentenced for a class D felony, Receiving Stolen Property, which property was a television set of a woman with whom he and his mother once resided. That sentence was three years. His sentence was then enhanced by three years, consecutive, for a Habitual Offender count that alleged two prior unrelated class D felony theft convictions. Anthony did have a criminal history. (See Appellant's Green Appendix, original and supplemental pages 3-5) He was age twenty (20) at sentencing. He had good family support, a pregnant fiancé, and a good probability of employment. (See sentencing hearing, Appellant's Appendix at 36-38) The entire pre-sentence investigation report submitted to the parties and the court is contained in the original Appellant's Green Appendix.

Prior to sentencing, the Tippecanoe County Probation Department conducted a Level of Service Inventory – Revised (LSIR) and Substance Abuse Subtle Screening Inventory (SASSI-3) on Anthony. The score sheets or worksheets were not provided in

the PSI report. The report states (Appellant's Green Appendix at 8) as to the SASSI. "The defendant completed a SASSI on 12-3-08. The SASSI indicates that the defendant has a high probability of having a Substance Dependence Disorder." The SASSI two-page worksheet is included in Appellant's Supplemental Green Appendix, which the appellant has filed with his Motion to Supplement the Record. This test appears to be a 67 question, all true or false form, which is then scored, and the result is either High Probability or Low Probability of having a Substance Dependence Disorder. There is no other reference or explanation of what this means contained in the PSI report.

Anthony was also administered the LSIR before sentencing. According to the probation officer, he scored 41, into the High Risk/Needs Category. The brief description of the findings encompasses two paragraphs, (Appellant's Green Appendix at 8). Again, neither the worksheets nor training manual were submitted by probation, and are the subject of the Appellant's Motion to Supplement the Record.

SUMMARY OF ARGUMENT

Your appellant relies on Rhodes v. State, 896 N.E.2d 1193 (Ind.Ct.App.2008) and has summarized additional contentions under Issue Presented for Review.

ARGUMENT

It is first important to note why this issue applies to Malenchik at bar. Malenchik takes issue with the Court of Appeals holding that Judge Meade made only a passing reference to the test scores and did not rely upon them in crafting his sentence. Judge Meade stated, "All of this is based upon the character, risk of recidivism, which is quite high according to the LSI-R and SASSI." (Appellant's Appendix at 67) The judge was in effect conveying here his reason for the imposition of the sentence. The court did have a

meaningful dialogue with Anthony. This dialogue was quoted extensively in the opinion below. As the opinion below states, the trial court made two references to the scoring models. Your appellant contends that these references were more than passing meaningless comments. Your appellant contends that the entire dialogue should be read as a whole, and that the references to the scoring models cannot be discounted simply because the judge also addressed other factors. If the trial court did not rely on the models, then it would not have mentioned them, or made it clear that the models were not used in determining the sentence.

1. Rhodes v. State

Rhodes v. State, 896 N.E.2d 1193 (Ind.Ct.App. 2008) is good law. Rhodes states,

“The use of a standardized scoring model, such as the LSI-R, undercuts the trial court’s responsibility to craft an appropriate, individualized sentence. Relying upon a sum of numbers purportedly derived from objective data cannot serve as a substitute for an independent and thoughtful evaluation of the evidence presented for consideration. As our Supreme Court recently noted in discussing the appellate review of sentences, “[a]ny effort to force a sentence to result from some algorithm based on the number and definition of crimes and various consequences removes the ability of the trial judge to ameliorate the inevitable unfairness a mindless formula sometimes produces.” *Cardwell v. State*, 895 N.E.2d 1219, 2008 Ind. Lexis 1049, *12, 2008 WL 4868299 (Ind. Nov. 12, 2008). Therefore, it is an abuse of discretion to rely on scoring models to determine a sentence.”

In Mr. Rhodes brief to the Court of Appeals, he rightly cited authority describing the LSIR. In State v. Lichti, 827 N.E.2d 82 (Ind.Ct.App. 2005), the court described the LSIR as a report used by the probation department as a tool to enhance pre-sentence reports, and it measures predictors of criminal conduct, including anti-social attitude, anti-social

associates, anti-social personality, a history of anti-social and problematic behavior, and difficulties at home, school, work, and leisure. The Lichtj court went on to recognize that the trial court was well able to determine the sentence without help from the LSIR, and even a positive LSIR would not likely have changed the court's sentence.

Similarly, the court in the Banks v. State, 841 N.E.2d 654 (Ind.Ct.App.2006) was relatively unimpressed with the LSIR. That decision approved the trial court's disregard of the low LSIR score because it was "after all, merely a prediction of future behavior", and "somewhat unreliable" based on factors concerning Mr. Banks.

In the event this Court grants the motion to supplement the record, this court is urged to look at the sample LSIR, and Malenchik's worksheets in judging the reliability of these tests. Regardless of that ruling, appellant points out that it is uncontroverted that the worksheets and forms were not included in the trial court record. This means that the trial court made no determination as to the reliability of the tests.

These scoring models purport to be scientific. They purport to be helpful to the sentencing judge. Yet, there has been no inquiry as yet as to whether these models would qualify as admissible under Indiana Rule of Evidence 702, or Indiana case law that has commented on Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In Indiana the trial judge is the gatekeeper for expert evidence. In the case at bar, Malenchik complains that the gate is squeaking. (See Franciose v. Jones, 907 N.E.2d 139 (Ind.Ct.App. 2009)) Word limitations prevent lengthy discussion of Daubert in this brief. Suffice to say that Malenchik takes the position that in order to utilize scoring models in any way, the trial court should conduct

an analysis as described in Steward v. State, 652 N.E.2d 490, 498 (Ind.1995) which provided that expert scientific testimony must be shown to be reliable to the court.

The State here will counter that the rules of evidence are generally suspended at a sentencing hearing. Still evidence, and particularly purported scientific evidence still needs to be reliable. See Cloum v. State 779 N.E.2d 84 (Ind.Ct.App. 2002) The Court should no more allow these scoring models than it would allow a defendant to bring in a polygraph result dispositive of his innocence at a sentencing.

Malenchik suggests that this court review some of the questions which form the LSIR. Of the fifty-four questions propounded on the LSIR, (Appellant's Supplemental Green Appendix at 23-24), thirteen questions call for subjective rating between 0-3. There is also a "Professional Discretion Over-ride Section" which allows the examiner to change a score. When a judge relies on the subjective judgments of a probation officer it creates an erosion of confidence in the judicial system. A defendant is entitled to be sentenced, to be judged, by a person meeting the statutory requirements of an elected judge.

Finally, as to reliability, Malenchik directs this court to the LSIR training manual (Appellant's Supplemental Green Appendix at 31-207) The manual warns of what can and usually does go wrong. It lists the following factors:

1. Assessment instruments are not validated or normed to new populations.
2. Offenders are assessed then everyone gets the same treatment.
3. Assessments are completed placed in the file and never used again.
4. Error occurs even with the most efficient instruments.
5. Choice of assessment does not reflect important organizational considerations or philosophies.
6. Some items can lead to biased decision.

7. The assessment tool ignores important risk factors/the assessment tool measures risk in a static fashion only.

2. Relevance

At bar, the LSIR and SASSI are ostensibly used to predict future criminal behavior. Malenchik suggests that this factor is no longer applicable in sentencing since that aggravator was removed from the statutes in 2005 by P.L. 71-2005, Sec. 3. The statute still provides that it is a mitigator if the character and attitude of the defendant indicates he is unlikely to commit another crime. I.C. 35-38-1-7.1(b)(8). In his appellate brief, Rhodes suggested that the deletion was in response to case law that held that the risk of re-offending was really just an observation about other factors in a record.

A case in point is Neff v. State, 849 N.E.2d 556 (Ind.2006). Relying on Morgan v. State, 829 N.E.2d 12 (Ind.2005) the Neff court disregarded as separate aggravators the finding that previous punishment had failed to rehabilitate him, and that he posed a risk to re-offend. Neff found these to be conclusory observations about the weight to be given to facts.

3. The LSIR is discriminatory

Some of the answers elicited on the LSIR go to factors beyond the control of the defendant. The fact that he has relatives in jail or lives in a high crime area should not be given any weight in determining the length of his sentence. He should not be more severely punished because he came from a broken home, he is poor, or he is dissatisfied with his parents. He should not get more time because he doesn't participate in organized activities or because he could make better use of his time. And he certainly should not be treated worse by the court because he is "unfavorable toward convention." Again,

Malenchik suggests that these types of factors examined in the LSIR should never bear any weight with a sentencing judge.

4. Right to counsel

Since the score sheet for this battery of tests was not provided to counsel (or the court for that matter), your appellant's lawyer had no real opportunity to dispute the findings or cross examine the methodology or theory behind the tests. At the very least this court should enunciate a rule whereby pre-sentencing disclosure of the worksheets are provided in advance. Counsel may then elect to litigate a Steward type challenge. Counsel may elect to cross-examine the test giver. The instant case gives only a cursory look at the issue, because there is no real record of litigation about the tests themselves. If this case is remanded, it should be with directions to litigate the qualifications of the proffered models. Undersigned counsel anticipates that this issue will be more extensively briefed by amicus counsel.

5. Use of scoring models conflicts with our Indiana Constitution. Article 1, Section 18

Article 1, Section 18 provides that the penal code shall be founded on the principles of reformation and not on vindictive justice. This issue will come into play if this court were to approve of the LSIR and SASSI as relevant evidence in a sentencing. Examination of both models reveals no attempt whatsoever to credit a defendant for positive strides made at any time in his life. There are no questions about whether a defendant had ever lived a law-abiding life for a substantial period of time. There is no information sought about successful participation in counseling or drug/alcohol rehabilitation. There is no attempt to discover positive marital or family support. This argument applies specifically to a lack of information gained from these models.

6. Use of scoring models pave the way to fundamentally change our sentencing system

In 2008, our Supreme Court wrote:

“And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. Individual judgments as to the proper balance to be struck among these considerations will necessarily vary from person to person, and judges, whether they sit on trial or appellate benches, are no exception. There is thus no right answer as to the proper sentences in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of the evidence. Appellate judges may disagree on these matters, but if they disagree they are usually able to articulate what the disagreement is and why they come out differently” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008).

This language somewhat captures the essence of our criminal justice system. The system is based on competent local judges, subject to the political process, making decisions that affect the lives of their local citizens. To take the sentencing responsibility away from a judge, at any level, and divest it to an arbitrary mathematical formula should be unthinkable. Of course any acceptance of the use of these models conjures up fears that the state is moving toward sentencing guidelines similar to those in the federal system.

At the present there are four classes of felonies which all carry broad ranges of possible sentences. In addition to that the penalty for murder is punishable by thirty years up to death. Each class of felony range overlaps with the next highest class. Also, there is great discretion in the State to charge crimes so that the same criminal act may be

charged as possibly two or three levels of classification. This sentencing scheme lends itself well to determining an appropriate individual sentence. This scheme lends itself well to appellate review. This scheme recognizes regional and cultural differences. This scheme provides for advocacy, and encourages the constitutional goal of reformation.

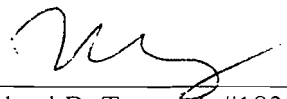
As a practical example, examine a young man charged with an A felony. While his case makes its way through the docket, he has an opportunity to make his case for plea negotiations and for sentencing. His counsel and family encourage him to seek treatment, work on his education, or perhaps make restitution. This behavior is often rewarded by way of negotiation or a break at sentencing.

The opposite may also occur. Instead of improving his lot, he continues to offend. In either scenario, a human judge will be able to look the defendant in the face and judge him according to what he has sown. The judge will not be bound by an algorithm, just the statutory range and his own good judgment. The marginal value of scoring models such as the ones at bar help to take the most important decisions away from the judges most qualified to make them.

CONCLUSION

Your appellant respectfully requests that the court consider the foregoing arguments, along with the amicus arguments aligned with Malenchik, and reverse and remand or revise the sentence herein.

Respectfully submitted,



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WORD COUNT CERTIFICATE

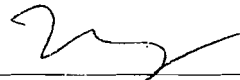
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2009, a copy of the above and foregoing document was served upon the below listed parties by depositing a copy of same in the United States Mail in envelopes properly addressed to each of them and with sufficient first-class postage affixed.



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