

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 2015-1137
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	:	

MERIT BRIEF OF PLAINTIFF-APPELLANT

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Introduction

In 1996, the Ohio Legislature reformed Ohio's sentencing laws. As part of that reform, when imposing community control, trial courts are required to inform defendants of what sentence they would receive if they violated community control. The failure to do so removed the ability of a trial court to do anything other than to place the defendant back on community control after a violation.

The trial court in this matter did what it was supposed to do when it placed Dominic Jackson on community control. It told him what term of imprisonment would result from a community control violation. And when Jackson violated his community control, that was the prison sentence that was imposed.

In his appeal, Jackson argued that the trial court violated his right of allocution when it did not ask him if he had anything to say on his own behalf at the violation hearing. In a 2-1 decision, the First District Court of Appeals agreed.

A review of Ohio's sentencing laws shows that the First District was wrong. It shows that defendants have a right of allocution when they are being sentenced. At a community control violation hearing, however, there is no such right. This is because the portion of the sentence that involves prison was determined and imposed at the sentencing hearing. The imposed prison term is simply suspended pending any violation of community control. The First District wrongly interpreted the law when it ruled otherwise.

This court should, therefore, should reverse the First District and rule that there is no right of allocution at a community control violation hearing.

Statement of the Case

Dominic Jackson was placed on two years of community control after pleading guilty to receiving stolen property, a fourth-degree felony. When he was placed on community control, the trial court specifically told him that he would be imprisoned for 18 months if he violated the terms of his community control.

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

Initially, the trial court seemed inclined to restore Jackson's community control. But Jackson, through his verbal and non-verbal comments to the trial court, caused the court to impose the 18-month prison term that had been promised to him when he was sentenced to community control.

Argument in Support of Proposition of Law

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

The question before this court is not whether defendants have the right of allocution when they are sentenced. They do. Nor is the question before this court whether Jackson was given the opportunity to exercise that right at his sentencing hearing. He did.

The question before this court is whether defendants, who have already been afforded the right of allocution at their sentencing hearing, have a second right of allocution at a community control violation hearing when the trial court enacts the prison term it previously imposed at the sentencing hearing.

A. Defendants have a right of allocution at sentencing hearings.

There is no question that defendants have the right of allocution when they are sentenced: “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.

Nor is there any question that the remedy for violating the right of allocution is to remand the matter for resentencing. *State v. Campbell*, 90 Ohio St.3d 320, 326, 738 N.E.2d 1178 (2000).

There is no question that Jackson was given a right of allocution when he was sentenced to community control.¹

¹ T.p. (Vol. I) 18.

B. A proper community control sentence includes a suspended term of imprisonment.

A suspended prison term is part of a valid community control sentence. Trial courts are required to tell defendants what their term of imprisonment will be should they violate the terms of their community control. Under R.C. 2929.19(B)(4), “[t]he court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender’s probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.”

While trial courts have the option of reducing this suspended sentence, they do not possess the ability to increase the suspended sentence. And if a trial court fails to make the suspended prison sentence a part of the community control sentence, then prison is not an option for even the most severe community control violations. *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995.

There is no question that the trial court imposed an 18-month term of imprisonment for any community control violation at Jackson’s sentencing hearing.²

² T.p. (Vol. I) 20.

C. Since trial courts are imposing an already existing sentence, there is no right of allocation when community control is violated and the prison term is implemented.

When defendants violate the terms of their community control, R.C. 2929.15(B) tells courts how to handle community control violation hearings. Section 2929.15(B)(2) limits a trial court's ability to imprison a defendant to no more than the prison term that was imposed at the sentencing hearing: "The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the person term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) [sic, (B)(4)] of section 2929.19 of the Revised Code."

While nothing in R.C. 2929.15 gives any reason to treat a community control violation hearing as a sentencing hearing, the First District read such a requirement out of this court's decision in *State v. Fraley*. In *Fraley*, the trial court failed to impose the specific prison term that the defendant would face for a community control violation. This court was considering whether this error was something that could be remedied at a future hearing. *Fraley, supra*, at ¶ 14-16, citing *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837.

This court found that such an error could be remedied at a "second sentencing hearing: "The notification requirement of R.C. 2929.19(B)(5) is meant to put the offender on notice of the specific prison term he or she faces if a violation of the conditions occurs. Following a community control violation, the court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes. The trial court could therefore comply with both the sentencing statutes and our holding in *Brooks* if at this second hearing the court notifies the offender of the specific prison term that may be imposed for a subsequent violation occurring after this second hearing. We believe that

this process complies with the letter and spirit of R.C. 2929.19(B)(5) and 2929.15(B).”³ *Fraley*, *supra*, at ¶ 17 (internal citation omitted).

The First District felt that this court’s use of the words “second sentencing hearing” meant that all community control violation hearings amounted to new sentencing hearings. This interpretation, while understandable, is wrong.

In R.C. 2929.19(B)(4), the Legislature directed trial courts that they “*shall* indicate the specific prison term that may be imposed as a sanction for the violation.” As this court has held, the failure to follow a statutory mandate renders that portion of a defendant’s sentence void. *E.g., State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 26. When a portion of a defendant’s sentence is void, then trial courts retain jurisdiction to correct those aspects of the sentence that are void. *Id.* at ¶ 29. So, as was the case in *Fischer*, when a trial court fails to properly impose post-release control, it may correct that error at a second sentencing hearing that is limited to just the post-release control issue.

Fraley’s treatment of failing to impose a specific prison term at the sentencing hearing is no different. When a trial court does not impose that part of the community control sentence, then that portion of the sentence is void. Since it is void, it is something that can be corrected at a second sentencing hearing.

Chief Justice Moyer’s dissent in *Fraley* explains that a community control hearing is not a sentencing hearing: “The majority is correct when it says that ‘relevant sentencing statutes’ apply at community-control-violation hearings. But those relevant sentencing statutes require only that the trial court comply with the purposes of felony sentencing and not be discriminatory, pursuant to R.C. 2929.11, and that the imposition of a prison term comply with the strictures of R.C. 2929.13 and 2929.14. The application of these basic principles of felony sentencing in an

³ What was R.C. 2929.19(B)(5) is now R.C. 2929.19(B)(4).

R.C. 2929.15(B) hearing does not transform that proceeding into an R.C. 2929.19 sentencing hearing.” *Fraleley*, supra, 2004-Ohio-7110, ¶ 23 (Moyer, C.J., dissenting).

As Chief Justice Moyer pointed out, nothing in R.C. 2929.15(B) describes the hearing following a community control violation hearing as a “sentencing hearing.” *Id.* at ¶ 24. Indeed, R.C. 2929.15(B) refers back to limiting trial courts to imposing “the prison term specified in the notice provided to the offender at *the* sentencing hearing.” (Emphasis added.)

Over the past decade, this court has repeatedly ruled that a trial court’s failure to follow statutory mandates causes that portion of a defendant’s sentence to be void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23 (where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the offender), *State v. Fischer*, supra (when a trial court fails to impose a mandatory term of post-release control, that part of the sentence is deemed void and must be set aside), and *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, 972 N.E.2d 509 (failure to include mandatory driver’s license suspension as part of defendant’s sentence renders that portion of the sentence void). While *Fraleley* may not have had the benefit of those sentencing decisions, the same message is found in all of those decisions: a trial court’s failure to follow a statutory mandate renders that portion of the defendant’s sentence void and that void part of the sentence may be corrected at a second sentencing hearing.

But when defendants are properly sentenced to community control and properly told what prison term will be imposed for a violation, nothing about their sentence is void. Once a defendant has been properly sentenced to community control, as Jackson was, there is no second sentencing hearing. There is only a community control violation hearing under R.C. 2929.15(B).

And, under R.C. 2929.15(B), a community control violation hearing is limited by “the sentencing hearing” that has already taken place. A community control violation hearing is not a sentencing hearing – it is controlled by a sentencing hearing.

Since a community control violation hearing is not a sentencing hearing, there is no right to allocution at one. The sentencing took place weeks, months, or even years earlier when the defendant was placed on community control. That was the time and place for allocution. And prior to the underlying case, this has been the consistent ruling across the state:

- “[T]here is no requirement for the right of allocution at a revocation hearing. *State v. Michael*, 3rd Dist. Napoleon No. 7-13-05, 2014-Ohio-754, ¶ 30.
- “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.” *State v. Gibson*, 11th Dist. Portage No. 2013-P-0047, 2014-Ohio-433, ¶ 44 (emphasis sic).
- “In a case such as this, 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. Presumably, the defendant was already afforded this right at his original sentencing hearing. That was the time that his statement could have had an effect on the court’s sentence. At that time, the court had yet to determine what sentence to impose.” *State v. Favors*, 7th Dist. Mahoning No. 08-MA-35, 2008-Ohio-6361, ¶ 19.
- “[I]n this case, the trial court was not conducting a sentencing hearing. The sentence that the appellant would receive if he violated community control sanctions had already been decided and announced by the trial court nearly two years earlier at the

original sentencing hearing. The trial court was conducting a revocation hearing.

There are no equivalent statutes or rules for such hearings.” *State v. Krouskoupf*, 5th Dist. Muskingum No. CT2005-0024, 2006-Ohio-783, ¶15.

The majority opinion of First District Court of Appeals converts community control violation hearings into new sentencing hearings. But absent statutory authority (such as judicial release), trial courts cannot sentence offenders anew. The only time a court can do that is when part of the imposed sentence is void. In cases such as this one where the sentenced imposed was proper, there can be no second sentencing hearing.

The time and place for allocution is the sentencing hearing. It is the time and place for a defendant to have their last say on mitigation. By the time a community control violation hearing is held, the time for offering mitigation is over. In turn, the time for (and right of) allocution is also over.

This court, therefore, should reverse the First District Court of Appeals and rule that the right of allocution does not apply to community control violation hearings.

Conclusion

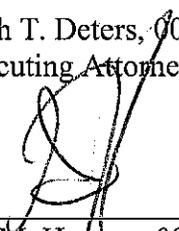
The right of allocution attaches to sentencing hearings. In Ohio, when defendants are given a term of community control, they must also be told the specific prison term they will receive if they violate the terms of that community control. That is part of their sentence. That is the time and place for allocution.

Community control violation hearings are not sentencing hearings and, instead, are controlled by the sentencing hearing. Since they are not sentencing hearings, the right of allocution does not apply to them. The First District wrongly interpreted the law when it ruled otherwise.

This court should, therefore, reverse this matter and hold that the right of allocution does not apply to community control violation hearings.

Respectfully,

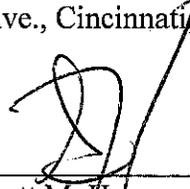
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Proof of Service

I hereby certify that I have sent a copy of the foregoing Merit Brief, by United States mail, addressed to Timothy Bicknell, 3268 Jefferson Ave., Cincinnati, Ohio 45202, counsel of record, this 4th day of February, 2016.



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Assistant Prosecuting Attorney

Appendix

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Decision Being Appealed	A-4
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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

:

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT, STATE OF OHIO

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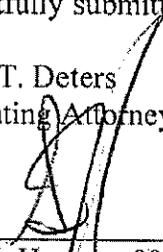
IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO.
Plaintiff-Appellant :
vs. : NOTICE OF APPEAL OF
DOMINIC JACKSON : PLAINTIFF-APPELLANT, STATE
 : OF OHIO
Defendant-Appellee :

Plaintiff-Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case number C-C-140384 rendered on June 5, 2015. This case involves a felony and is of public or great general interest.

Respectfully submitted,

Joseph T. Deters
Prosecuting Attorney

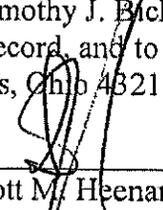


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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Notice of Appeal of Appellant, State of Ohio, by United States mail, addressed to Timothy J. Bicknell, attorney at law, 3268 Jefferson Ave., Cincinnati, Ohio 45202, counsel of record, and to Timothy Young, Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, this 21 day of July, 2015.



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney

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

STATE OF OHIO,	:	APPEAL NO. C-140384
	:	TRIAL NO. B-1205198
Plaintiff-Appellee,	:	
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 *Fraleley* decision. Only this court has cited *Fraleley* 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 *Fraleley* 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.

2929.15 Community control sanctions - felony.

(A)

(1) If in sentencing an offender for a felony the court is not required to impose a prison term, a mandatory prison term, or a term of life imprisonment upon the offender, the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code. If the court is sentencing an offender for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code, in addition to the mandatory term of local incarceration imposed under that division and the mandatory fine required by division (B)(3) of section 2929.18 of the Revised Code, the court may impose upon the offender a community control sanction or combination of community control sanctions in accordance with sections 2929.16 and 2929.17 of the Revised Code. If the court is sentencing an offender for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, in addition to the mandatory prison term or mandatory prison term and additional prison term imposed under that division, the court also may impose upon the offender a community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

The duration of all community control sanctions imposed upon an offender under this division shall not exceed five years. If the offender absconds or otherwise leaves the jurisdiction of the court in which the offender resides without obtaining permission from the court or the offender's probation officer to leave the jurisdiction of the court, or if the offender is confined in any institution for the commission of any offense while under a community control sanction, the period of the community control sanction ceases to run until the offender is brought before the court for its further action. If the court sentences the offender to one or more nonresidential sanctions under section 2929.17 of the Revised Code, the court shall impose as a condition of the nonresidential sanctions that, during the period of the sanctions, the offender must abide by the law and must not leave the state without the permission of the court or the offender's probation officer. The court may impose any other conditions of release under a community control sanction that the court considers appropriate, including, but not limited to, requiring that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in division (D) of this section to determine whether the offender ingested or was injected with a drug of abuse and requiring that the results of the drug test indicate that the offender did not ingest or was not injected with a drug of abuse.

(2)

(a) If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or

2929.18 of the Revised Code, the court shall place the offender under the general control and supervision of a department of probation in the county that serves the court for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer. Alternatively, if the offender resides in another county and a county department of probation has been established in that county or that county is served by a multicounty probation department established under section 2301.27 of the Revised Code, the court may request the court of common pleas of that county to receive the offender into the general control and supervision of that county or multicounty department of probation for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer, subject to the jurisdiction of the trial judge over and with respect to the person of the offender, and to the rules governing that department of probation.

If there is no department of probation in the county that serves the court, the court shall place the offender, regardless of the offender's county of residence, under the general control and supervision of the adult parole authority for purposes of reporting to the court a violation of any of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer.

(b) If the court imposing sentence upon an offender sentences the offender to any community control sanction or combination of community control sanctions authorized pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, and if the offender violates any condition of the sanctions, any condition of release under a community control sanction imposed by the court, violates any law, or departs the state without the permission of the court or the offender's probation officer, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation or departure directly to the sentencing court, or shall report the violation or departure to the county or multicounty department of probation with general control and supervision over the offender under division (A)(2)(a) of this section or the officer of that department who supervises the offender, or, if there is no such department with general control and supervision over the offender under that division, to the adult parole authority. If the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction reports the violation or departure to the county or multicounty department of probation or the adult parole authority, the department's or authority's officers may treat the offender as if the offender were on probation and in violation of the probation, and shall report the violation of the condition of the sanction, any condition of release under a community control sanction imposed by the court, the

violation of law, or the departure from the state without the required permission to the sentencing court.

(3) If an offender who is eligible for community control sanctions under this section admits to being drug addicted or the court has reason to believe that the offender is drug addicted, and if the offense for which the offender is being sentenced was related to the addiction, the court may require that the offender be assessed by a properly credentialed professional within a specified period of time and shall require the professional to file a written assessment of the offender with the court. If a court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after consideration of the written assessment, if available at the time of sentencing, and recommendations of the professional and other treatment and recovery support services providers.

(4) If an assessment completed pursuant to division (A)(3) of this section indicates that the offender is addicted to drugs or alcohol, the court may include in any community control sanction imposed for a violation of section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code a requirement that the offender participate in a treatment and recovery support services program certified under section 5119.36 of the Revised Code or offered by another properly credentialed community addiction services provider.

(B)

(1) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose upon the violator one or more of the following penalties:

(a) A longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit specified in division (A) of this section;

(b) A more restrictive sanction under section 2929.16, 2929.17, or 2929.18 of the Revised Code;

(c) A prison term on the offender pursuant to section 2929.14 of the Revised Code.

(2) The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) of section 2929.19 of the Revised Code. The court may reduce the longer period of time that the offender is required to spend under the longer sanction, the more restrictive sanction, or a prison term imposed pursuant to this division by the time the offender successfully spent under the sanction that was initially imposed.

(C) If an offender, for a significant period of time, fulfills the conditions of a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code in an exemplary manner, the court may reduce the period of time under the sanction or impose a less restrictive sanction, but the court shall not permit the offender to violate any law or permit the offender to leave the state without the permission of the court or the offender's probation officer.

(D)

(1) If a court under division (A)(1) of this section imposes a condition of release under a community control sanction that requires the offender to submit to random drug testing, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section may cause the offender to submit to random drug testing performed by a laboratory or entity that has entered into a contract with any of the governmental entities or officers authorized to enter into a contract with that laboratory or entity under section 341.26, 753.33, or 5120.63 of the Revised Code.

(2) If no laboratory or entity described in division (D)(1) of this section has entered into a contract as specified in that division, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section shall cause the offender to submit to random drug testing performed by a reputable public laboratory to determine whether the individual who is the subject of the drug test ingested or was injected with a drug of abuse.

(3) A laboratory or entity that has entered into a contract pursuant to section 341.26, 753.33, or 5120.63 of the Revised Code shall perform the random drug tests under division (D)(1) of this section in accordance with the applicable standards that are included in the terms of that contract. A public laboratory shall perform the random drug tests under division (D)(2) of this section in accordance with the standards set forth in the policies and procedures established by the department of rehabilitation and correction pursuant to section 5120.63 of the Revised Code. An offender who is required under division (A)(1) of this section to submit to random drug testing as a condition of release under a community control sanction and whose test results indicate that the offender ingested or was injected with a drug of abuse shall pay the fee for the drug test if the department of probation or the adult parole authority that has general control and supervision of the offender requires payment of a fee. A laboratory or entity that performs the random drug testing on an offender under division (D)(1) or (2) of this section shall transmit the results of the drug test to the appropriate department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section.

2929.19 Sentencing hearing.

(A) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to section 2953.07 or 2953.08 of the Revised Code. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.

(B)

(1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to section 2951.03 of the Revised Code or Criminal Rule 32.2, and any victim impact statement made pursuant to section 2947.051 of the Revised Code.

(2) Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;

(b) In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications;

(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. This division applies with respect to all prison terms imposed for an offense of a type described in this division, including a term imposed for any such offense that is a risk reduction sentence, as defined in section 2967.28 of the Revised Code. If a court imposes a sentence including a prison term of a type described in division (B)(2)(c) of this section on or after July 11,

2006, the failure of a court to notify the offender pursuant to division (B)(2)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(c) of this section and failed to notify the offender pursuant to division (B)(2)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(2)(c) of this section. This division applies with respect to all prison terms imposed for an offense of a type described in this division, including a term imposed for any such offense that is a risk reduction sentence, as defined in section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(d) of this section and failed to notify the offender pursuant to division (B)(2)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(2)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(2)(e) of this section that the parole board may impose a prison term as described in division (B)(2)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to division (D)(1) of section 2967.28 of the Revised Code, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(2)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(f) Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in section 341.26, 753.33, or 5120.63 of the Revised Code, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.

(g)

(i) Determine, notify the offender of, and include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term under section 2967.191 of the Revised Code. The court's calculation shall not include the number of days, if any, that the offender previously served in the custody of the department of rehabilitation and correction arising out of the offense for which the prisoner was convicted and sentenced.

(ii) In making a determination under division (B)(2)(h)(i) of this section, the court shall consider the arguments of the parties and conduct a hearing if one is requested.

(iii) The sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under division (B)(2)(h)(i) of this section. The offender may, at any time after sentencing, file a motion in the sentencing court to correct any error made in making a determination under division (B)(2)(h)(i) of this section, and the court may in its discretion grant or deny that motion. If the court changes the number of days in its determination or redetermination, the court shall cause the entry granting that change to be delivered to the department of rehabilitation and correction without delay. Sections 2931.15 and 2953.21 of the Revised Code do not apply to a motion made under this section.

(iv) An inaccurate determination under division (B)(2)(h)(i) of this section is not grounds for setting aside the offender's conviction or sentence and does not otherwise render the sentence void or voidable.

(3)

(a) The court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of section 2950.03 of the Revised Code if any of the following apply:

(i) The offender is being sentenced for a violent sex offense or designated homicide, assault, or kidnapping offense that the offender committed on or after January 1, 1997, and the offender is adjudicated a sexually violent predator in relation to that offense.

(ii) The offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iii) The offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iv) The offender is being sentenced under section 2971.03 of the Revised Code for a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007.

(v) The offender is sentenced to a term of life without parole under division (B) of section 2907.02 of the Revised Code.

(vi) The offender is being sentenced for attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code.

(vii) The offender is being sentenced under division (B)(3)(a), (b), (c), or (d) of section 2971.03 of the Revised Code for an offense described in those divisions committed on or after January 1, 2008.

(b) Additionally, if any criterion set forth in divisions (B)(3)(a)(i) to (vii) of this section is satisfied, in the circumstances described in division (E) of section 2929.14 of the Revised Code, the court shall impose sentence on the offender as described in that division.

(4) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to section 2929.14 of the Revised Code.

(5) Before imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

(6) If the sentencing court sentences the offender to a sanction of confinement pursuant to section 2929.14 or 2929.16 of the Revised Code that is to be served in a local

detention facility, as defined in section 2929.36 of the Revised Code, and if the local detention facility is covered by a policy adopted pursuant to section 307.93, 341.14, 341.19, 341.21, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code and section 2929.37 of the Revised Code, both of the following apply:

(a) The court shall specify both of the following as part of the sentence:

(i) If the offender is presented with an itemized bill pursuant to section 2929.37 of the Revised Code for payment of the costs of confinement, the offender is required to pay the bill in accordance with that section.

(ii) If the offender does not dispute the bill described in division (B)(6)(a)(i) of this section and does not pay the bill by the times specified in section 2929.37 of the Revised Code, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(6)(a)(ii) of this section.

(7) The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(2)(a) of this section or to include in the sentencing entry any information required by division (B)(2)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.

(C)

(1) If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code, the court shall impose the mandatory term of local incarceration in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code, and, in addition, may impose additional sanctions as specified in sections 2929.15, 2929.16, 2929.17, and 2929.18 of the Revised Code. The court shall not impose a prison term on the offender except that the court may impose a prison term upon the offender as provided in division (A)(1) of section 2929.13 of the Revised Code.

(2) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the court shall impose the mandatory prison term in accordance with that division, shall impose a mandatory fine

in accordance with division (B)(3) of section 2929.18 of the Revised Code, and, in addition, may impose an additional prison term as specified in section 2929.14 of the Revised Code. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may impose a community control sanction on the offender, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(D) The sentencing court, pursuant to division (I)(1) of section 2929.14 of the Revised Code, may recommend placement of the offender in a program of shock incarceration under section 5120.031 of the Revised Code or an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.