[Cite as *State v. Fisher*, 2020-Ohio-6829.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL R. FISHER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 BE 0005

Criminal Appeal from the
Belmont County Court-Northern Division of Belmont County, Ohio
Case No. 19CRB00113

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Daniel P. Fry, Belmont County Prosecutor, *Atty. Scott Lloyd*, Asst. Prosecuting Attorney, 147-A W. Main Street, St. Clairsville, Ohio 43950 for Plaintiff-Appellee and

Atty. Edward A. Czopur, DeGenova & Yarwood, Ltd., 42 North Phelps St, Youngstown, Ohio 44503 for Defendant-Appellant.

Dated: November 2, 2020

Robb, J.

{¶1} Defendant-Appellant Michael Fisher appeals from his conviction for attempted drug possession entered in Belmont County Court, Northern Division. Three arguments are raised in this appeal. Appellant asserts the trial court had no authority to order a drug test post guilty plea but prior to the sentencing. He additionally contends trial counsel was ineffective for failing to object to the trial court's order requiring Appellant to submit to a drug test prior to sentencing. Lastly, he argues he was denied the right to allocution. For the reasons expressed below, the conviction is affirmed.

Statement of the Case

{¶2} Appellant was charged with drug instruments, a misdemeanor, and drug possession from methamphetamine (meth), a fifth-degree felony. The state and Appellant reached a plea agreement. The state dismissed the drug instruments charge and amended the drug possession charge to attempted drug possession in violation of R.C. 2923.02 and R.C. 2925.11, which is a first-degree misdemeanor. Appellant pled guilty to the attempted drug possession charge. The trial court accepted the plea.

{¶3} The trial court then asked if the state had a sentencing recommendation, to which it responded at least 30 days confinement followed by supervised probation and it would not oppose treatment. Tr. 3. The trial court asked Appellant if he had ever been evaluated by a drug and alcohol agency. Tr. 3. Appellant indicated he had and that he was currently in an out-patient program, but he had made a bad decision. Tr. 3. The court then asked if Appellant was drug tested would he pass. Tr. 3-4. Appellant admitted that marijuana was in his system, but he had not used any other drug. Tr. 4 The trial court then ordered him to submit to testing and indicated if the result only showed marijuana that would be taken into account during sentencing. Tr. 4. The trial court further indicated if Appellant tested positive for anything else, such as meth, that would also be taken into consideration. Tr. 4. The court then asked Appellant if he was being honest, to which Appellant responded he was. Tr. 4.

{¶4} Appellant was tested, and he tested positive for meth. Tr. 4. Appellant informed the court that he had lied, but he believed he would not test positive for meth because it had been over a week since he used meth. Tr. 4-5.

{¶5} The trial court proceeded to sentencing. Appellant was sentenced to 180 days confinement in the Belmont County Jail and suspended 30 days. 2/13/19 J.E.; Tr. 5. The fines and court costs were also suspended. 2/13/19 J.E.; Tr. 5. The trial court sentenced Appellant to two years of probation and ordered Appellant to be evaluated by Crossroads and to follow their recommendations. 2/13/19 J.E.; Tr. 6.

{¶6} Appellant appealed the conviction. The trial court stayed the execution of the sentence pending appeal. 2/22/19 J.E.

First Assignment of Error

"The trial court had no authority to order a drug test of Appellant prior to sentencing and violated Appellant's Fourth, Fifth, and Fourteenth Amendment rights of the United States Constitution, as well as Article I, Section 14, Article I, Section 10, and Article I, Section 16 of the Ohio Constitution in doing so."

{¶7} Appellant argues the trial court committed plain error when it ordered the drug test and when it relied on the results of the test; he asserts it was an unreasonable search and seizure and violated his right against self-incrimination. Appellant further contends the urine test was unreliable; he asserts there are certain procedures required for drug testing set forth in R.C. 2925.51 and if those procedures are not followed, then the test is unreliable.

{¶8} Appellant correctly limits his argument to a plain error analysis, as he did not object to the urine test at sentencing. An appellate court does not have to resolve an alleged error if it was never brought to the attention of the trial court "at a time when such error could have been avoided or corrected by the trial court." *State v. Carter,* 89 Ohio St.3d 593, 598, 734 N.E.2d 345 (2000). In the absence of an objection, this court may only examine the court's actions for plain error. *Id.* Plain error should be used "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Barnes,* 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). A claim of plain error does not stand unless, but for the error, the outcome of the trial would have been different: "[t]he test for plain error is stringent. A party claiming plain

error must show that (1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial." *State v. Davis,* 116 Ohio St.3d 404, 2008–Ohio–2, 880 N.E.2d 31, ¶ 378.

{¶9} Our analysis will begin with the Fifth Amendment. Appellant asserts his urine test results violated his right against self-incrimination. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, ¶ 11, quoting U.S. Const. Amend. V. The Fifth Appellate District recently explained:

> The right against self-incrimination bars only "compelled incriminating communications ... that are 'testimonial' in character." *United States v. Hubbell*, 530 U.S. 27, 34, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000). Put differently, to qualify for protection under the Fifth Amendment, a statement or other communication must be: (1) testimonial; (2) incriminating; and (3) compelled. *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 189, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Schmerber v. California*, 384 U.S. 757, 763, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (*quoting Holt v. United States*, 218 U.S. 245, 252–53, 31 S.Ct. 2, 54 L.Ed. 1021 (1910)).

State v. Colston, 5th Dist. Muskingum No. CT2019-0076, 2020-Ohio-3879, ¶ 50.

{¶10} Appellant's Fifth Amendment argument fails. The United State Supreme Court in *Schmerber* held that police do not violate a defendant's Fifth Amendment right against self-incrimination by requesting a blood test upon making an arrest for driving under the influence of alcohol because a defendant's bodily fluids are nontestimonial in nature. *Schmerber v. California*, 384 U.S. 757, 765, 86 S.Ct. 1826 (1966). While some states have interpreted the self-incrimination clauses in their own constitutions or the common law to protect affirmative acts such as the refusal to consent to blood or urine tests, Ohio has not done so. *Compare Dobbins v. Ohio Bur. of Motor Vehicles*, 75 Ohio

St.3d 533, 664 N.E.2d 908 (1996) (citing *Schmerber* nontestimonial body fluid holding) *with Elliott v. State*, 305 Ga. 179, 198–201, 824 S.E.2d 265, 279–81 (Georgia Supreme Court 2019) (Georgia Supreme Court cited to multiple states that held defendants could not be compelled to perform affirmative acts that were incriminating such as to trying on a hat, submitting to a physical exam, making a foot print and trying on a shoe. Also citing cases that held the results of involuntary chemical testing in a DUI case would be inadmissible as violating the state's constitutional self-incrimination clause.). Thus, the urine result was not testimonial. Consequently, the Fifth Amendment argument fails for that reason.

{¶11} We now turn to the Fourth Amendment argument that the urine test was an unreasonable search and seizure. The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. *Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct. 1093 (1990). Warrantless searches are per se unreasonable unless they fall within an exception to a search warrant. *Katz v. U.S.*, 389 U.S. 347, 357, 88 S.Ct. 507 (1967). Typically, a person has a legitimate expectation of privacy in his or her bodily fluids. *Schmerber*, 384 U.S. at 770.

{¶12} Appellant acknowledges the issue of whether a trial court's presentence drug test violates the Fourth Amendment is an issue of first impression with this court. In support of his argument, he cites our *State v. Stafford* case, but acknowledges that we did not reach the Fourth Amendment issue in that case.

{¶13} In *Stafford*, the defendant appeared at a pre-trial hearing and appeared to be under the influence of drugs or alcohol. *State v. Stafford*, 7th Dist. Columbiana No. 12 CO 24, 2013-Ohio-4356, ¶ 1. The trial court ordered a drug test and the results came back positive for methamphetamines. *Id*. The court then cited the defendant for direct contempt and imposed a 30-day jail sentence. *Id*.

{¶14} We reversed the direct contempt and reasoned:

> The unusual aspect of this case is that the trial judge, based on no recognized authority, *sua sponte* ordered a drug test to be immediately administered, and then used the results of this drug test rather than Appellant's conduct in court as the basis to convict her of direct contempt.

> We must further note that no such test results appear of record. Appellant argued that her mannerisms in court followed her normal behavior pattern, but the judge did not believe her. The judge stated that she would "rely upon the test of this Court" and "we have tested positive here so we are going to have consequences for that now." (Tr., pp. 4, 8). Despite the trial judge's protestations that Appellant could not participate in the hearing due to her impaired state, the hearing continued for a considerable length of time after the judge cited and penalized her for contempt. Thus, the record affirmatively demonstrates that the results of the drug test were the primary, if not the exclusive, basis for the contempt conviction.
>
> Had Appellee been able to cite to some statutory or procedural justification for the drug test, or if it had been a condition for granting bail or driving privileges, or had the drug test been taken voluntarily instead of being ordered by the court, we might still be inclined to affirm the trial court's actions. Under the facts of this particular case, however, we find no evidentiary or legal support for this contempt citation.

Id. at ¶ 12-13.

{¶15} Despite Appellant's insistence that the cases are analogous, there are distinguishing factors between the two cases. First and foremost, Appellant pled guilty and the urine test was ordered prior to sentencing to aid in sentencing. This is not a contempt issue during a pre-trial. Also, the results of the urine test signed by the Probation Officer are in the record. Appellant tested positive to THC, methamphetamines, amphetamine, and buprenorphine. Furthermore, Appellant is correct. In that case, we declined to address whether a drug test ordered at that point in the proceedings violated the Fourth Amendment. *Id*. at ¶ 14.

{¶16} Case law on the issue of whether a presentence, postconviction urine test violates the Fourth Amendment is sparse. However, the Ninth Federal Circuit decided a case similar to the one before us. *Portillo v. U.S. Dist. Court for Dist. of Arizona*, 15 F.3d 819, 821 (9th Cir.1994). In *Portillo*, the defendant pled guilty to stealing a vacuum cleaner,

a baby stroller, a child's car seat, and a cellular telephone from a military base in violation of 18 U.S.C. § 661. *Id* The matter was scheduled for sentencing, and a presentence urine test was ordered. *Id*. In analyzing whether the Fourth Amendment was violated by the ordering of a presentence urine test, the Ninth Federal Circuit explained that the United States Supreme Court has recognized that urine testing may be deemed a search under the Fourth Amendment. *Id*. at 822, citing *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 617, 109 S.Ct. 1402 (1989). However, the Supreme Court has recognized the limited exception to the probable cause requirement "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'" *Portillo* at 822, quoting *Skinner*. The operation of the probation system has been determined to be "special needs, beyond the normal need for law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Portillo* at 822, quoting *Griffin v. Wisconsin,* 483 U.S. 868, 876–78, 107 S.Ct. 3164 (1987) (upholding a probation officer's search of a probationer's home without a warrant). The *Portillo* court then looked at the United States Code and explained sentencing courts have wide discretion in the type of information they may consider when determining whether probation or other sentencing alternatives are appropriate. *Portillo* at 822.

{¶17} Utilizing that reasoning, the *Portillo* court concluded:

> Thus, where probation is an available sentencing alternative, the sentencing court's need for information relevant to whether probation is an appropriate, safe, useful, and reasonable disposition of a defendant's sentence, is an integral part of the operation of the probation system. *See Wisconsin v. Guzman,* 166 Wis.2d 577, 480 N.W.2d 446, *cert. denied,* 504 U.S. 978, 112 S.Ct. 2952, 119 L.Ed.2d 575 (1992). Here, the district court ordered Portillo to submit to urinalysis for presentence investigation purposes to determine the appropriate sentencing disposition. Accordingly, the "special needs" exception to the Fourth Amendment applies. *See Skinner,* 489 U.S. at 624, 109 S.Ct. at 1417.

Portillo 15 F.3d at 823.

{¶18} Thus, the *Portillo* court indicated the "special needs" exception makes the warrant requirement inapplicable to post-verdict, presentence urine testing. Rose, *The Constitutionality of Mandatory, Presentence Urine Testing of Convicted Defendants*, 26 Golden Gate U.L. Rev. 73, 80–81 (1996).

{¶19} The *Portillo* court then balanced Portillo's privacy interest in refusing urine testing against the governmental interest in determining an appropriate sentence. *Portillo*, 15 F.3d at 823. The court concluded that Portillo had a lesser privacy interest than an ordinary citizen based on his convicted status, but the government still must exercise some degree of reasonableness in ordering urine testing:

> The act of providing urine is one which society recognizes implicates a reasonable expectation of privacy. *See Skinner,* 489 U.S. at 617, 109 S.Ct. at 1413. Nevertheless, the degree of one's privacy interest varies with his or her situation. *See United Treasury Employees v. Von Raab,* 489 U.S. 656, 671, 109 S.Ct. 1384, 1393, 103 L.Ed.2d 685 (1989). For example, it is well established that society does not recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell. *Hudson v. Palmer,* 468 U.S. 517, 525–28, 104 S.Ct. 3194, 3199–3201, 82 L.Ed.2d 393 (1984). Further, prisoners have a diminished expectation of being free from body cavity searches after contact with visitors. *See Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).
>
> While parolees and probationers have greater privacy interests than prisoners, they do not enjoy the same degree of privacy expectations as the ordinary citizen. *See Griffin,* 483 U.S. at 876–78, 107 S.Ct. at 3170–71 (supervision of probationers is a "'special need' of the [s]tate permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large"). In some cases, probation officers may search probationers without obtaining a warrant and under circumstances when there is less than probable cause. *Id.* "However, the search must be reasonable and must be based upon the probation officer's reasonable belief that it is necessary to the performance of her duties." *United States v.*

> *Duff,* 831 F.2d 176, 179 (9th Cir.1987) (citing *Latta v. Fitzharris,* 521 F.2d 246, 250–52 (9th Cir.), *cert. denied,* 423 U.S. 897, 96 S.Ct. 200, 46 L.Ed.2d 130 (1975)).
>
> Here, Portillo has been convicted of theft and is awaiting sentencing. He has been and remains free on his own recognizance pending sentencing, subject to the supervision of the court and the imposition of general conditions of release. Thus, the supervisory nature of Portillo's release, like that of a probationer, presents a "special need, beyond the normal need for law enforcement." *See Griffin,* 483 U.S. at 875–76, 107 S.Ct. at 3170. Nevertheless, Portillo, like a probationer, has an expectation of privacy which requires the government to exercise some degree of reasonableness in performing its searches unless doing so would jeopardize the interest it seeks to advance. *See id.; see also Martinez–Fuerte,* 428 U.S. at 560, 96 S.Ct. at 3084.

Portillo at 823-824.

{¶20} However, given the facts of the case, the court concluded the district court erred by requiring Portillo to submit to a presentence urine test because the crimes committed did not bear any correlation to drug usage, the court had no information regarding Portillo's background, criminal history or potential prior drug use, and there was an advance notice of a test indicating that there was no exigency which would jeopardize the government's interest. *Id*. at 824.

{¶21} We have previously stated, under the special needs doctrine, as long as a government interest exists beyond the need to procure criminal convictions, governmental special needs can be enough to eliminate the requirement of probable cause or individualized suspicion of wrongdoing. *State v. Bandy*, 7th Dist. Mahoning No. 05-MA-49, 2007-Ohio-859, ¶ 57. Ohio's statutes governing imposition of misdemeanor sentencing indicate the sentencing court shall be guided by the overriding purposes of misdemeanor sentencing, which "are to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.21(A). To achieve these purposes, the sentencing court shall consider the need for changing the offender's

behavior and the need to rehabilitate the offender. R.C. 2929.21(A). "[T]he court may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code." R.C. 2929.22(B)(2). Thus, the trial court has wide discretion to consider any factor to achieve the purposes and principles of misdemeanor sentencing.

{¶22} Given the fact that Appellant was convicted of attempted possession of methamphetamines, whether he had meth in his system was a relevant factor for determining the appropriate sentence. This is especially true in this case, where Appellant told the court the only drug in his system would be marijuana and he explained he had slipped and was going to drug counseling. Accordingly, the drug test did not violate the Fourth Amendment or at the minimum did not amount to plain error. *State v. Guzman*, 166 Wis.2d 577, 480 N.W.2d 446 (1992) (Wisconsin Supreme Court determined surprise presentence drug testing of an offender convicted of felony drug delivery was allowed).

{¶23} Appellant also argues the urine test taken was unreliable and the procedures required for drug testing set forth in R.C. 2925.51 were not followed.

{¶24} This argument is meritless. The introductory clause to R.C. 2925.51 states, "In any criminal prosecution for a violation of this chapter or Chapter 3719. of the Revised Code." *See also State v. Starcic*, 8th Dist. Cuyahoga No. 72742, 1998 WL 289393. Appellant was not being prosecuted for the methamphetamine in his system; rather, it was being used as a consideration for determining the appropriate sentence. Therefore, R.C. 2925.51 by its very terms is inapplicable.

{¶25} Furthermore, as stated above the results are in the file. The sample was witnessed by Chad Moore, the probation officer for the Northern Division Court. While the testing procedures for the Northern Division Court are not in the file, the issue of accuracy of test results could have been objected to and the Probation Department could have produced their procedures and policies for urine testing at the trial court level. Therefore, even if R.C. 2925.51 is applicable, any error does not rise to the level of plain error.

{¶26} Therefore, for the above stated reasons, the first assignment of error is meritless.

Second Assignment of Error

"Trial counsel was ineffective for failing to object to the sua sponte drug test ordered by the trial court."

{¶27} This assignment of error is an alternative to the first assignment of error. Appellant argues if this court does not find plain error in the trial court ordering the drug test and relying on its results, this court should hold trial counsel was ineffective for failing to object to the drug test and the trial court's reliance on the result. Due to the resolution of the first assignment of error, this assignment of error will be addressed.

{¶28} A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *See State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2d 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689. On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶29} As stated above, there was no violation of the Fourth Amendment when the trial court ordered the presentence urine test and that test did not violate R.C. 2951.25. Therefore, there was no deficient performance, the prejudice prong does not need to be addressed, and the ineffective assistance of counsel claim fails.

{¶30} In conclusion, this assignment of error is meritless. There was no error in ordering the presentence urine test and relying on that result in determining the appropriate sentence. Thus, there was no deficient performance and there was no ineffective assistance of counsel.

Third Assignment of Error

"Appellant was denied his right of allocution at sentencing, thereby requiring reversal."

{¶31} Appellant contends he was denied the right to allocution and, as such, the sentence must be vacated and the matter remanded for resentencing. He contends the trial court did not ask him if he had anything to say and in fact, twice denied him the right to speak.

{¶32} The right of allocution is set forth in Crim.R. 32(A)(1); at 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." Crim.R. 32(A)(1).

{¶33} The language of Crim.R.32(A)(1) imposes an affirmative duty on the trial court, and courts must painstakingly adhere to this rule. *State v. Green,* 90 Ohio St.3d 352, 359–360, 738 N.E.2d 1208 (2000). "A Crim.R. 32 inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *Id*. A defendant has an absolute right to allocution, which is not subject to waiver due to the defendant's failure to object. *Id.* at 358. The Ohio Supreme Court has explained:

> We therefore hold that pursuant to Crim.R. 32(A)(1), before imposing sentence, a trial court must address the defendant personally and ask whether he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment, and that Crim.R. 32(A)(1) applies to capital cases as well as noncapital cases. We further hold that 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).

{¶34} After the trial court accepted the guilty plea, it asked the state for a sentencing recommendation. Tr. 3. The state requested a jail sentence of at least 30 days followed by supervised probation and said that it would not oppose treatment. Tr. 3. The trial court then asked Appellant if he had ever been evaluated by a drug and alcohol agency. Tr. 3. Appellant responded he was currently in an outpatient program, he had been clean for four years, he knew he slipped, and he just wanted to get this past him and get his life back on track. Tr. 3. The court then asked Appellant if he took a drug test at that moment, would there be any illicit drugs in his system. Tr. 3-4. Appellant indicated that there would be marijuana in his system. Tr. 4. The court then ordered a urine test and stated if Appellant was being honest he would take that into account, and if he was not honest and if he tested positive for meth, it would not be good for Appellant. Tr. 4. The trial court asked Appellant again if he was being honest with the court, and Appellant responded yes. Tr. 4. Appellant was then tested. Following the test, the trial court had another conversation with Appellant:

> The Court: Recalling State of Ohio vs. Michael Fisher. Mr. Fisher, in response to the drug test, you lied to me?
>
> The Defendant: Yes. I didn't think it would be in there; it's been about a week ago, and I – it showed up and you know, I will be accountable for it. You know, I apologize and I – it's a stupid thing for me to – (UNINTELLIGIBLE) – especially with two kids and one on the way. You know – (UNINTELLIGIBLE) – Family at home. I work tonight.
>
> The Court: Do you comprehend that, that you were not stopping on your own. Do you think using meth assists you in being the father you should be?
>
> The Defendant: No, Your Honor.
>
> The Court: Is that the example you want to set for your children?
>
> The Defendant: Of course not, Your Honor.

> The Court: You're charged with a felony meth possession. This case is pending, and you are still using. I asked you as a man to be honest with me, and you lied to me. That's where we're at. I don't want a response.

Tr. 4-5.

{¶35} Appellant tried to speak two more times during sentencing, and the trial court indicated it did not want to hear from him. Tr. 6. One of the times was clearly to confirm that he wanted an "evaluation for the SUD program," which his counsel requested. Tr. 6. Despite indicating it did not want to hear from Appellant, the trial court indicated that it would have him evaluated. Tr. 6.

{¶36} The above constitutes compliance with Crim.R. 32(A)(1), the right to allocution. Although the trial court did not specifically ask Appellant if he wished to make a statement on his own behalf or present any information in mitigation of punishment, the trial court permitted Appellant to make a statement, explain, and offer mitigation. Appellant indicated he had been clean for four years, he slipped, he was going to drug counseling, he has kids and family, and he wanted to get this resolved and move on with his life. Even after Appellant tested positive for meth, the trial court permitted a statement from Appellant. While apologizing, Appellant indicated he lied to the court, it was stupid to lie with a family at home relying on him, and he knows he will be held accountable. We have stated, "[t]he purpose of allocution is to allow the defendant an opportunity to state for the record any mitigating information which the judge may take into consideration when determining the sentence to be imposed." *State v. Turjonis*, 7th Dist. Mahoning No. 11 MA 28, 2012-Ohio-4215, ¶ 6. The statements made by Appellant during sentencing, but prior to the point where the trial court told Appellant it did not want to hear from him, satisfied this purpose. Therefore, even though the trial court told Appellant it did not want to hear from him and twice stopped him from speaking further, the conversation that did occur constituted an allocution sufficient to comply with the Ohio Supreme Court's mandates and the mandates of Crim.R. 32(A)(1).

{¶37} This assignment of error lacks merit for the above stated reasons.

Conclusion

{¶38} All three assignments of error lack merit. The conviction is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Belmont County Court-Northern Division of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.