

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO</b>	)	<b>Ohio Supreme Court No. 2015-1137</b>
<i>Plaintiff-Appellant,</i>	)	
	)	
<b>vs.</b>	)	<b>On Appeal from the Hamilton County</b>
	)	<b>Court of Appeals, 1st Appellate District</b>
	)	
<b>DOMINIC JACKSON</b>	)	<b>Court of Appeals No: C 140384</b>
<i>Defendant-Appellee.</i>	)	
	)	

**MERIT BRIEF OF APPELLEE**

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## INTRODUCTION

This case involves the question of whether a defendant's right to allocution applies to the imposition of sentence at a probation violation hearing. For the reasons that follow, Appellee, Mr. Jackson, submits to this Honorable Court that the right should apply.

The First District found in this case that the trial court did not provide Mr. Jackson with his right to allocution when, during a probation revocation hearing, the court quieted Mr. Jackson when he attempted to speak in mitigation before the imposition of sentence. In support for its holding, the First District determined that in *State v. Fraley*, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995 (2004), this Court had correctly characterized a community control violation hearing as a second sentencing hearing where the sentencing "...court must comply with the relevant sentencing statutes." *Id.* at ¶ 17.

Appellant, the State of Ohio, argues that the right of allocution only applies to the initial sentencing hearing, not to subsequent community control violation hearings, and that this Court used the description of a "second sentencing hearing" in *State v. Fraley* in reference to community control violation hearings occurring after the trial court had failed to properly notify the defendant of the possible term of imprisonment at the initial sentencing. (Appellant's Br. 5-6). Appellant is correct that the facts in *Fraley* involved circumstances where the trial court failed to impose a prison term at the original sentencing hearing and then notified the defendant of the sentence at a subsequent community control violation hearing. However, Appellant's assertion that the First District misinterpreted *Fraley's* characterization of a community control violation hearing as a second sentencing hearing is incorrect, as is Appellant's reasoning for limiting allocution to an initial sentencing hearing.

As the First District correctly held in this case, the right to allocution should be applied to community control revocation proceedings. This Court's accurate characterization of a probation revocation proceeding as a "second sentencing hearing" illustrates the importance of allocution beyond an initial sentencing hearing because, upon a finding that a defendant has violated the terms of probation, the trial court maintains broad discretion in determining an appropriate sentence. Further, as other state and federal jurisdictions have found, the criminal rules applying to the imposition of sentence and to the revocation of probation are not in conflict and should be read to compliment each other.

#### **STATEMENT OF THE CASE**

On August 3, 2012, Appellee, Dominic Jackson, was indicted on two felony counts: tampering with evidence, in violation of Ohio Revised Code ("RC") section 2921.12(A)(1), and receiving stolen property in violation of RC 2913.51(A). Mr. Jackson pleaded guilty to the receiving stolen property count, a fourth degree felony, on September 7, 2014, and the State dismissed the remaining count. The trial court held a sentencing hearing on October 15, 2012, where Jackson was sentenced to two years of community control (Vol. 1, Tr., P. 20). A community control sanction violation was filed on May 15, 2014. The trial court held a probable cause hearing on Mr. Jackson's community control violation, and following a guilty plea to the violations sentenced Mr. Jackson to 18 months in the Ohio Department of Corrections (Vol. 2, Tr., PP. 5-6). Appellant timely filed a notice of appeal on June 30, 2014. On June 5, 2015, the First District entered an opinion reversing the trial court; finding that the court erred by not allowing Mr. Jackson the right to allocution before passing sentence. The State of Ohio appealed the First District's decision to this Court, and the appeal was accepted.

## STATEMENT OF THE FACTS

The State alleged that on or about the 28th day of July, 2012, police officers observed Mr. Jackson pick up a loaded firearm and throw it into a bush in an attempt to conceal it. The firearm was reported to have been stolen. After Mr. Jackson pleaded guilty to receiving stolen property, he was sentenced to two years of community control (Vol. 1, Tr., P. 20). A community control sanction violation hearing was held following the filing of a violation on May 15, 2014.

At the outset of the violation hearing, the trial court explained to Mr. Jackson that sentencing would be continued for 60 days to give Mr. Jackson a chance to “get your act together.” (Vol. 2, Tr., P. 2). However, the trial court then told Mr. Jackson that “... I don’t need all the sighs and the eye rolling and everything. I’m done. We’re not doing that. We’re sentencing now.” (Id. at 5). The court then proceeds to sentence Mr. Jackson to 18 months in prison. (Id. at 6). The trial court not only failed to ask Mr. Jackson if he wished to speak on his own behalf, it actually silenced Mr. Jackson when he attempted to explain his conduct, expressly telling Mr. Jackson to be quiet. (Id.). Once the trial court determined that sentence was to be imposed, it no longer allowed Mr. Jackson to address the court.

## ARGUMENT

**The First District Court of Appeals correctly found that the right of allocution applies to community control violation hearings.**

The First District, in finding that the trial court had not provided Mr. Jackson with his right to allocution when it did not allow him to speak in mitigation before sentencing him to prison following a community control violation hearing, properly applied a defendant’s right to allocution to community control revocation hearings.

**1. The First District’s interpretation of *State v. Fraley*, and its effect on the right to allocution at community control violation hearings, is accurate, fair, and practical.**

In *State v. Fraley*, the issue addressed was whether, “...a trial court is mandated to notify a defendant at the initial sentencing hearing of a specified term of imprisonment that could be imposed if a defendant violates the terms and conditions of his community control, or whether such notification may come at a later sentencing hearing.” *Fraley*, 105 Ohio St.3d at ¶ 11. This Court’s use of the terms “later sentencing hearing” is instructive because it is wording that mirrors language used later in the decision describing a subsequent community control violation hearing as a “second sentencing hearing.” The First District was guided by this Court’s language in *Fraley* when it held in this case that Mr. Jackson’s community control violation hearing should have included the same right to allocution required at an initial sentencing hearing.

Appellant’s argument that the *Fraley* decision does not support a right to allocution at probation violation hearings where a prison sentence is imposed is problematic for three reasons: First, the plain language of the *Fraley* decision does not indicate that this Court’s use of the terms “later sentencing hearing,” and, “second sentencing hearing,” referred solely to probation revocation hearings which are subsequent to an initial sentencing where the trial court failed to notify the defendant of the sentence to be imposed upon violation of probation terms and conditions.

Second, even assuming - which Appellee does not - that Appellant’s interpretation of *Fraley*’s language is correct, Appellant fails to address the question raised by that interpretation, which is whether, under Appellant’s theory, *Fraley* himself would have had a right to allocution

at the three community control violation hearings which were held after the trial court in that case failed to inform Fraley of the sentence to be imposed at the original sentencing hearing.

If, as Appellant asserts, the distinguishing factor that transforms a community control hearing into a second (or third, or fourth) sentencing hearing is the failure of the trial court to properly inform a defendant of the prison sentence to be imposed should the defendant violate the terms and conditions of community control, then defendants in cases that meet that criteria would have a right to allocution at their respective community control hearings. Clearly this outcome would prove impractical, as it would create a class of defendants - those who were not properly notified of the prison sentence to be imposed upon a violation of community control - who would have a right to allocution at subsequent community control revocation hearings.

Finally, Appellant argues that the failure of a trial court to properly inform a defendant of the sentence to be imposed voids the sentence (Appellant's Br. at p. 7). However, the *Fraley* decision does not conclude that a sentence is void when a trial court fails to inform a defendant of the sentence to be imposed for violating the terms and conditions of community control. As Appellant points out, this Court has held that resentencing is the proper remedy for a void sentence. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23. A community control violation hearing, which can include a probable cause hearing, an evidentiary hearing to determine whether a violation has occurred, or a plea hearing, is not analogous to a resentencing hearing.

**2. Allocution plays an important role at community control revocation hearings because the trial court maintains broad sentencing discretion; including reinstating**

**probation, imposing alternative sanctions, or imposing a sentence within the range allowed by law.**

The purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of punishment. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121 (Ohio 2011), quoting *State v. Reynolds*, 80 Ohio St.3d 670, 684, 1998-Ohio-171, 687 N.E.2d 1358 (1998). A trial court has broad discretion in determining the appropriate sentence following a community control violation. RC § 2929.15(B)(1) allows trial courts the discretion at a community control revocation hearing to sentence a defendant to a longer period under the same sanction, a more restrictive sanction, or a prison term up to the maximum allowed by statute.

Appellant's argument that trial courts imposing sentence after a community control violation are simply "imposing an already existing sentence" (Appellant's Br. 5), simplifies both the initial sentence imposed, and the varied possible outcomes which fall within the sentencing court's discretion at a community control revocation hearing.

In *State v. Osume*, 2015-Ohio-3850 (1st App. Dist.), the First District elucidated the difference between a sentence of community control and a prison sentence imposed at an initial sentencing hearing; finding that the two sanctions are mutually exclusive alternatives. *Id.* at ¶ 21. This Court has held that "...the General Assembly intended prison and community-control sanctions as alternative sentences for a felony offense." *State v. Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, ¶ 31 (2015). The imposition of sentence following revocation of community control should give rise to a defendant's right to speak on his or her own behalf and ability to present additional information in mitigation which can aid the sentencing court in its decision as

to the proper disposition. “The right of allocution is minimally invasive of the sentencing proceeding; the requirement of providing a defendant a few moments of court time is slight.”

*United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991).

**3. Ohio Criminal Rules 32 and 32.3 are complimentary not conflicting.**

Ohio Criminal Rule 32(A)(1) provides that before imposing sentence, the trial court shall address the defendant personally and inquire as to whether the defendant wishes to exercise his or her right to allocution. *State v. Campbell*, 90 Ohio St.3d 320, 324, 738 N.E.2d 1178 (2000).

The Rule does not merely give the defendant a right to allocution, it imposes an affirmative requirement on the trial court to ask if he wishes to exercise that right. *Id.* Ohio Criminal Rule 32(B) provides for the notification of the defendant’s right to appeal. And, Ohio Criminal Rule 32(C) provides for the entering of a judgment.

Ohio Criminal Rule 32.3 provides for a hearing and right to counsel in probation revocation proceedings. While Ohio Criminal Rule 32.3 is silent as to a right of allocution following revocation of probation, it is also silent on notification of a defendant’s right to appeal, and on the entering of a judgment after revocation of probation and the related sentencing. Yet, both the right of appeal and the necessity of a judgment entry journalizing the trial court’s decision in a case follow from sentences involving the revocation of probation. Apart from allocution, the requirements of Crim. R. 32 are not strictly limited to the initial sentencing hearing, and are also applied following imposition of a sentence following probation revocation.

While Appellant is correct that several Ohio courts of appeal have found that the right of allocution found in Ohio R. Crim. P. 32(A)(1) does not apply in probation revocation cases, several jurisdictions outside Ohio have come to the opposite conclusion. *Compare Vicory v.*

*Indiana*, 802 N.E.2d 426, 428 (Ind. 2004)(extending right of allocution to probation violation hearings); *United States v. Patterson*, 128 F.3d 1259 (8th Cir. 1997)(finding that Fed. R. Crim. P. 32 and 32.1 are complimentary and allocution applies to revocation of supervised release); *United States v. Carper*, 24 F.3d 1157 (9th Cir. 1994); *State v. Strickland*, 703 A.2d 109, 243 Conn. 339, 354 (Conn. 1997)(finding right of allocution applies to probation revocation); and, *Forbes v. Wyoming*, 220 P.3d 510 (Wyo. 2009)(commenting that allowing probationer the opportunity to allocate is the better practice). These cases are instructive as to the issues and possible solutions raised by the application of Ohio Criminal Rules 32 and 32.3 in this case.

### **CONCLUSION**

While the First District's decision in this case is not consistent with other courts of appeal in Ohio, it is consistent with the rulings of this Court, the history and purpose of the right of allocution, the complimentary protections afforded by Crim. R. 32(A) and 32.3, considerations of practicality and fairness in probation revocation hearings, and with the rulings of state and federal courts outside Ohio. For the aforementioned reasons, this Court should hold that the right of allocution applies to probation revocation proceedings in Ohio.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLEE was served this 25th day of March 2016, upon Scott M. Heenan, Asst. Hamilton County Prosecutor, at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 via U.S. Mail.

*/s Timothy J. Bicknell* \_\_\_\_\_  
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