[Cite as *Middleburg Hts. v. Sefcik*, 2005-Ohio-4575.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85370

CITY OF MIDDLEBURG HEIGHTS Plaintiff-appellee vs. MICHAEL SEFCIK Defendant-appellant	ACCELERATED DOCKET JOURNAL ENTRY AND OPINION

DATE OF ANNOUNCEMENT OF DECISION:	SEPTEMBER 1, 2205
CHARACTER OF PROCEEDING:	Criminal appeal from Berea Municipal Court, Case No. 04 CRB 00447
JUDGMENT:	SENTENCE VACATED; REMANDED FOR RESENTENCING.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For plaintiff-appellee:	PETER H. HULL, ESQ. CITY PROSECUTOR City of Middleburg Heights 15700 E. Bagley Road Middleburg Hts., Ohio 44130
For defendant-appellant:	KENNETH J. REXFORD, ESQ. 112 North West Street Lima, Ohio 45801

KARPINSKI, J.:

{¶1} Defendant, Michael Sefcik, appeals the terms of probation imposed by the Berea Municipal Court. Defendant pleaded no contest to a first degree misdemeanor: one count of sale of alcohol to underage persons in violation of Middleburg Heights City Code Section 612.02(B) (later amended to R.C. 4302.69(B)).

{¶2} The court imposed the following unique sentence: ten days in jail with five permitted to be served on house arrest. The remaining five days, the court said, would be suspended. The court explained as follows: if defendant will "sell the house and close on it and get out of there by February 1st, then [the court] will suspend the balance of it for five days." Tr. September 16, 2004 at 9. The court delineated additional terms of probation at the plea hearing. These terms were attached as Exhibit A to the sentencing statement:

> 1. [Defendant] shall sell the premises located at[defendant's address] before the conclusion of the probationary term;
> 2. No individual who is not related by blood shall reside on the premises or be on the premises after midnight until 6:00 a.m. the following day;
> 3. No alcoholic beverage on the [defendant]'s premises whether the alcohol was purchased by defendant *** or someone else;
> 4. At no time will there be more than one person on the premises who is not related by blood;
> 5. There will be no social gatherings on the premises [sic]
> 6. During times when defendant *** is on the premises there are no disturbances of the peace in the neighborhood caused by people who are going to, leaving from or on the premises;
> 7. During times when defendant *** is not on the premises he authorized Middleburg Hts. Police to enter the property without his permission in

response to disturbances of the peace or any reasonable suspicion that there is a violation of these conditions or other laws;
8. A disturbance of the peace is any incident or event which is likely to cause annoyance, distress or alarm to other persons or reckless or intentional damage to property;
9. Defendant *** to attend AA meetings or other counseling as directed by the Court."

{¶3} Defendant presents only one assignment of error:

"I. THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT BY IMPOSING UNCONSTITUTIONAL TERMS OF COMMUNITY CONTROL."

{¶4} Defendant argues that the terms of probation imposed on him are unreasonable and overly broad and that "[e]nabling random entry into and a search of a home to seek out the transgression of a second guest or a social gathering simply is too draconian for our Constitution to allow." Appellant's brief at 9.

{¶5} We note first, however, a troubling omission in the sentencing hearing. At no time during the sentencing hearing did the court directly address defendant or give defendant an opportunity to speak.

{¶6} "Crim.R. 32(A)(1) provides that a court must do two things prior to imposing sentence: 1) "Afford counsel an opportunity to speak on behalf of the defendant;" and 2) "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." While the defendant may waive the right of allocution, Crim.R. 32(A)(1) imposes an

affirmative duty on the court to speak directly to the defendant on the record and inquire whether he or she wishes to exercise that right or waive it." *State v. Sexton*, Greene App. No. 04CA14, 2005-Ohio-449 ¶31, quoting *State v. Campbell* (2000), 90 Ohio St.3d 320, 326. See *State v. Cook*, Cuyahoga App. No. 85186, 2005-Ohio-4010 ¶¶5-7 ("The Ohio Supreme Court has determined that Crim.R. 32(A)(1) confers an absolute right of allocution.") See also *Youngstown v. Czopur*, Mahoning App. No. 99 CA 120 ¶12, holding that "[e]ven if a clear description of his rights of allocution were given in the initial explanation of pleas, appellant must still be informed of his rights and personally asked if he has anything to say after the court determines the judgment prior to imposing sentence." In the case at bar, defendant was not afforded an opportunity to make a statement at either his plea or his sentencing hearing.

{¶7} We thus find plain error in the trial court's failure to afford Sefcik his constitutional right to allocution at the sentencing hearing. We do not address defendant's sole assignment of error, which defendant has characterized as a constitutional issue, because our ruling renders it moot. As the Ohio Supreme Court has noted, the court will not address a constitutional question when the case can be decided on other grounds. *Fantozzi v. Sandusky Cement Products Co.* (1992), 64 Ohio St.3d 601, 609

fn.5. Accordingly, we vacate defendant's sentence and remand for resentencing.

This cause is vacated and remanded.

It is, therefore, ordered that appellant recover of appellee his costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., J., CONCURS.

COLLEEN CONWAY COONEY, P.J., CONCURS IN IN JUDGMENT ONLY WITH SEPARATE CONCURRING OPINION.

DIANE KARPINSKI
JUDGE

COLLEEN CONWAY COONEY, P.J., CONCURRING IN JUDGMENT ONLY:

{¶8} I concur in judgment only and write separately to state that we should address the sole assignment of error and reverse the misdemeanor sentence which counsel for the City concedes should be vacated.[1] Under the majority's ruling, the municipal court may resentence Sefcik to the same probation conditions and another appellate panel will be faced with the same issue.

{¶9} I would sustain the sole assignment of error because the court clearly imposed an unreasonable sentence.

{¶10} R.C. 2929.22 governs misdemeanor sentencing and sets forth factors the court must consider before imposing a sentence. Those factors include the nature and circumstances of the offense, the offender's history of criminal conduct, the condition of the victim, and the likelihood that the offender will commit crimes in the future. R.C. 2929.22(B). The trial court enjoys broad discretion in imposing a sentence on a misdemeanor offense; however, its failure to consider the factors enumerated under R.C. 2929.22(B) constitutes an abuse of discretion. *State v. Frazier* (2004), 158 Ohio App.3d 407; *State v. Wagner* (1992), 80 Ohio App.3d 88, 95.

{¶11} In the instant case, the trial court imposed a combination of sanctions pursuant to the "catch-all" provision of R.C. 2929.27(B), which provides:

---

[1]Counsel filed a motion to vacate the sentence after the appeal was filed and conceded at oral argument that the sentence should be vacated.

> "In addition to the sanctions authorized under division (A) of this section, the court imposing a sentence for a misdemeanor, other than a minor misdemeanor, upon an offender who is not required to serve a mandatory jail term may impose any other sanction that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding purposes and principles of misdemeanor sentencing."

{¶12} In examining the reasonableness of conditions imposed as part of a defendant's probation for a felony violation, the Ohio Supreme Court noted in *State v. Jones* (1990), 49 Ohio St.3d 51, 52-53, that the trial court's discretion is not "limitless" and explained:

> "In determining whether a condition of probation is related to the 'interests of doing justice, rehabilitating the offender, and insuring his good behavior,' courts should consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." (Citations omitted.)

{¶13} The Ohio Supreme Court recently recognized that the same rationale applies to the imposition of community control sanctions. In *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, the court determined that the trial court's imposition of an antiprocreation order on the defendant for failure to pay child support was overbroad. In reaching this decision, the court reasoned:

> "* * * the trial court in the instant case did not allow for suspending the procreation ban if Talty fulfilled his child-support obligations. Indeed, the trial court cited Talty's rehabilitation and the avoidance of future

> violations as the reasons for imposing the condition. In view of these objects, however, the antiprocreation condition is, by any objective measure, overbroad; it restricts Talty's right to procreate without providing a mechanism by which the prohibition can be lifted if the relevant conduct should change."

{¶14} Applying the same rationale to the instant case, I would find the sanctions imposed overbroad and unreasonable. Here, the trial court's order not only impacted Sefcik's use of his home, but also the conduct of other family members who were not charged in the instant case. Moreover, I do not find the displacement of Sefcik's family to be reasonably related to rehabilitating him or protecting the public from future crime by Sefcik. The trial court clearly exceeded its authority in imposing such a drastic sanction.

{¶15} Therefore, I would reverse the sentence.