

IN THE
SUPREME COURT OF INDIANA

CAUSE NO. 79S02-0908-CR-365

ANTHONY MALENCHIK,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Appeal from the Tippecanoe Superior Court,

Court of Appeals No. 79A02-0902-CR-133,
Trial Court No: 79D05-0711-FD-628,

The Honorable Les Meade, Judge.

SUPPLEMENTAL RESPONSE TO PETITION TO TRANSFER

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Question Presented on Transfer

Whether a trial court may rely on “scoring models” in sentencing.

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“Scoring models,” such as the LSI-R and SASSI, are admissible in Indiana. This Court’s concerns expressed in *Cardwell*¹ are not threatened by the inclusion of such evidence-based practice results in sentencing, provided their proper purposes and limitations are observed. The interest in *Cardwell* in individualized sentencing, including a multitude of factors, is actually served by the admission and consideration of the LSI-R and similar instruments. Given their proper scope, “scoring models” are a legitimate and valuable contribution to the sentencing process.

¹ *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008).

BACKGROUND AND PRIOR TREATMENT OF THE ISSUE ON TRANSFER

The facts underlying Defendant's class D felony receiving stolen property conviction and his status as a habitual offender, as accurately found by the Court of Appeals, are as follows:

Malenchik and his mother, Marilyn Hopkins ("Hopkins"), lived with Connie Griesey ("Griesey") at some point prior to the events of the instant case. In September of 2005, Malenchik was convicted of Theft for taking property belonging to Griesey, and he was ordered not to enter her property.

A year and a half later, several items were stolen from Griesey's home, including a flat-screen television, DVDs, a camera and its accessories, as well as two guns-one each from her maternal and paternal grandfathers. On November 17, 2008, Malenchik pled guilty to Receiving Stolen Property, as a Class D felony. The trial court then found that he was a Habitual Offender.

Malenchik v. State, No. 79A02-0902-CR-133, 1 (Ind. Ct. App. 2009) (unpublished).

At sentencing, the trial court considered numerous instances of Defendant's prior behavior including his lengthy criminal history at only twenty-years of age, and his continued use of drugs in the face of court-ordered testing (Tr. 12-15). *Id.* at 7. The trial court also mentioned "in passing," Defendant's Level of Service Inventory-Revised ("LSI-R") and Substance Abuse Subtle Screening Inventory ("SASSI-3") scores during sentencing. *Id.* at 7.²

The trial court sentenced Defendant to three years on the receiving stolen property charge, enhanced to six years by virtue of his status as a habitual offender. Of the six years,

² Defendant's LSI-R score of 41 ("high risk/needs category") and SASSI determination ("high probability of having a substance disorder") were included in his PSI (Appellant's Green Appendix, 8).

four years were ordered executed at the Department of Correction and two years were ordered suspended to probation (Appellant's App. 1-2, 70-71).³

On appeal, Defendant argued that the trial court abused its discretion by referring to his LSI-R and SASSI scores during sentencing. Defendant relied on *Rhodes v. State*, 896 N.E.2d 1193 (Ind. Ct. App. 2008) where the Court of Appeals held:

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, 1224 (Ind. 2008). Therefore, it is an abuse of discretion to rely on scoring models to determine a sentence.

Id. at 1195. The LSI-R and SASSI scores were sponsored by the probation department. The State did not utilize them in arguing for Defendant's sentence. On appeal, the State argued, and the Court of Appeals agreed, that because the trial court relied on other proper considerations in sentencing Defendant, there no abuse of discretion. *Malenchik*, slip op. at 3. This Court has granted transfer.

ARGUMENT

The use of "scoring models" in sentencing does not offend Indiana's sentencing jurisprudence or the trial court's responsibility to craft an individualized sentence, provided their proper purposes and limitations are observed.

This Court's reasoning in *Cardwell*, coupled with a trial court's responsibility to craft an individualized sentence, does not prohibit a trial court from relying on the LSI-R, or any

³ Citations to "Appellant's App" refer to his appendix filed in the Court of Appeals.

“scoring model,” in issuing a sentence. There appears to be no impediment in Indiana’s sentencing jurisprudence to the use of evidence-based practices in sentencing. A trial court’s responsibility to issue an individualized sentencing is actually served by the admission and consideration of the LSI-R and similar instruments, provided their proper purposes and limitations are observed. The self-imposed limitations of any given scoring model should serve to restrict its applicability. In support of its argument, the State will address our own jurisprudence, the purpose and validity of the LSI-R, and the utilization of evidence-based practices by our sister states in determining whether “scoring models” should be permitted in sentencing and if so, for what purpose.

Admissibility factor in Indiana

During sentencing, a trial court is provided a wealth of information from a defendant and the State before it issues a sentence. That information includes a pre-sentence investigation report (“PSI”). Ind. Code §35-38-1-8. The PSI may contain any information a probation officer deems relevant. Ind. Code § 35-38-1-9(c). Other information is provided in the form of testimony and other material presented by a defendant or the State. Ind. Code § 35-38-1-3. The trial court, in addition to considering and weighing the information provided by the parties, “may consider a non-inclusive list of aggravator or mitigators.” Ind. Code § 35-38-1-7.1. There appears to be no exclusion in the use of “scoring models,” or evidence-based practices, in determining a defendant’s sentence.

The term evidence-based practice “refers to professional practices that are supported by the best research evidence consisting of scientific results related to intervention strategies...derived from clinically relevant research...based on systemic reviews, reasonable effect sizes, statistical and clinical significance, and a body of supporting

evidence.” Roger, Warren, University of San Francisco Law Review: Evidence-Based Sentencing: The application of principles of evidence-based practice to state sentencing practice and policy, 43 U.S.F. L. Rev. 585, 597 (2009). In the realm of corrections, evidence-based practice would refer to scientifically proven practices that have been proven to reduce recidivism. *Id.* As to any challenge to the admissibility of evidence-based practices by a defendant under Indiana Evidence Rule 702 or any other scientific basis, the “the rules of evidence, other than those concerning matters of privilege, do not apply” to sentencing. *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App.1999) (citing Ind. Evidence Rule 101(c)(2); *Jackson v. State*, 697 N.E.2d 53, 55 (Ind.1998)). While the rules of evidence are relaxed during sentencing, the State acknowledges that “a defendant has the right to challenge any information used in determining a sentence. *White v. State*, 756 N.E.2d 1057, 1061 (Ind. Ct. App. 2001) (citing *Dillon v. State*, 492 N.E.2d 661, 663 (Ind. 1986)). However, such a challenge would then be to the weight, if any, a trial court was to afford the evidence-based practice.

After this Court issued *Anglemyer*, it is now improper to argue that a trial court abused its discretion in failing to “properly weigh” those circumstances. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). While a defendant may challenge the validity of the evidence-based practice and argue as to the weight afforded to the practice, there appears to be no avenue for a defendant to object to its admissibility. In addition, any prejudice suffered by a defendant in considering evidence-based practices in sentencing is diminished because sentencing is conducted before a judge, who is able to evaluate the evidence-based practice for what it is, and not a jury.

Background, purpose, and predictive validity of the LSI-R

As of 2005, approximately one-quarter of Indiana's counties utilize the LSI-R.⁴ The original model for LSI-R was developed in Canada in the late 1970s by Don A. Andrews, Ph.D., through collaboration with probation officers, correctional executives, and research professionals. Andrews, D.A. & Bonta, J.L., LSI-R, The Level of Service Inventory – Revised User's Manual, 1 (1995) ("Manual"); Girard, L. & Wormith, S.J., The Predictive Validity of the Level of Service Inventory –Ontario Revision on General and Violent Recidivism among Various Offender Groups, *Criminal Justice and Behavior*, Vol. 31 No.2, 151 (2004).⁵

"The LSI-R is a quantitative survey of attributes of offenders and their situations relevant to level of service decisions. The LSI-R is composed of 54 items. Each item is answered with a Yes or No, or a 0 to 3 rating." Manual at 1. The subcomponents of the items are as follows:

- Criminal History – ten items
- Education/Employment – ten items
- Financial considerations – two items
- Family/Marital – four items
- Accommodation – three items
- Leisure/Recreation – two items
- Companions – five items
- Alcohol/Drug Problems – nine items

⁴ According to the Indiana Judicial Center, as of 2005, twenty-one counties were utilizing the LSI-R. They are: Whitley, Carroll, Dearborn, Elkhart, Hamilton, Miami, Monroe, Montgomery, Owen, Porter, St. Joseph, Tippecanoe, Vigo, White, Bartholomew, Floyd, Grant, Ripley, Shelby, Steuben, and Johnson. In addition, the undersigned deputy, through conversations with Marion County Probation, verified that Marion County is currently utilizing the LSI-R in preparing pre-sentence investigation reports.

⁵ The instrument, as originally developed, was titled the "Level of Supervision Inventory" ("LSI"). Revisions to the tool have led the current title of the Level of Service Inventory Revised ("LSI-R"). Manual at viii. The manual is included in the State's Supplemental Appendix.

- Emotional/Personal – five items
- Attitudes/Orientation – four items

Id. at 2.⁶ The subcomponents consist of both dynamic (changeable) items and static items.

The dynamic items serve as both “risk factors” and “treatment targets.” *Id.*

The test is conducted in a semi-structured interview process. *Id.* at 3-5. Answers to the questions receive a score as noted above. *Id.* at 1. The higher the aggregate score, the higher the risk the offender will recidivate, and thus the need for a more intensive level of service. *Id.* at 14. Administrators of the LSI-R should “be familiar with the standards for educational and psychological testing developed jointly by the American Psychological Association, American Educational Research Association, and the National Council on Measurement in Education.” *Id.* at 3. According to the Indiana Judicial Conference, training is required for probation officers in Indiana who administer the LSI-R. The training is provided by either the Department of Correction or through a Multi-Health Systems (“MHS”)⁷ authorized training program.

The purpose and intended uses of the LSI-R include:

identifying treatment targets and monitoring offender risk while under supervision and/or treatment services; making probation/supervision decisions; making decisions regarding placement into half-way houses, deciding appropriate security-level classification within institutions; and assessing the likelihood of recidivism.

Id. at 3. The LSI-R was designed for specific purposes, and thus has explicit restrictions.

Specifically,

[the LSI-R] was designed to assist in the implementation of the least restrictive and least onerous interpretation of a criminal sanction, and to identify dynamic areas of risk/needs that may be

⁶ “*Id.*” refers the LSI-R Manual cite above.

⁷ MHS is the publisher of the LSI-R manual.

addressed by programming in order to reduce risk. *[The LSI-R] is not a comprehensive survey of mitigating and aggravating factors relevant to criminal sanctioning and was never designed to assist in establishing the just penalty.*

Id. at 3 (emphasis added).

The reliability and validity of the LSI-R has been evaluated by both its authors and independent researchers. The LSI-R's user manual includes various validity studies that attest to the instruments reliability. Manual at 37-49. For instance, within a probation/parole setting, the LSI-R was "significantly correlated" to in-program success and recidivism. *Id.* at 43. In addition, the LSI-R has been found to predict recidivism accurately for both male and female inmates. Flores, *et al.* Predicting Outcome with the Level of Service Inventory-Revised: The Importance of Implementation Integrity, *Journal of Criminal Justice*, 34, 523-529, 525 (2006); Lowencamp, *et al.* Risk/Need Assessment, Offender Classification, and the Role of Child Abuse, *Criminal Justice and Behavior*, 28(5), 543-563 (2001); Gendreau, *et al.* Predicting Adult Offender Recidivism: What Works! 575-607 (1996).⁸ Moreover, the Flores study indicated that there is a direct correlation between the amount of experience and training the administrator has in conducting the LSI-R to the reliability of the results.

⁸ In a study conducted on behalf of the Pennsylvania Board of Probation and Parole, it was determined that LSI-R created "noise" for the purpose of determining which offenders currently incarcerated would pose a risk to the public if paroled. There were only eleven items that were found to be associated with recidivism. The study concluded that the Pennsylvania Parole Board would be better suited utilizing a condensed version of a similar test that focuses on the factors most reflective of recidivism. The study further indicated that "[t]he LSI-R, in its full version, is best suited for institutional case planning upon admission to prison and to determine the level of community supervision required once parole has been granted." Austin, *et al.* Reliability and Validity Study of the LSI-R Risk Assessment Instrument, 1-23, (2003). The study reemphasizes that the LSI-R is not limited to an assessment of recidivism.

The LSI-R's predictive validity is limited only by its self-imposed competency: "to assist in the implementation of the least restrictive and least onerous interpretation of a criminal sanction, and to identify dynamic areas of risk/needs that may be addressed by programming in order to reduce risk." Manual at 3.⁹ Stated another way, the LSI-R is designed to promote treatment options and to properly determine the service needs of offenders and not solely an offender's risk of recidivism.

Evidence-based practice and its application to sentencing in Indiana

The Court of Appeals in *Rhodes* has precluded the use of evidence-based practices as an aggravator. *Rhodes* 896 N.E.2d at 1195. Neither the Court of Appeals, nor this Court, has yet to provide guidance on when, how, if, and to what extent, evidence-based practices may be utilized in sentencing. As such, in addition to analyzing our jurisprudence, it is appropriate to look to the practices of our sister states, discussed *infra*, which offer support for the State's contention as to the proper uses of evidence-based practices.

In *Rhodes*, the Court of Appeals found the trial court abused its discretion in utilizing the LSI-R as an aggravating factor. *Id.* In prohibiting the use of evidence-based actuarial instruments as an aggravator, the Court of Appeals in *Rhodes* referenced a trial court's responsibility to craft an individualized sentence and also relied, in part, on *dicta* from this Court's opinion in *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). *Rhodes*, 896 N.E.2d at 1195. In discussing the parameters of *Anglemeyer*, *supra*, this Court in *Cardwell* discussed the individualized nature of Indiana's sentencing scheme where evidence-based

⁹ The SASSI-3, also referenced by the trial court, is a psychological screening questionnaire that identifies adults who have a high probability of having a substance abuse disorder. See http://pubs.niaaa.nih.gov/publications/Assesing%20Alcohol/InstrumentPDFs/66_SASSI.pdf. The instrument is approximately ninety-three percent accurate and training is not required to administer the test. (Appellant's App. 67).

practices were not at issue. *Cardwell*, 895 N.E.2d at 1224. With respect to mechanical approaches to sentencing, and after referencing the complexity of the federal sentencing guidelines and the federal government's eventual relaxation of its strict guidelines requirement, this Court stated:

Indiana has never adopted a mechanical approach to sentencing, and we have not identified any inflexible system that did not raise more problems than it solved. Any 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.

Id. The statement refers to an algorithmic based sentencing scheme that would remove the ability of the trial court to fashion an individualized sentence. If *Cardwell's* concerns were realized, a trial court would be permitted to consider only the number of crimes, statutory definition of the crime, and consequences in reaching a sentence. Thus, consideration of evidence based-practices by the trial court would not run afoul this reasoning, provided the "scoring model" is not the *only* tool utilized by the trial court.

While sentencing remains an individualized practice performed by the trial court, the use of these evidence-based practices does not intrude or alter the essential nature of Indiana's sentencing scheme. The Court of Appeals held in *Rhodes* that the use of these "scoring models" as an aggravating circumstance would permit the trial court to consider duplicative factors in enhancing a sentence. *Rhodes*, 896 N.E.2d at 1195. The concerns the Court of Appeals had in *Rhodes* applies equally to mitigators. However, *Cardwell* does not prohibit the use of evidence-based practices in sentencing because such use does not threaten to convert Indiana's sentencing scheme into a mechanical machine, provided the evidence-based practice is utilized for its self-imposed purpose and not the sole factor relied upon by

the trial court. A number of our sister states have also utilized evidence-based practices in sentencing.

Since 2003, Virginia has utilized a risk assessment instrument to divert non-violent offenders who are “good candidates” from incarceration. *Id.* at 608.¹⁰ The assessment was designed to divert twenty-five percent of non-violent offenders from incarceration into alternative sanctions. *Id.* See also fn. 11, *infra*. When judges in Virginia were asked to express their view of the evidence-based practice, “most judges viewed risk assessment as a complement to the sentencing guidelines, and did not believe it infringed on judicial discretion. Furthermore, none of them were opposed to having the instrument available. Several judges added that they ultimately retain discretion because the system is voluntary.” See fn. 11, *Offender Risk Assessment in Virginia*, p. 3.

San Diego has implemented a pilot program that evaluates the involvement of judges and probation officers in crafting treatment plans for offenders sentenced to incarceration. The treatment plans are based on information derived from a risk and needs assessment tool, another evidence-based practice, at the time of sentencing. 43 U.S.F. L. Rev. 585, 609.

Maine also implemented an evidence-based practice pilot program in which prior to entering a plea, an offender is screened using a risk/needs assessment tool to determine whether the offender would qualify for diversion or unsupervised probation. 43 U.S.F. L. Rev. 585, 609-10. Upon conviction, the trial court would mandate the administration of the LSI-R. If the offender was classified as high-risk, a PSI is ordered. However, the LSI-R

¹⁰ See also *Offender Risk Assessment in Virginia: A Three Stage Evaluation, Process of Sentencing Reform, Empirical Study of Diversion and Recidivism, Benefit-Cost Analysis*, p. 1, available at http://www.vcsc.state.va.us/risk_off_rpt.pdf

would be utilized only in setting probation conditions or sanctions imposed post-revocation.
43 U.S.F. L. Rev. 585, 609-10.¹¹

Therefore, in implementing a sentencing regime where evidence-based practices are utilized based on the instruments' self-imposed competencies, Indiana would place itself within the mainstream of the jurisprudence of our sister states.

Application to Defendant's sentence

The Court of Appeals concluded the trial court did not abuse its discretion because the trial court did not rely explicitly on the results of Defendant's LSI-R and SASSI as an aggravating, mitigating, or sentencing factor. *Malenchik*, slip op. at 7. The trial court based its sentencing decision "upon a series of proper considerations" including Defendant's repeated failure to take advantage of court-ordered services, and his continued use of drugs in the face of court-ordered testing. *Id.*

Defendant failed to raise this issue before the trial court, and thus has failed to preserve the issue. Regardless of whether Defendant is permitted to object to the instruments admissibility during sentencing, the onus remains with Defendant to raise the issue before the trial court in order to preserve the issue for appellate review. See *Turner v. State*, 870 N.E.2d 1083, 1085 (Ind. Ct. App. 2007). Defendant, having failed to do so in the instant case, has failed to preserve the issue. *Id.*

The trial court did not use Defendant's LSI-R and SASSI scores as either an aggravator or mitigator. The trial court relied on a series of proper considerations in sentencing Defendant including his repeated failure to take advantage of court-ordered services and his continued use of drugs in the face of court-ordered testing (Appellant's

¹¹ Washington County, Minnesota currently uses LSI-R. U.S.F. L. Rev. 585, 609.

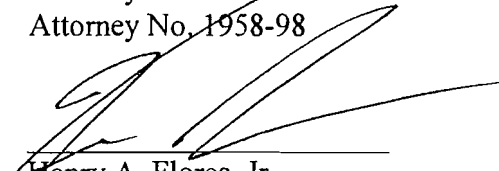
App. 63-68). It is apparent from the record that the trial court did not rely exclusively on evidence-based practices in sentencing Defendant. The trial court's reliance on the results of Defendant's "scoring models" did not run afoul *Cardwell*. Accordingly, the trial court properly sentenced Defendant.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm the trial court. The State also respectfully requests that should the Court permit trial courts to utilize evidence-based practices in sentencing, that their application be limited to assisting service determinations.

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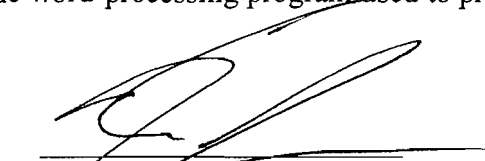


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CERTIFICATE OF WORD COUNT

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CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties of perjury that on the 29th day of September, 2009, I served upon the Appellant and *Amicus Curiae*, copies of the State's Supplemental Response to Petition to Transfer by depositing the same in the United States mail, first-class postage prepaid, addressed as follows:

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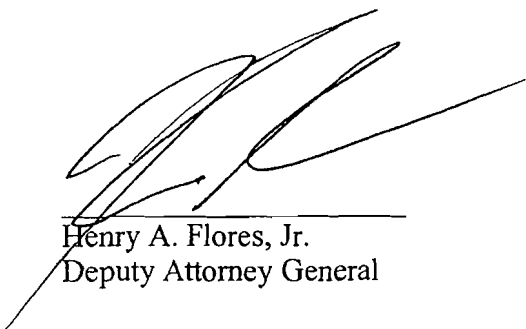
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