

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 15-1137
Plaintiff-Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
DOMINIC JACKSON	:	Court of Appeals Case Number C-140384
Defendant-Appellee	:	

MEMORANDUM IN SUPPORT OF JURISDICTION

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Explanation of why this case is a case of public or great general interest and involves a substantial constitutional question

In 1996, the Ohio Legislature reformed Ohio's sentencing laws with the aim of achieving truth in sentencing. As part of that reform, trial courts were required to tell defendants being sentenced to community control exactly what punishment they would receive if they violated the terms of their community control. Indeed, this court has ruled that the failure to inform a defendant of exactly what sentence they would receive for a violation removed the trial court's ability to imprison them.

In this case, the trial court sentenced Dominic Jackson to community control. It told him exactly what sentence it would impose if he violated the terms of his community control. And when Jackson violated, the trial court imposed that sentence.

Jackson appealed. He argued that the trial court violated his right to allocution when it failed to permit him to address the trial court following its decision to imprison him on the violation. In a 2-1 decision, the First District agreed.

This case presents this court with a question that it has not yet addressed: despite having already been told what sentence they will be given at an earlier hearing where they did have the right to allocution, do defendants have a subsequent right of allocution when they are being sentenced for a community control violation?

With the exception of the First District, each district that has considered this issue has said the answer to that question is no.

This court should, therefore, accept jurisdiction over this matter to resolve whether the right to allocution applies to community control violation hearings.

Statement of the Case and Facts

Dominic Jackson was placed on two years of community control after pleading guilty to receiving stolen property, a fourth-degree felony. He was specifically told that he would receive 18 months in prison if he violated the terms of his community control.

Jackson subsequently violated the terms of his community control by failing to report to his probation officer on three occasions, failing to pay court costs, and failing to pay probation fees. Jackson waived his right to a probable cause hearing and stipulated to the facts underlying his violations. The trial court then found him guilty of the violation.

Initially, the trial court seemed inclined to place Jackson back onto community control. But Jackson, through his verbal and non-verbal comments to the trial court, caused the court to impose the promised 18-month sentence.

Argument in Support of State's Proposition of Law

Proposition of Law: The right of allocution does not apply to community control violation hearings.

The 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. Crim.R. 32(A). 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).

There is generally no right of allocution, though, in a probation revocation hearing. *State v. Michael*, 3rd Dist. No. 7-13-05, 2014-Ohio-754; *State v. Krouskoupf*, 5th Dist. No. CT2005-0024, 2006-Ohio-783, ¶ 15; *State v. Flavors*, 7th Dist. No. 08-MA-35, 2008-Ohio-6361; *State v. Turjoniz*, 7th Dist. No. 11-MA-28, 2012-Ohio-4215, ¶ 6 & 13; and *State v. Gibson*, 11th Dist. No 2013-P-0047, 2014-Ohio-433, ¶ 43-44. "The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into considering [sic] when considering the sentence imposed. * * * A sentence is imposed at sentencing, but when community control is modified or revoked no new sentence is imposed on the defendant; rather the defendant's probation is either modified or the defendant's sentence is reinstated." *Gibson*, supra, 2014-Ohio-433, ¶ 43-44.

While a trial court may allow a defendant to speak at a revocation hearing, unlike at the initial sentencing hearing, nothing in the law requires it. The majority opinion below, however, believes that this court changed that in *State v. Fraley*. 105 Ohio St. 3d 13, 2004-Ohio-7110, 821 N.E.2d 995.

In *Fraleley*, this court was addressing the situation where a trial court had failed to tell a defendant what sentence he would receive if he violated the terms of his community control. The appellate court had ruled that this failure meant that the trial court could never impose a prison sentence. This court disagreed and stated that “[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.” *Id.* at ¶ 17. Trial courts, therefore, were permitted to correct a community control sentence that failed to include a specific prison term at a violation hearing, thus allowing imprisonment for future violations.

At first glance, that quote seems to support the First District’s decision that allocution is required at a community control violation hearing. But as the dissent pointed out, this court was relying on the Eighth District’s *State v. Martin* decision when it made the above ruling. The *Martin* court had said that “[w]hen a defendant violates community control sanctions; a second sentencing hearing is conducted. The sentence imposed in this second sentencing hearing must comply with R.C. 2929.14.” *State v. Martin*, 8th Dist. No. 82140, 2003-Ohio-3381, ¶ 35.

No reference to any other sentencing statute was mentioned, let alone the right of allocution, in that decision. Only R.C. 2929.14, which just sets forth are what sentences are considered legal in Ohio, was mentioned.

Notably, the Eighth District is one of the courts that has specifically rejected the notion that there is a right to allocution at a community control violation hearing. *State v. Henderson*, 8th Dist. No. 42765, 1981 Ohio App. LEXIS 10890, *12 (June 18, 1981). And the Eighth District is joined by the Third, Fifth, Seventh, and Eleventh Districts who – all post *Fraleley* – have ruled that there is no right to allocution at a community control violation hearing. *State v.*

Michael, 3rd Dist. No. 7-13-05, 2014-Ohio-754; *State v. Krouskoupf*, 5th Dist. No. CT2005-0024, 2006-Ohio-783, ¶ 15; *State v. Flavors*, 7th Dist. No. 08-MA-35, 2008-Ohio-6361; *State v. Turjoniz*, 7th Dist. No. 11-MA-28, 2012-Ohio-4215, ¶ 6 & 13; and *State v. Gibson*, 11th Dist. No 2013-P-0047, 2014-Ohio-433, ¶ 43-44.

The First District's decision has now created two sides on this issue. Jackson believes the First District is correct; the State feels the other districts are correct. This court should, therefore, accept jurisdiction over this case to determine which side is correct.

Conclusion

This case presents this court with the question of whether a defendant has a right of allocution at a community control violation hearing. The First District has said that defendants have that right; the rest of the appellate districts to have considered the question have said they do not. This court should, therefore, accept jurisdiction over this case to resolve this issue.

Respectfully,

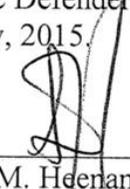
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Proof of Service

I hereby certify that I have sent a copy of the foregoing Memorandum in Support, by United States mail, addressed to Timothy J. Bicknell, 3268 Jefferson Ave., , Cincinnati, Ohio 45202, counsel of record and Timothy Young, Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998, this 7th day of July, 2015.



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**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140384
Plaintiff-Appellee,	:	TRIAL NO. B-1205198
vs.	:	<i>OPINION.</i>
DOMINIC JACKSON,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentence Reversed, and Cause Remanded

Date of Judgment Entry on Appeal: June 5, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. Bicknell, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Presiding Judge.

{¶1} Defendant-appellant Dominic Jackson appeals from the trial court's judgment revoking his community control and sentencing him to 18 months in prison. On appeal, he argues that his sentence is contrary to law because the trial court failed to consider the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12, and it denied him the right to allocution. Finding merit in his allocution argument, we reverse Jackson's sentence and remand this cause to the trial court for a new sentencing hearing.

Community-Control-Violation Hearing

{¶2} On September 7, 2012, Jackson pleaded guilty to one count of receiving stolen property, a felony of the fourth degree. On October 23, 2012, the trial court sentenced Jackson to two years of community control, with the conditions that Jackson follow the standard rules and requirements of probation, pass the General Educational Development ("GED") test, and pay court costs and probation fees. The trial court informed Jackson that if he violated the terms and conditions of community control, it would impose an 18-month prison term.

{¶3} On May 15, 2014, Jackson was charged with violating the terms and conditions of his community control. He had failed to report to his probation officer in February, March, and April 2014, and he had failed to pay his court costs and probation fees. On June 2, 2014, Jackson waived his right to a probable-cause hearing and stipulated to the facts underlying the community-control violations. The trial court found he had violated the terms of his community control.

{¶4} The trial court then stated that it was going to send Jackson to the Hamilton County Justice Center for 60 days, so that he could "get his act together" and enroll in the GED program. Jackson's counsel told the court that Jackson was

under the impression that he did not qualify for the program. The following exchange then took place between Jackson and the trial court:

THE COURT: Let me be very, very clear. The only place you're going, if it doesn't work out in the Justice Center is the Ohio Department of Corrections.

THE DEFENDANT: Yes, ma'am.

THE COURT: You did nothing. You have a lousy record. You have a police officer who tried to mentor you for years and said nothing worked.

THE DEFENDANT: I mean, I took the GED program. I failed the first test. I was supposed to take the test over. I got two kids, Your Honor.

THE COURT: You've done nothing. How are you going to help two kids by being in the Ohio Department of Corrections?

THE DEFENDANT: Yes Ma'am. Every penny I get goes towards the household, each dollar.

THE COURT: Here's the problem. You never reported to probation. You never responded to their attempting to contact you. You didn't do anything.

THE DEFENDANT: I didn't have a phone.

THE COURT: I'm sure some of your friends have phones.

THE DEFENDANT: I missed one appointment. I had a warrant.

THE COURT: Don't give me that. You know why this is so thick?

This is so thick because it is your record. We'll continue it for 60

days and see how it goes. Never mind. It doesn't look like that's going to work.

THE DEFENDANT: Yes ma'am. I was --.

THE COURT: You just shook your head.

THE DEFENDANT: I was talking to him, Your Honor.

THE COURT: Mr. Jackson, it is clear to me from your attitude that you don't get it. I'm not going to waste the time, effort, and space.

THE DEFENDANT: I don't understand. So, he was explaining, that's all.

THE COURT: How many times does he need to explain it? And I don't need all the sighs and the eye rolling and everything. I'm done. All right. I'm done. We're not doing that. We're sentencing now. We're going to terminate the probation on the charge of receiving stolen property, a Felony of the Fourth Degree, we're going to sentence you to 18 months in the Ohio Department of Corrections.

THE DEFENDANT: Please, Your Honor, he was just explaining to me.

THE COURT: Don't give me that. Don't make it worse.

THE DEFENDANT: I apologize for my attitude.

THE COURT: You obviously understand the GED program because you've been told by me, you've taken the test. Be quiet. That's enough. Eighteen months in the Ohio Department of Corrections. You'll be eligible for any program you can get into. We'll credit the

time served. They'll be no fines, there will be court costs. You can either pay them or work them off through community service.

THE DEFENDANT: He was just telling me --.

THE COURT: I'm sorry. I'm telling you to be quiet. * * * The police officer that tried to mentor you said in the pre-sentence investigation and I quote, "Many officers have tried to mentor the defendant. He continues to lead a life full of criminal activity and needs time to wake up." He's recommending incarceration. I gave you time on probation. You didn't do it. You didn't wake up. Maybe you'll wake up. Thank you.

Crim.R. 32 and the Right of Allocution

{¶5} We begin by addressing Jackson's second assignment of error, which we find dispositive of his appeal. In his second assignment of error, Jackson argues the trial court violated his right to allocution when it failed to permit him to address the court following its decision to impose a prison sentence

{¶6} Crim.R. 32(A)(1) provides, "[a]t 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." Likewise, R.C. 2929.19(A)(1) permits a defendant to "present information relevant to the imposition of sentence" in the case and requires the trial court to ask the defendant "whether he has anything to say as to why sentence should not be imposed * * *."

{¶7} The Ohio Supreme Court has held that the right to allocution is mandatory. *See State v. Campbell*, 90 Ohio St.3d 320, 324-325, 738 N.E.2d 1178

(2000). Thus, if the trial court does not ask the defendant if he wishes to speak in allocution, the defendant cannot be deemed to have waived the right by failing to object at the sentencing hearing. *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.” *Id.* at paragraph three of the syllabus.

{¶8} The state argues that when a defendant is sentenced for a community-control violation, he has no right to allocution. In *State v. McAfee*, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, ¶ 14, we rejected this argument. We held that McAfee, who was being sentenced to prison for a felony, following a violation of his community control, had a right to allocution under R.C. 2929.19(A)(1) and Crim.R. 32(A)(1). We declined to follow those appellate districts that had reached a contrary result. *Id.* We noted that in *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, ¶ 17, the Ohio Supreme Court “had effectively resolved this issue to the contrary, holding that the sentencing hearing conducted upon finding a community-control violation constitutes ‘a second sentencing hearing[,] [at which] the court sentences the offender anew and must comply with the relevant sentencing statutes.’” *Id.* Thus, we held that a trial court, when sentencing a defendant for a community-control violation, is required to address the defendant personally and “to afford him his statutory right to speak concerning matters relevant to his sentence.” *Id.*, citing *State v. Thompson*, 1st Dist. Hamilton No. C-120516, 2013-Ohio-1981.

{¶9} Here, the record reflects that the trial court told Jackson it was continuing the matter for sentencing so that Jackson could enroll in the GED program at the Hamilton County Justice Center. The trial court then peppered Jackson with both comments and questions relating to his failure to comply with the

terms and conditions of community control. The trial court again stated that it was going to continue the matter for 60 days. Only after the court determined that Jackson was being disrespectful by shaking his head, rolling his eyes, and sighing, did the trial court decide it was going to sentence Jackson to prison. Although Jackson apologized to the trial court for his actions, the trial court never provided Jackson or his counsel with an opportunity to speak in mitigation before it imposed the maximum prison term of 18 months. Moreover, when Jackson later tried to speak at two separate times, the trial court told him to be quiet. Thus, the trial court did not provide Jackson with his right to allocution.

{¶10} In *State v. Mynhier*, 146 Ohio App.3d 217, 223, 765 N.E.2d 917 (1st Dist.2001), this court held that a trial court's failure to comply with Crim.R. 32 was harmless error where the defendant failed to come forward with information on appeal that he would have provided the trial court in mitigation of the punishment imposed by the court had the trial court afforded him that opportunity.

{¶11} More recently in *State v. Thompson*, 1st Dist. Hamilton No. C-120516, 2013-Ohio-1981, ¶ 10, we questioned the viability of *Mynhier*. We noted that the Second Appellate District had disavowed the case the *Mynhier* court had relied upon, and that the Fourth, Seventh, and Eleventh Appellate Districts had declined to follow *Mynhier*. The Fourth and Eleventh Districts reasoned that it was unfair to judge the defendant's plea for mitigation on appeal when the defendant was entitled under Crim.R. 32 to make that plea in person to the court that was sentencing him, while the Seventh District reasoned that requiring the defendant to present such a plea on appeal would be problematic because the defendant is limited to the record on appeal and cannot present new evidence for the appellate court to consider. *See id.*, citing *State v. Spradlin*, 4th Dist. Pike No. 04CA727, 2005-Ohio-4704, ¶ 10; *State v.*

Brown, 166 Ohio App.3d 252, 2006-Ohio-1796, 850 N.E.2d 116, ¶ 11 (11th Dist.); *State v. Land*, 7th Dist. Mahoning No. 00-CA-261, 2002-Ohio-1531, ¶ 21.

{¶12} While we found their reasoning persuasive, we did not overrule *Mynhier* because we found it to be factually distinguishable from *Thompson*. We noted in *Thompson* that prior to imposition of sentence, the trial court had addressed the defendant, asking for his reasons for his actions and it had afforded the defendant an opportunity to speak further before entering judgment. *Id.* at ¶ 12. We held that when viewing the record as a whole, the defendant had been given an opportunity to “make his case in mitigation to the trial court” and that any failure to strictly comply with Crim.R. 32(A) was harmless. *Id.*

{¶13} Jackson, however, unlike the defendant in *Thompson*, was not afforded an opportunity to speak in mitigation before the trial court imposed his sentence. And when Jackson tried to speak, the trial court told him to be quiet not once, but two times. The trial court, moreover, did not afford Jackson’s counsel an opportunity to speak on his behalf before imposing sentence.

{¶14} Thus, we are left to determine whether Jackson’s failure, like the defendant in *Mynhier*, to come forward with the information on appeal that he would have offered the trial court in mitigation, renders the trial court’s failure to comply with Crim.R. 32 harmless. After reviewing the cases criticizing *Mynhier*, we conclude for the reasons set forth within them that *Mynhier* is no longer viable precedent and we overrule it.

{¶15} Given that the trial court imposed the maximum prison term upon Jackson, we cannot say that had the trial court afforded Jackson and his attorney the opportunity to present evidence in mitigation, it would have had no positive effect upon his sentence. *Compare State v. Reed*, 10th Dist. Franklin No. 09AP-1164, 2010-

Ohio-5819, ¶ 19 (holding the trial court's failure to provide the defendant with the right to allocution harmless where the defendant had been sentenced to the minimum prison term allowed, and the court imposed no fines and waived costs). We, therefore, sustain his second assignment of error.

{¶16} Our disposition of Jackson's second assignment of error has rendered moot his first assignment of error, in which he asserts the trial court failed to consider the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors set forth R.C. 2929.12 before imposing his prison sentence. We, therefore, reverse Jackson's sentence, and we remand the cause to the trial court for resentencing in accordance with this opinion and the law. We affirm the trial court's judgment in all other respects.

Judgment affirmed in part, reversed in part, and cause remanded.

DEWINE, J., concurs.

MOCK, J., dissents.

MOCK, J., dissenting.

{¶17} I understand that the right of allocution at a community-control-revocation hearing is the law of this District, but I believe that case was wrongly decided. I respectfully dissent.

{¶18} In *State v. McAfee*, this court held that, when sentencing a defendant for a community-control violation, a trial court is required to address the defendant personally and allow an opportunity of allocution. *State v. McAfee*, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, ¶ 14. In support of that holding, this court cited the Ohio Supreme Court case of *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995. But I believe that this court has read the *Fraley* decision too broadly.

{¶19} *Fraley* addressed a situation where the trial court failed to sentence a defendant to a specific prison term on the date of his initial sentencing. The issues addressed in *Fraley* arose when the defendant, who had been placed on community control at his original sentencing, was not informed of the possible prison term in the event of a community-control-violation. *Id.* at ¶ 1. After being placed on community control, *Fraley* violated the terms on two separate occasions. At the second community-control-violation hearing, the trial court again reinstated his community control, but informed him of the possible prison term for any subsequent violations. *Id.* at ¶ 2-4. When *Fraley* once again violated the terms of his community control, he was sentenced to the prison term about which he had been informed at the previous hearing. *Id.* at ¶ 5. The appellate court reversed the decision of the trial court, finding that the trial court could not correct its initial failure to inform *Fraley* of the prison term when it sentenced him at the subsequent community-control-violation hearing. *Id.* at ¶ 6.

{¶20} The actual issue that the *Fraley* court was called to address by the conflicting decisions of the appellate districts was “whether R.C. 2929.19(B)(5) requires a judge to notify a defendant at his initial sentencing hearing, as opposed to any subsequent sentencing hearings, of the specific prison term that may be imposed as a sanction for a subsequent community-control violation.” *Id.* at ¶ 8. The case was truly about the interplay between R.C. 2929.19(B)(5), which instructs the trial court to “indicate the specific prison term that may be imposed as a sanction for the [community-control] violation,” and R.C. 2929.15(B), which indicates that the sanctions available for a community-control violation include the imposition of a prison term not exceeding “the prison term specified in the notice provided to the offender at the sentencing hearing * * *.”

{¶21} When the *Fraley* court determined, in the context of a community-control-violation hearing, that “the court sentenced the offender anew and must comply with the relevant sentencing statutes,” it was not speaking of the entirety of the statutory and procedural sentencing scheme. It was speaking in the context of this R.C. 2929.19(B)(5) and 2929.15(B) interplay and the mechanics of the actual imposition of a prison term. In particular, the court was addressing the untenable conclusion that the appellate court had reached—that once a trial court failed to impose a prison term at the original sentencing hearing, it could NEVER correct that defect at a subsequent community-control-violation hearing and, in essence, would NEVER be able to sentence that defendant to prison.

{¶22} For the above-quoted proposition of law, the *Fraley* court cited *State v. Martin*, 8th Dist. Cuyahoga No. 82140, 2003-Ohio-3381, ¶ 35. But the *Martin* court had merely said that “[w]hen a defendant violates community control sanctions; a second sentencing hearing is conducted. The sentence imposed in this second sentencing hearing must comply with R.C. 2929.14.” (Citations omitted.) *Id.* ¶ 35. It made no reference to any other aspect of sentencing, and certainly not to a defendant’s right to allocution. In fact, the Eighth Appellate District is one of the districts that has specifically held that there is no right of allocution at a violation hearing. See *State v. Henderson*, 8th Dist. Cuyahoga No. 42765, 1981 Ohio App. LEXIS 10890, *12 (June 18, 1981).

{¶23} Along with the Eighth Appellate District, the Third, Fifth, Seventh, and Eleventh Districts have likewise held that there is no separate right to allocation at a community-control-violation hearing. See *State v. Michael*, 3rd Dist. Henry No. 7-13-05, 2014-Ohio-754; *State v. Krouskoupf*, 5th Dist. Muskingum No. CT2005-0024, 2006-Ohio-783, ¶ 15; *State v. Favors*, 7th Dist. Mahoning No. 08-MA-35,

2008-Ohio-6361; *State v. Turjonis*, 7th Dist. Mahoning No. 11 MA 28, 2012-Ohio-4215, ¶ 6, 13; *State v. Gibson*, 11th Dist. Portage No. 2013-P-0047, 2014-Ohio-433, ¶ 43-44. Importantly, all of these cases were decided after the *Fraley* decision. Only this court has cited *Fraley* in the context of a right to allocution at community-control-violation hearings. And I believe it is time for this court to rejoin the other districts on this question.

{¶24} I agree with the holdings of the Third, Fifth, Seventh, Eighth, and Eleventh Districts that, where community control has been revoked and the trial court is simply reinstating an already determined sentence, there is no need for the defendant to be afforded the right to make a statement in mitigation of his sentence. As the Eleventh District noted:

“The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into considering [sic] when considering the sentence to be imposed.”

Defiance v. Cannon, 70 Ohio App.3d 821, 828, 592 N.E.2d 884 (1990).

* * * A sentence is imposed at sentencing, but when community control is modified or revoked no new sentence is imposed on the defendant; rather the defendant's probation is either modified or the defendant's sentence is reinstated.

Gibson at ¶¶ 43-44.

{¶25} Of course, the trial court may allow the defendant to speak at the revocation hearing, but that decision should be left to the discretion of the trial court. I do not think it is proper for this court to continue to take the *Fraley* holding out of context and broadly apply it so as to require a “second” allocution, which is not provided for by statute. We should take this opportunity to overrule our decision in

McAfee. And since the trial court did not violate Jackson's right of allocution, the assignment of error should be overruled.

Please note:

The court has recorded its own entry this date.