[Cite as *State v. Jackson*, 2015-Ohio-2171.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-140384 TRIAL NO. B-1205198
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
DOMINIC JACKSON,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentence Reversed, and Cause Remanded

Date of Judgment Entry on Appeal: June 5, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. Bicknell, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Presiding Judge.

{¶1} Defendant-appellant Dominic Jackson appeals from the trial court's judgment revoking his community control and sentencing him to 18 months in prison. On appeal, he argues that his sentence is contrary to law because the trial court failed to consider the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12, and it denied him the right to allocution. Finding merit in his allocution argument, we reverse Jackson's sentence and remand this cause to the trial court for a new sentencing hearing.

Community-Control-Violation Hearing

{¶2} On September 7, 2012, Jackson pleaded guilty to one count of receiving stolen property, a felony of the fourth degree. On October 23, 2012, the trial court sentenced Jackson to two years of community control, with the conditions that Jackson follow the standard rules and requirements of probation, pass the General Educational Development ("GED") test, and pay court costs and probation fees. The trial court informed Jackson that if he violated the terms and conditions of community control, it would impose an 18-month prison term.

{¶3} On May 15, 2014, Jackson was charged with violating the terms and conditions of his community control. He had failed to report to his probation officer in February, March, and April 2014, and he had failed to pay his court costs and probation fees. On June 2, 2014, Jackson waived his right to a probable-cause hearing and stipulated to the facts underlying the community-control violations. The trial court found he had violated the terms of his community control.

{¶4} The trial court then stated that it was going to send Jackson to the Hamilton County Justice Center for 60 days, so that he could "get his act together" and enroll in the GED program. Jackson's counsel told the court that Jackson was

under the impression that he did not qualify for the program. The following exchange then took place between Jackson and the trial court:

> THE COURT: Let me be very, very clear. The only place you're going, if it doesn't work out in the Justice Center is the Ohio Department of Corrections.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: You did nothing. You have a lousy record. You have a police officer who tried to mentor you for years and said nothing worked.
>
> THE DEFENDANT: I mean, I took the GED program. I failed the first test. I was supposed to take the test over. I got two kids, Your Honor.
>
> THE COURT: You've done nothing. How are you going to help two kids by being in the Ohio Department of Corrections?
>
> THE DEFENDANT: Yes Ma'am. Every penny I get goes towards the household, each dollar.
>
> THE COURT: Here's the problem. You never reported to probation. You never responded to their attempting to contact you. You didn't do anything.
>
> THE DEFENDANT: I didn't have a phone.
>
> THE COURT: I'm sure some of your friends have phones.
>
> THE DEFENDANT: I missed one appointment. I had a warrant.
>
> THE COURT: Don't give me that. You know why this is so thick? This is so thick because it is your record. We'll continue it for 60

days and see how it goes. Never mind. It doesn't look like that's going to work.

THE DEFENDANT: Yes ma'am. I was –-.

THE COURT: You just shook your head.

THE DEFENDANT: I was talking to him, Your Honor.

THE COURT: Mr. Jackson, it is clear to me from your attitude that you don't get it. I'm not going to waste the time, effort, and space.

THE DEFENDANT: I don't understand. So, he was explaining, that's all.

THE COURT: How many times does he need to explain it? And I don't need all the sighs and the eye rolling and everything. I'm done. All right. I'm done. We're not doing that. We're sentencing now. We're going to terminate the probation on the charge of receiving stolen property, a Felony of the Fourth Degree, we're going to sentence you to 18 months in the Ohio Department of Corrections.

THE DEFENDANT: Please, Your Honor, he was just explaining to me.

THE COURT: Don't give me that. Don't make it worse.

THE DEFENDANT: I apologize for my attitude.

THE COURT: You obviously understand the GED program because you've been told by me, you've taken the test. Be quiet. That's enough. Eighteen months in the Ohio Department of Corrections. You'll be eligible for any program you can get into. We'll credit the

> time served. They'll be no fines, there will be court costs. You can either pay them or work them off through community service.
>
> THE DEFENDANT: He was just telling me --.
>
> THE COURT: I'm sorry. I'm telling you to be quiet. * * * The police officer that tried to mentor you said in the pre-sentence investigation and I quote, "Many officers have tried to mentor the defendant. He continues to lead a life full of criminal activity and needs time to wake up." He's recommending incarceration. I gave you time on probation. You didn't do it. You didn't wake up. Maybe you'll wake up. Thank you.

Crim.R. 32 and the Right of Allocution

{¶5} We begin by addressing Jackson's second assignment of error, which we find dispositive of his appeal. In his second assignment of error, Jackson argues the trial court violated his right to allocution when it failed to permit him to address the court following its decision to impose a prison sentence

{¶6} Crim.R. 32(A)(1) provides, "[a]t the time of imposing sentence, the court shall * * * [a]fford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." Likewise, R.C. 2929.19(A)(1) permits a defendant to "present information relevant to the imposition of sentence" in the case and requires the trial court to ask the defendant "whether he has anything to say as to why sentence should not be imposed * * *."

{¶7} The Ohio Supreme Court has held that the right to allocution is mandatory. *See State v. Campbell*, 90 Ohio St.3d 320, 324-325, 738 N.E.2d 1178

(2000). Thus, if the trial court does not ask the defendant if he wishes to speak in allocution, the defendant cannot be deemed to have waived the right by failing to object at the sentencing hearing. *Id*. "In a case in which the trial court has imposed sentence without first asking the defendant whether he or she wishes to exercise the right of allocution created by Crim.R. 32(A), resentencing is required unless the error is invited error or harmless error." *Id.* at paragraph three of the syllabus.

{¶8} The state argues that when a defendant is sentenced for a community-control violation, he has no right to allocution. In *State v. McAfee*, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, ¶ 14, we rejected this argument. We held that McAfee, who was being sentenced to prison for a felony, following a violation of his community control, had a right to allocution under R.C. 2929.19(A)(1) and Crim.R. 32(A)(1). We declined to follow those appellate districts that had reached a contrary result. *Id*. We noted that in *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17, the Ohio Supreme Court "had effectively resolved this issue to the contrary, holding that the sentencing hearing conducted upon finding a community-control violation constitutes 'a second sentencing hearing[,] [at which] the court sentences the offender anew and must comply with the relevant sentencing statutes.'" *Id*. Thus, we held that a trial court, when sentencing a defendant for a community-control violation, is required to address the defendant personally and "to afford him his statutory right to speak concerning matters relevant to his sentence." *Id.*, citing *State v. Thompson*, 1st Dist. Hamilton No. C-120516, 2013-Ohio-1981.

{¶9} Here, the record reflects that the trial court told Jackson it was continuing the matter for sentencing so that Jackson could enroll in the GED program at the Hamilton County Justice Center. The trial court then peppered Jackson with both comments and questions relating to his failure to comply with the

terms and conditions of community control. The trial court again stated that it was going to continue the matter for 60 days. Only after the court determined that Jackson was being disrespectful by shaking his head, rolling his eyes, and sighing, did the trial court decide it was going to sentence Jackson to prison. Although Jackson apologized to the trial court for his actions, the trial court never provided Jackson or his counsel with an opportunity to speak in mitigation before it imposed the maximum prison term of 18 months. Moreover, when Jackson later tried to speak at two separate times, the trial court told him to be quiet. Thus, the trial court did not provide Jackson with his right to allocution.

{¶10} In *State v. Mynhier*, 146 Ohio App.3d 217, 223, 765 N.E.2d 917 (1st Dist.2001), this court held that a trial court's failure to comply with Crim.R. 32 was harmless error where the defendant failed to come forward with information on appeal that he would have provided the trial court in mitigation of the punishment imposed by the court had the trial court afforded him that opportunity.

{¶11} More recently in *State v. Thompson*, 1st Dist. Hamilton No. C-120516, 2013-Ohio-1981, ¶ 10, we questioned the viability of *Mynhier*. We noted that the Second Appellate District had disavowed the case the *Mynhier* court had relied upon, and that the Fourth, Seventh, and Eleventh Appellate Districts had declined to follow *Mynhier*. The Fourth and Eleventh Districts reasoned that it was unfair to judge the defendant's plea for mitigation on appeal when the defendant was entitled under Crim.R. 32 to make that plea in person to the court that was sentencing him, while the Seventh District reasoned that requiring the defendant to present such a plea on appeal would be problematic because the defendant is limited to the record on appeal and cannot present new evidence for the appellate court to consider. *See id.*, citing *State v. Spradlin*, 4th Dist. Pike No. 04CA727, 2005-Ohio-4704, ¶ 10; *State v.*

Brown, 166 Ohio App.3d 252, 2006-Ohio-1796, 850 N.E.2d 116, ¶ 11 (11th Dist.); *State v. Land*, 7th Dist. Mahoning No. 00-CA-261, 2002-Ohio-1531, ¶ 21.

{¶12} While we found their reasoning persuasive, we did not overrule *Mynhier* because we found it to be factually distinguishable from *Thompson*. We noted in *Thompson* that prior to imposition of sentence, the trial court had addressed the defendant, asking for his reasons for his actions and it had afforded the defendant an opportunity to speak further before entering judgment. *Id*. at ¶ 12. We held that when viewing the record as a whole, the defendant had been given an opportunity to "make his case in mitigation to the trial court" and that any failure to strictly comply with Crim.R. 32(A) was harmless. *Id*.

{¶13} Jackson, however, unlike the defendant in *Thompson*, was not afforded an opportunity to speak in mitigation before the trial court imposed his sentence. And when Jackson tried to speak, the trial court told him to be quiet not once, but two times. The trial court, moreover, did not afford Jackson's counsel an opportunity to speak on his behalf before imposing sentence.

{¶14} Thus, we are left to determine whether Jackson's failure, like the defendant in *Mynhier*, to come forward with the information on appeal that he would have offered the trial court in mitigation, renders the trial court's failure to comply with Crim.R. 32 harmless. After reviewing the cases criticizing *Mynhier*, we conclude for the reasons set forth within them that *Mynhier* is no longer viable precedent and we overrule it.

{¶15} Given that the trial court imposed the maximum prison term upon Jackson, we cannot say that had the trial court afforded Jackson and his attorney the opportunity to present evidence in mitigation, it would have had no positive effect upon his sentence. *Compare State v. Reed*, 10th Dist. Franklin No. 09AP-1164, 2010-

Ohio-5819, ¶ 19 (holding the trial court's failure to provide the defendant with the right to allocution harmless where the defendant had been sentenced to the minimum prison term allowed, and the court imposed no fines and waived costs). We, therefore, sustain his second assignment of error.

{¶16} Our disposition of Jackson's second assignment of error has rendered moot his first assignment of error, in which he asserts the trial court failed to consider the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors set forth R.C. 2929.12 before imposing his prison sentence. We, therefore, reverse Jackson's sentence, and we remand the cause to the trial court for resentencing in accordance with this opinion and the law. We affirm the trial court's judgment in all other respects.

Judgment affirmed in part, reversed in part, and cause remanded.

DEWINE, J., concurs.
MOCK, J., dissents.

MOCK, J, dissenting.

{¶17} I understand that the right of allocution at a community-control-revocation hearing is the law of this District, but I believe that case was wrongly decided. I respectfully dissent.

{¶18} In *State v. McAfee*, this court held that, when sentencing a defendant for a community-control violation, a trial court is required to address the defendant personally and allow an opportunity of allocution. *State v. McAfee*, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, ¶ 14. In support of that holding, this court cited the Ohio Supreme Court case of *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995. But I believe that this court has read the *Fraley* decision too broadly.

{¶19} *Fraley* addressed a situation where the trial court failed to sentence a defendant to a specific prison term on the date of his initial sentencing. The issues addressed in *Fraley* arose when the defendant, who had been placed on community control at his original sentencing, was not informed of the possible prison term in the event of a community-control- violation. *Id*. at ¶ 1. After being placed on community control, Fraley violated the terms on two separate occasions. At the second community-control-violation hearing, the trial court again reinstated his community control, but informed him of the possible prison term for any subsequent violations. *Id*. at ¶ 2-4. When Fraley once again violated the terms of his community control, he was sentenced to the prison term about which he had been informed at the previous hearing. *Id*. at ¶ 5. The appellate court reversed the decision of the trial court, finding that the trial court could not correct its initial failure to inform Fraley of the prison term when it sentenced him at the subsequent community-control-violation hearing. *Id*. at ¶ 6.

{¶20} The actual issue that the *Fraley* court was called to address by the conflicting decisions of the appellate districts was "whether R.C. 2929.19(B)(5) requires a judge to notify a defendant at his initial sentencing hearing, as opposed to any subsequent sentencing hearings, of the specific prison term that may be imposed as a sanction for a subsequent community-control violation." *Id*. at ¶ 8. The case was truly about the interplay between R.C. 2929.19(B)(5), which instructs the trial court to "indicate the specific prison term that may be imposed as a sanction for the [community-control] violation," and R.C. 2929.15(B), which indicates that the sanctions available for a community-control violation include the imposition of a prison term not exceeding "the prison term specified in the notice provided to the offender at the sentencing hearing * * *."

{¶21} When the *Fraley* court determined, in the context of a community-control-violation hearing, that "the court sentenced the offender anew and must comply with the relevant sentencing statutes," it was not speaking of the entirety of the statutory and procedural sentencing scheme. It was speaking in the context of this R.C. 2929.19(B)(5) and 2929.15(B) interplay and the mechanics of the actual imposition of a prison term. In particular, the court was addressing the untenable conclusion that the appellate court had reached—that once a trial court failed to impose a prison term at the original sentencing hearing, it could NEVER correct that defect at a subsequent community-control-violation hearing and, in essence, would NEVER be able to sentence that defendant to prison.

{¶22} For the above-quoted proposition of law, the *Fraley* court cited *State v. Martin*, 8th Dist. Cuyahoga No. 82140, 2003-Ohio-3381, ¶ 35. But the *Martin* court had merely said that "[w]hen a defendant violates community control sanctions; a second sentencing hearing is conducted. The sentence imposed in this second sentencing hearing must comply with R.C. 2929.14." (Citations omitted.) *Id.* ¶ 35. It made no reference to any other aspect of sentencing, and certainly not to a defendant's right to allocution. In fact, the Eighth Appellate District is one of the districts that has specifically held that there is no right of allocution at a violation hearing. *See State v. Henderson*, 8th Dist. Cuyahoga No. 42765, 1981 Ohio App. LEXIS 10890, *12 (June 18, 1981).

{¶23} Along with the Eighth Appellate District, the Third, Fifth, Seventh, and Eleventh Districts have likewise held that there is no separate right to allocation at a community-control-violation hearing. *See State v. Michael*, 3rd Dist. Henry No. 7-13-05, 2014-Ohio-754; *State v. Krouskoupf*, 5th Dist. Muskingum No. CT2005-0024, 2006-Ohio-783, ¶ 15; *State v. Favors*, 7th Dist. Mahoning No. 08-MA-35,

2008-Ohio-6361; *State v. Turjonis*, 7th Dist. Mahoning No. 11 MA 28, 2012-Ohio-4215, ¶ 6, 13; *State v. Gibson*, 11th Dist. Portage No. 2013-P-0047, 2014-Ohio-433, ¶ 43-44. Importantly, all of these cases were decided after the *Fraley* decision. Only this court has cited *Fraley* in the context of a right to allocution at community-control-violation hearings. And I believe it is time for this court to rejoin the other districts on this question.

{¶24} I agree with the holdings of the Third, Fifth, Seventh, Eighth, and Eleventh Districts that, where community control has been revoked and the trial court is simply reinstating an already determined sentence, there is no need for the defendant to be afforded the right to make a statement in mitigation of his sentence. As the Eleventh District noted:

> "The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into considering [sic] when considering the sentence to be imposed." *Defiance v. Cannon*, 70 Ohio App.3d 821, 828, 592 N.E.2d 884 (1990).
>
> * * * A sentence is imposed at sentencing, but when community control is modified or revoked no new sentence is imposed on the defendant; rather the defendant's probation is either modified or the defendant's sentence is reinstated.

Gibson at ¶¶ 43-44.

{¶25} Of course, the trial court may allow the defendant to speak at the revocation hearing, but that decision should be left to the discretion of the trial court. I do not think it is proper for this court to continue to take the *Fraley* holding out of context and broadly apply it so as to require a "second" allocution, which is not provided for by statute. We should take this opportunity to overrule our decision in

McAfee. And since the trial court did not violate Jackson's right of allocution, the assignment of error should be overruled.

Please note:

The court has recorded its own entry this date.