[Cite as *State v. Cantrell*, 2015-Ohio-1936.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 2014-CA-19
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2014-CRB-150
v.	:	
	:	(Criminal appeal from Champaign
MARK CANTRELL	:	County Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 15th day of May, 2015.

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HALL, J.

{¶ 1} Mark Cantrell appeals from his conviction and sentence following a guilty

plea to one count of first-degree misdemeanor theft.

{¶ 2} In his sole assignment of error, Cantrell contends the trial court committed plain error by not providing an opportunity for allocution prior to sentencing. For its part, the State has not filed an appellate brief.

{¶ 3} The record reflects that Cantrell was charged with theft for stealing beer from a Kroger store and then "returning" it to Walmart using an old receipt. He subsequently agreed to plead guilty in exchange for the prosecutor's recommendation of a 180-day jail sentence with 150 days suspended and three years of community control. The trial court accepted the plea and found Cantrell guilty. It then announced that it also would accept the prosecutor's sentencing recommendation and would "pass sentence right now." (May 20, 2014 Transcript at 4). The trial court proceeded to impose the recommended sentence. It also imposed a $550 fine and ordered Cantrell to pay court costs. The trial court journalized its sentence in a May 20, 2014 judgment entry. (Doc. #26).

{¶ 4} On appeal, Cantrell claims the trial court was required to provide an opportunity for allocution before sentencing and that its failure to do so constituted plain error. We agree. "The plain language of Crim.R. 32(A)(1) imposes a mandatory duty upon the trial court to unambiguously address the defendant and provide him or her with the opportunity to speak before sentencing." *State v. Collier*, 2d Dist. Clark Nos. 2006 CA 102, 2006 CA 104, 2007-Ohio-6349, ¶ 92. The right to allocution applies to felony and misdemeanor convictions. *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." *State v. Campbell*, 90 Ohio St.3d 320, 326, 738 N.E.2d 1178 (2000). "The error is harmless if the defendant made an unsworn statement to the jury, sent a letter to the judge, and defense counsel had made a statement to the judge on the defendant's behalf." *State v. Morris*, 2d Dist. Montgomery No. 24810, 2012-Ohio-3287, ¶ 22. The right to allocution is both absolute and not subject to waiver, however, due to the defendant's failure to object. *Collier* at ¶ 92; *see also State v. Lundberg*, 2d Dist. Montgomery No. 22708, 2009-Ohio-1641, ¶ 22 (recognizing that "it is plain error not to afford a defendant his right to allocution"). "Where the record shows that the court did not afford the right of allocution, and where this is the only error in the record, the finding of guilt is not reversed, but instead the cause is remanded to the trial court for the sole purpose of resentencing." *State v. Conkle*, 2d Dist. Montgomery Nos. 24161, 24163, 2012-Ohio-1772, ¶ 41.

{¶ 5} In the present case, the trial court did not provide an opportunity for allocution. After accepting Cantrell's plea, it immediately imposed sentence. Nothing in the record indicates that Cantrell invited this error. Nor do we find that the error was harmless. Although harmless error could be argued because the trial court imposed a sentence that Cantrell had agreed to have the prosecutor recommend, we would find such an argument unpersuasive. The plea agreement provided for the prosecutor to recommend a 180-day jail sentence with 150 days suspended and three years of community control. Nothing in the plea agreement indicates, however, that Cantrell agreed to forego his right to allocute for a more lenient sentence. Moreover, the prosecutor's recommendation did not address the issue of a fine, and Cantrell had a right to allocute against the imposition of one. Finally, we cannot find that the allocution issue is

moot. Although Cantrell may have served his thirty-day jail sentence, nothing in the record establishes that he has paid the fine or completed his community control, which means the suspended portion of the jail sentence remains subject to allocution.

{¶ 6} Cantrell's assignment of error is sustained. The trial court's judgment is reversed with respect to the imposition of sentence, and the cause is remanded for the limited purpose of resentencing. In all other respects, the trial court's judgment is affirmed.

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FAIN, J., and DONOVAN, J., concur.

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