

[Cite as *State v. Frazier*, 2017-Ohio-470.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104596

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ANTHONY LEE FRAZIER**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-14-591113-A

**BEFORE:** Celebrezze, J., E.T. Gallagher, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** February 9, 2017

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Anthony Lee Frazier, appeals from a sentence imposed for an admitted violation of the conditions of community control. He argues that the trial court's summary hearing and lack of notice violated his due process rights, and that the court failed to provide appellant with the evidence against him and the ability to defend. After a thorough review of the record, this court affirms in part, reverses in part, and remands.

### **I. Factual and Procedural History**

{¶2} Appellant was indicted for and pled guilty to a single charge of failure to comply, a third-degree felony violation of R.C. 2921.331(B). The charges stemmed from an interaction with Cleveland police where a police officer attempted to pull over a vehicle being driven by appellant.

{¶3} On April 29, 2015, appellant was sentenced to one year of community control with active supervision, a \$1,000 fine, and costs. He was also informed that violation of the terms of community control could result in a 36-month prison sentence.

{¶4} A capias warrant was issued on February 10, 2016, when appellant failed to appear at the probation department. Appellant claims this was due to the fact that he pled guilty to criminal charges in Lake County, Ohio, on February 4, 2016, and was in jail awaiting sentencing, which occurred on March 15, 2016.

{¶5} On May 12, 2016, the trial court conducted a hearing after appellant failed to

report to the probation department and after a capias warrant had been issued for his arrest. The trial court also was presented with information that appellant had been convicted of crimes on March 15, 2016, in Lake County, Ohio. The hearing began with a recitation of the Lake County conviction. The court then gave appellant's attorney an opportunity to address appellant's failure to abide by the terms of his community control. Appellant's attorney admitted to the conviction and violation, and acknowledged that appellant was in jail in Lake County when he was required to report. The court immediately imposed a 36-month prison sentence, informed appellant of the terms of postrelease control, and adjourned the hearing.

{¶6} Appellant then filed the instant appeal, assigning two errors for review:

I. The appellant was deprived of his Constitutionally guaranteed right to due process of law by the manner in which the trial court conducted the community control violation hearing.

II. The trial court abused its discretion in revoking appellant's community control because the state provided no evidence that appellant violated R.C.

2919.15(B)

## **II. Law and Analysis**

{¶7} Appellant argues that he was denied due process of law at the community control revocation hearing. He also argues that the court erred in finding that he violated the terms of community control because no evidence was presented. These assignments of error are interrelated, so they will be addressed together.

{¶8} Appellant failed to object to any alleged error below, and therefore has

waived all but plain error. *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001), quoting *State v. Childs*, 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968) (“Even constitutional rights ‘may be lost as finally as any others by a failure to assert them at the proper time.’”). Crim.R. 52(B) provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” This court is mindful that notice of plain error “‘is to be taken 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), quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶9} The revocation of community control can result in a serious loss of liberty, so “a probationer must be accorded due process at the revocation hearing.” *State v. Bailey*, 8th Dist. Cuyahoga No. 103114, 2016-Ohio-494, ¶ 9, citing *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *State v. Miller*, 42 Ohio St.2d 102, 326 N.E.2d 259 (1975), syllabus. In this context, due process entitles a person on community control to:

(1) written notice of the claimed violations; (2) disclosure of evidence against him; (3) opportunity to be heard and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a “neutral and detached” hearing body; and (6) a written statement by the factfinder of the evidence relied upon and reasons for revocation.

*Bailey* at ¶ 9, citing *State v. Davis*, 8th Dist. Cuyahoga No. 93959, 2010-Ohio-5126, ¶ 26.

Appellant claims that he was not provided with notice, the evidence against him was not presented, and that he did not have an opportunity to defend.

{¶10} In a similar case, this court held that oral notification that apprised the defendant of the claimed violation was sufficient, and the admission to the violation meant that no due process violation occurred when no evidence of the violation was presented. *State v. Patton*, 8th Dist. Cuyahoga No. 103737, 2016-Ohio-4867, ¶ 10 (“We conclude that oral notice of the claimed violations met the minimum due process guarantee in this case. At the violation hearing, Patton’s probation officer read into the record the basis for his allegations. From this point on, Patton was aware of the allegations against him, and there was a record for appellate review. Defense counsel did not contend that the oral notification was insufficient to provide adequate notice, nor did he ask that the hearing be continued to a later date. Rather, defense counsel authoritatively addressed the court and admitted to the allegations on behalf of his client without further discussion. Therefore, the oral notification did not violate Patton’s due process rights.”).

{¶11} The situation in *Patton* is almost identical to the present case. It demonstrates that appellant’s rights were not circumvented, but appellant’s admission to the community control violation dispensed with the need to present evidence or to give appellant the opportunity to defend. Appellant’s claim that the trial court failed to provide him with a meaningful opportunity to object or defend is not accurate.

Appellant, through his attorney, was given an opportunity to address the court and dispute the charges brought against him. Instead, appellant admitted to the violation.

{¶12} Therefore, the court did not commit plain error in finding that appellant violated the terms of his community control. Appellant waived the requirement that evidence be presented against him by admitting to a violation of the terms of community control. He further waived the right to cross-examine or call witnesses. Any error that occurred below was introduced by appellant, who is now attempting to assert that error is reversible on appeal. The invited error doctrine prevents successful argument on appeal.

“Under the settled principle of invited error, a litigant may not ‘take advantage of an error which he himself invited or induced.’” *Murphy*, 91 Ohio St.3d at 535-536, 747 N.E.2d 765, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph one of the syllabus, citing *Lester v. Leuck*, 142 Ohio St. 91, 50 N.E.2d 145 (1943), paragraph one of the syllabus.

{¶13} Separate from appellant’s admission to the violation and the court finding that appellant violated the terms of community control, is the summary nature of the sentencing hearing that occurred in this case. The Supreme Court of Ohio has recently addressed the implications of a community control violation hearing:

The revocation of community control is an exercise of the sentencing court’s criminal jurisdiction, and pursuant to R.C. 2929.15(B)(1), the court may extend the term of the offender’s community control or impose a more restrictive sanction or a prison term if the conditions of community control

are violated. As we explained in *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17, “[f]ollowing a community control violation, the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes.”

*State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814, 56 N.E.3d 965, ¶ 15. Because offenders are sentenced anew, they must be afforded the same rights as those afforded during an original sentencing hearing.

{¶14} Here, the transcript ends with appellant asking the court if he can speak. There was no response from the trial court, and the transcript indicates the hearing simply ended. Appellant was not given an opportunity to say anything during the hearing, and the court did not address appellant’s request for allocution.

{¶15} The above-quoted language from *Heinz* indicates that a sentence imposed following a community control violation constitutes a full sentencing hearing where the court must abide by the relevant sentencing provisions and the rights that inure to a criminal defendant. This includes the right to allocution. *State v. Jackson*, Slip Opinion No. 2016-Ohio-8127, ¶ 1. Crim.R. 32(A)(1) imposes a duty on the trial court to determine whether a defendant wishes to exercise his or her right to allocution. *State v. Campbell*, 90 Ohio St.3d 320, 324, 738 N.E.2d 1178 (2000). Crim.R. 32(A)(1) provides that the court must “[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.” This is an affirmative duty of the trial court, and waiver is not applicable. *Campbell* at 324.

{¶16} Therefore, the court erred in conducting a summary sentencing hearing without affording appellant the right to allocution. Appellant’s second assignment of error is overruled, but his first assignment of error is sustained in part. Appellant must be given the rights afforded to him by Crim.R. 32, including an opportunity to personally address the court and speak in mitigation.

### **III. Conclusion**

{¶17} Appellant admitted to a violation of the terms of community control and waived any argument that he did not commit a violation of those terms. Appellant’s due process rights were not violated where appellant caused any error of which he now complains. However, the trial court did not afford appellant the required right of allocution during the sentencing hearing. Therefore, appellant must be resentenced.

{¶18} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN T. GALLAGHER, P.J., and  
SEAN C. GALLAGHER, J., CONCUR