

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MARK RODRIGUEZ,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 MA 0105

Criminal Appeal from the
Mahoning County Court #4, of Mahoning County, Ohio
Case No. 2023 CR B 00477

BEFORE:

Cheryl L. Waite, Mark A. Hanni, Judges, and William A. Klatt, Judge of the
Tenth District Court of Appeals, Sitting by Assignment (Retired).

JUDGMENT:

Reversed and Remanded.
Sentence Vacated.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*,
Assistant Prosecutor, for Plaintiff-Appellee

Atty. Christopher P. Lacich, for Defendant-Appellant

Dated: March 21, 2024

WAITE, J.

{¶1} Appellant Mark Rodriguez was charged with two misdemeanor counts of violating a protection order in Mahoning County Court No. 4, Austintown, Ohio. A bench trial was held. He was found guilty of the charges and immediately sentenced. Appellant's counsel requested that a presentence investigation report ("PSI") be prepared. The court denied the motion and sentenced Appellant to 180 days in jail, with 90 days suspended. Appellant raises one assignment of error with three sub-arguments. He argues that the court should have afforded him the right of allocution at sentencing. The state concedes that Appellant was denied the right of allocution. Following review, we agree with the parties and vacate the sentence so that resentencing may occur affording Appellant the right of allocution. Appellant also argues that the court should have granted his motion for a PSI and that he should not have been given the maximum sentence of 180 days in jail. Because the sentence is vacated and a resentencing will occur, these arguments are moot. Appellant's assignment of error is sustained based on the denial of the right of allocution. Accordingly, Appellant's sentence is vacated, and the case is remanded for full resentencing.

Facts and Procedural History

{¶2} On October 27, 2018, a civil protection order ("CPO") was issued against Appellant in favor of six individuals. The CPO was effective until October 19, 2023. On August 11, 2023, Appellant encountered two of the protected persons at a dental office. Appellant recognized them, approached them, and spoke to them. Appellant would not leave the office, so the two protected persons left. On August 15, 2023, a warrant was

issued to arrest Appellant on two counts of violation of a protection order pursuant to R.C. 2919.27, first degree misdemeanors. The court held a bench trial on September 20, 2023. Appellant testified and admitted that he violated the CPO. The court proceeded immediately to sentencing. Appellant's counsel requested that a PSI be prepared, and the judge overruled the oral motion. The judge sentenced Appellant to 180 days in jail, with 90 days suspended, on count one. On count two, the court sentenced him to 180 days in jail, with 180 days suspended. The court also imposed a fine and probation, and ordered no contact with the parties listed in the CPO. Appellant filed this timely appeal, raising one assignment of error with three separate sub-arguments. The state concedes error on one of the arguments made in Appellant's brief.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO ORDER A PSI UPON REQUEST, DENIED APPELLANT THE RIGHT OF ALLOCUTION, AND FAILED TO CONSIDER THE SENTENCING FACTORS UNDER R.C. 2929.22, INSTEAD SENTENCING HIM TO THE MAXIMUM SENTENCE WITH AN ACTUAL TERM OF INCARCERATION.

{13} Appellant raises three arguments under this assignment of error. Appellant's second argument is that the court failed to afford him the right of allocution prior to imposing sentence. The right of allocution is found in Crim.R. 32(A)(1). "The purpose of allocution is to allow the defendant an opportunity to state for the record any further information which the judge may take into consideration when determining the

sentence to be imposed." *State v. DeWalt*, 7th Dist. Carroll No. 08 CA 852, 2009-Ohio-5283, ¶ 47. The right of allocution applies to both misdemeanor and felony convictions. *Defiance v. Cannon*, 70 Ohio App.3d 821, 828, 592 N.E.2d 884 (1990); *State v. Brown*, 166 Ohio App.3d 252, 2006-Ohio-1796, 850 N.E.2d 116, ¶ 8. The remedy for a violation of the right of allocution is a new sentencing hearing. *State v. Green*, 90 Ohio St.3d 352, 359, 738 N.E.2d 1208 (2000).

{¶4} The state concedes this error and agrees that Appellant was not afforded his right of allocution. The record clearly indicates that the court allowed one of the victims to make a statement at sentencing, but immediately after that statement was made and before Appellant could present any closing statement, the court announced the sentence. Therefore, Appellant was denied his right of allocution and the sentence must be vacated so that full resentencing may occur.

{¶5} Appellant also argues that the court should have granted an oral motion raised at sentencing to prepare a PSI. The court immediately denied the motion and continued with sentencing. A decision to order a PSI in a misdemeanor case is left up to the discretion of the trial court. *State v. Bowie*, 5th Dist. Delaware No. 99CAC01-001, 1999 WL 668567, *2; Crim.R. 32.2; R.C. 2951.03. Because the sentence is vacated and resentencing will occur, the issue is moot. Appellant will have another opportunity to request a PSI, but it will remain within the trial court's discretion to grant or deny such request.

{¶6} Appellant also argues that the court should not have imposed the maximum sentence in this case. This is also a moot issue because the sentence is vacated.

{¶7} Due to the failure to allow Appellant the right of allocution, Appellant's assignment of error is sustained. The sentence is vacated, and the case is remanded for full resentencing.

Conclusion

{¶8} Appellant challenged his sentence after he was convicted at a bench trial of two misdemeanor counts of violating a protection order. Appellant argued that the court should have afforded him the right of allocution at sentencing. The state concedes that Appellant was denied the right of allocution and that the case should be remanded for resentencing. The record supports the parties' argument, and the sentence is hereby vacated due to the denial of the right of allocution. We hereby order the case remanded for full resentencing. Appellant also contends that the court should have granted his request for a PSI and that he should not have been given the maximum sentence of 180 days in jail. These arguments are moot because the sentence has been vacated and the case is remanded for resentencing.

Hanni, J. concurs.

Klatt, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Mahoning County Court #4, of Mahoning County, Ohio, is reversed. Appellant's sentence is hereby vacated and this matter is remanded to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

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.