Thus, the Legislature may amend the statute to refine or change the definition of an "innocent third party."

But because such a change is the province of the Legislature, it cannot come from this court. For over 10 years, the Legislature has apparently acquiesced in this court's 2002 assessment of legislative intent and its definition fashioned to implement that intent. If the definition is to be changed now, it must be enacted by the Legislature. I therefore join the court's opinion.

STATE OF NEBRASKA, APPELLEE, V. DEVIN D. QUALLS, APPELLANT.

824 N.W.2d 362

Filed December 21, 2012. No. S-12-409.

1. **Constitutional Law: Waiver: Appeal and Error.** In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
2. **Criminal Law: Statutes: Presentence Reports.** The plain language of Neb. Rev. Stat. § 29-2261(1) (Cum. Supp. 2012) provides that a presentence investigation is mandatory in felony cases, except if it would be impractical.
3. **Presentence Reports: Waiver.** The right to a presentence investigation may be waived.
4. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
5. **Constitutional Law: Waiver: Records.** A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

Pursuant to a plea bargain, appellant Devin D. Qualls pled guilty to one count of theft by deception in the amount of $500 to $1,500, in return for the dismissal of other charges and the State's promise that it would not object to Qualls' request that any sentence be served concurrently to a federal sentence that had been imposed upon Qualls. The district court sentenced Qualls to 20 months' to 4 years' imprisonment with credit for 5 days' time served. The district court ordered that sentence to be served consecutively to the federal sentence. Qualls appeals. We affirm.

BACKGROUND

Qualls was charged with theft by deception in the amount of $500 to $1,500. Qualls allegedly used checks written on accounts with insufficient funds to purchase gift cards sold as part of a fundraiser for a Catholic school in Papillion, Nebraska. The record suggests that Qualls perpetrated this scheme across the Omaha, Nebraska, area.

The issue on appeal is whether Qualls was adequately informed of his right to a presentence investigation. As relevant on appeal, the record shows that during Qualls' plea hearing, the following colloquy took place:

> THE COURT: . . . I do need to advise you that since this is a felony offense, you do have a right to have a presentence investigation report prepared in this case.
>
> Your attorney has indicated that you wish to waive that right and have me do sentencing based upon, I believe, the reports and your criminal history and then any other information you wish to present.
>
> Do you wish to waive your right to a presentence report, sir?
>
> [Qualls]: Yes.
>
> THE COURT: All right. Has anyone threatened you or promised you anything to waive that right?
>
> [Qualls]: No.
>
> THE COURT: Are you waiving that right freely and voluntarily?

> [Qualls] Yes.
>
> THE COURT: A11 right. The Court will find that the waiver of presentence report has been made freely, voluntarily, knowingly and intelligently.

Qualls contends that this advisory was insufficient to inform him of his right to a presentence investigation. But the State contends that Qualls was informed that he had a right to a presentence investigation and that the record establishes that Qualls' waiver was made freely, voluntarily, knowingly, and intelligently, which is all that should be required.

ASSIGNMENT OF ERROR

Qualls assigns that the district court erred in "failing to advise [him] of the right being waived when he agreed to not insist on his statutory right to a presentence investigation."

STANDARD OF REVIEW

[1] In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.[1]

ANALYSIS

[2] In his sole assignment of error, Qualls argues that the district court erred in failing to properly advise him of his right to a presentence investigation. Neb. Rev. Stat. § 29-2261(1) (Cum. Supp. 2012) provides that "[u]nless it is impractical to do so, when an offender has been convicted of a felony other than murder in the first degree, the court shall not impose sentence without first ordering a presentence investigation . . . ." The plain language of the statute provides that this investigation is mandatory in felony cases; however, there are exceptions under which such an investigation is unnecessary.

[3] The first such exception is set out in the statute itself; an investigation is not necessary if it would be impractical. We have explained that one such instance might be where another investigation had just been completed.[2] In addition to this

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[1] Cf. *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

[2] See *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986).

statutory exception, this court has held that such an investigation may be waived.[3]

[4,5] Though this court has held that an otherwise mandatory presentence investigation may be waived, we have never before opined upon how such a waiver would be effectuated. As a general proposition,

> [a] waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. . . . A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.[4]

In *State v. Figeroa*,[5] we addressed whether a defendant had voluntarily, knowingly, and intelligently waived his right to counsel. We noted that "a formalistic litany is not required"[6] to establish such a waiver and examined the totality of the circumstances before concluding that the defendant was competent to waive counsel and that "the defendant was sufficiently aware of the right to have counsel and of the possible consequences of a decision to proceed without counsel."[7]

And in *State v. Fox*,[8] we concluded the district court did not err in finding that the defendant had waived his right to be present at trial. In addition to protection under the U.S. and Nebraska Constitutions, the right to be present at trial is guaranteed by Neb. Rev. Stat. § 29-2001 (Reissue 2008). But we have long held that the right to be present at trial can be waived so long as that waiver was voluntary and knowing.[9]

We conclude that the appropriate standard to apply in the case of a waiver of a right to a presentence investigation under

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[3] *Id.*

[4] *State v. Kennedy*, 224 Neb. 164, 170, 396 N.W.2d 722, 726 (1986).

[5] *Figeroa, supra* note 1.

[6] *Id.* at 103, 767 N.W.2d at 780.

[7] *Id.* See, also, *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

[8] *State v. Fox*, 282 Neb. 957, 806 N.W.2d 883 (2011).

[9] *Id.* (citing *Scott v. State*, 113 Neb. 657, 204 N.W. 381 (1925)).

§ 29-2261 is whether it is apparent from the record that the defendant's relinquishment of the right was knowingly and intelligently made.[10]

But this does not end our inquiry. We are next presented with the question of whether Qualls' waiver was, in fact, knowingly and intelligently made. While Qualls acknowledges that he was informed of his right to a presentence investigation, he contends that his waiver could not have been made knowingly, because he was not aware that (1) a presentence investigation was "mandatory"[11]; (2) the lack of such a report would mean that any appellate court "would not have the benefit of [the report's] findings [were] he to be unsatisfied with his sentence"[12]; (3) the absence of a presentence investigation deprives the sentencing court of the ability to properly consider all the factors it is required to consider under § 29-2261(3), further suggesting that a deficient advisement leads to a sentence that is an abuse of discretion in every case; and (4) by waiving the right to a presentence investigation, he was also waiving his right to have mitigating factors presented to any appellate court that might hear his appeal.

We find all of these contentions to be without merit. Qualls first argues he was not informed that absent waiver, a presentence investigation was "mandatory." But he was clearly informed that he had a right to a presentence investigation. We decline to engage in Qualls' game of semantics.

Qualls also asserts that he was not aware that by waiving the presentence investigation, an appellate court would not have access to this investigation in the event he was "unsatisfied" with his sentence. There are two problems with this assertion. First, it is self-evident that by waiving the presentence investigation, such investigation would not be completed and thus would be unavailable to the district court and also to any appellate court. Moreover, Qualls does not directly contend that his sentence was excessive or otherwise problematic, except the

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[10] See *State v. Kellogg*, 10 Neb. App. 557, 633 N.W.2d 916 (2001).

[11] Brief for appellant at 8.

[12] *Id.*

general contention that the sentence imposed upon him was "a direct result of the absence of the safeguard guaranteed by such an investigation."[13]

Qualls next contends that the lack of a presentence investigation means that a sentencing court cannot consider the sentencing factors set forth in § 29-2261(3) and that any resulting sentence is an abuse of discretion. Qualls' argument on this point is also without merit. Just as it is self-evident that waiving a presentence investigation invariably means there will be no presentence investigation completed and available to the courts, it is also self-evident that such a waiver might limit the sentencing court's available information. It should be noted that in this case, the district court had before it the police reports and a criminal history, and additionally provided Qualls the opportunity to introduce other information. (We note that despite this opportunity, Qualls failed to present any such evidence.) Moreover, this court has indicated these factors, among others, are to be considered in all sentencings,[14] while a presentence investigation is mandatory only in felony cases.[15] Therefore, in misdemeanor cases, a sentencing court considers these factors to the best of its ability, even without the benefit of a presentence investigation; thus, it is difficult for us to find that the lack of a presentence investigation could have substantially limited the district court's ability to adequately impose sentence.

Finally, Qualls argues that he was not aware that by waiving the presentence investigation, he was waiving the right of an appellate court to consider any mitigating factors. But at least on the facts of this case, such is not so. As is noted above, the district court provided Qualls the opportunity to introduce into evidence for sentencing purposes "any other information you wish to present," but Qualls failed to do so. If he had introduced such evidence, the information would have been preserved for an appellate court's review.

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[13] *Id.*

[14] See *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[15] See § 29-2261(1) and (2).

We reject Qualls' contentions that his waiver was not knowing. As noted above, this court has previously held, with respect to constitutional rights, that "a formalistic litany is not required" to establish waiver, but instead that waiver is shown under the totality of the circumstances. And we decline to require a more "formalistic litany" for the waiver of a statutory right than for the waiver of a constitutional one.

A review of the totality of these circumstances shows that Qualls was informed of his right to a presentence investigation, was informed as to what information the judge would be considering, was provided the opportunity to present any additional information to the court, was questioned as to whether he had been threatened or promised anything for his decision to waive this right, and was expressly asked if his waiver was made freely and voluntarily. The district court did not clearly err in finding that Qualls' waiver was made "voluntarily, knowingly, and intelligently."

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF CANDICE H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. CANDICE H., APPELLEE.

824 N.W.2d 34

Filed December 21, 2012. No. S-12-424.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. ____: ____. In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings.
3. **Juvenile Courts: Probation and Parole: Sentences: Records.** Satisfactory completion of a juvenile's probation, supervision, or other treatment or rehabilitation program provided under the Nebraska Juvenile Code or satisfactory