[Cite as *State v. Jones*, 2003-Ohio-3285.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 02-BE-65
VS.	)	
	)	OPINION
FREDERICK L. JONES,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from County Court, Northern Division, Case No. 02CRB1036
JUDGMENT:	Appellant's sentence is vacated; case remanded for resentencing
APPEARANCES:	
For Plaintiff-Appellee:	Frank Pierce Prosecuting Attorney Thomas M. Ryncarz Assistant Prosecuting Attorney 147-A West Main Street St. Clairsville, Ohio 43950
For Defendant-Appellant:	Attorney James L. Nichelson Belmont County Public Defender 100 West Main Street, Side Ent. St. Clairsville, Ohio 43950

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 19, 2003

DONOFRIO, J.

{¶1} Defendant-appellant, Frederick L. Jones, appeals from a Belmont County Northern Division Court decision sentencing him to six months in jail and two years probation following a domestic violence conviction.

{¶2} In September 2002, appellant was arrested and charged with domestic violence against his father, Andrew Jones, in violation of R.C. 2919.25, a first degree misdemeanor. Appellant entered a not guilty plea. On October 9, 2002, appellant withdrew his not guilty plea and pled guilty. The court entered a finding of guilt and stated that it would sentence appellant at a later date. The court ordered appellant to have no contact with Andrew Jones without his consent. The court placed appellant on supervised probation, ordered him to be evaluated by Women's Tri-County Help Center and to comply with their recommendations, and to complete counseling. According to plaintiff-appellee, the State of Ohio, when appellant pled guilty the court placed him in a deferred sentencing program. Under the program, if appellant rehabilitated himself, the court would set aside his guilty plea.

{¶3} On October 30, 2002, the court held a preliminary hearing on an unrelated burglary charge against appellant. Appellant was alleged to have burglarized the home of Jackie Delbrugge, whom he had a relationship with in the past. At the beginning of the hearing, the court advised appellant and appellee that appellant had several other open cases, including the domestic violence case. The court stated that it was going to address all the cases once it concluded the preliminary hearing. The court then heard evidence from Miss Delbrugge regarding the alleged burglary and decided to bind the matter over to the Belmont County Grand Jury. Next, the court addressed appellant's other cases, including the domestic violence case, and proceeded to sentencing on the domestic violence conviction. The court sentenced appellant to six months in jail, two months suspended, and two years

of supervised probation. Appellant objected on the ground that the court failed to have a hearing to determine if appellant violated the court's October 9, 2002 order.

{¶4} Appellant filed his timely notice of appeal on November 6, 2002. The court stayed appellant's sentence pending this appeal.

{¶5} Appellant raises one assignment of error, which states:

{¶6} "THE TRIAL COURT VIOLATED RIGHTS OF THE APPELLANT BY FAILING TO AFFORD TO HIM A MEANINGFUL SENTENCING HEARING AND THOSE RIGHTS PRESCRIBED BY CRIM.R. 32."

{¶7} Appellant argues the trial court failed to provide him with a meaningful sentencing hearing as Crim.R. 32(A) requires. He also asserts the court should not have considered evidence presented at his preliminary hearing on the burglary charge. Appellant argues that during his preliminary hearing, he should not have had to anticipate his defense of an unannounced sentencing hearing. Appellant further contends no evidence was presented that he violated the court's October 9, 2002 order. For these reasons, appellant asserts we must reverse his sentence and remand his case.

{¶8} Crim.R. 32(A)(1) provides in pertinent part:

{¶9} "Sentence shall be imposed without unnecessary delay. * * *. At the time of imposing sentence, the court shall do all of the following:

{¶10} "(1) Afford 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."

{¶11} In *State v. Campbell* (2000), 90 Ohio St.3d 320, the Ohio Supreme Court examined a capital case where the trial court did not afford the defendant the right of allocution before sentencing. The court held:

{¶12} "1. Pursuant to Crim.R. 32(A)(1), before imposing sentence, a trial court must address the defendant personally and ask whether he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

{¶13} "2. Crim.R. 32(A)(1) applies to capital cases and noncapital cases.

{¶14} "3. 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 paragraphs one, two, and three of the syllabus.

{¶15} The right of allocution also applies in misdemeanor cases. See *City of Warrensville Heights v. Shaffer*, 8th Dist. No. 80482, 2002-Ohio-3269; *State v. Spiess*, 6th Dist. No. WM-01-015, 2002-Ohio-2051; *State v. Nahhas* (Mar. 16, 2001), 11th Dist. No. 99-T-0179.

{¶16} In the present case, appellant was before the court for a preliminary hearing on an unrelated burglary charge. Before beginning the hearing, the court informed the parties that at the conclusion of the preliminary hearing it was going to address all of appellant's other open cases, including the case where "there was a guilty plea in a domestic case that was put in the deferral program." (Tr. 4). The court proceeded with the hearing. Miss Delbrugge alleged that appellant burglarized her home. (Tr. 11). During her testimony, Miss Delbrugge stated that she went to

appellant's house on two occasions during the last couple of weeks and was invited into the house. (Tr. 15, 19, 36). She also played tapes from her answering machine of appellant calling her and talking about returning her "stuff." (Tr. 28-34). Based on Miss Delbrugge's testimony, the court decided to bind the matter over to the Grand Jury. (Tr. 41).

{¶17} The following colloquy then occurred:

{¶18} "THE COURT: * * * Now, the fleeing and eluding case, the old one, that's been long resolved.

{¶19} "The assault case of September 25th was dismissed.

{¶20} "We've got a couple others I've got to take a look at.

{¶21} "The last entry in 0873 [not the lower case number of the present appeal] was I ordered – that was on October 9th – I ordered this defendant to have absolutely no contact with Jackie Delbrugge. That's set for review November 13th. * * *.

{¶22} "There's a restitution order in another case. * * *.

{¶23} "* * *

{¶24} "THE COURT: * * * Now, having said that, that leaves one case, the case that he entered a guilty plea on.

{¶25} "This court is prepared to sentence, unless we need some time on that.

{¶26} "Mr. Thomas, Mr. Nichelson [appellant's counsel], any comments or position on that?

{¶27} "MR. NICHELSON: What case, your Honor?

{¶28} "THE COURT: That's the case where he just entered a guilty plea, 02 01036 [the lower case number of the present appeal]. October 9th.

{¶29} "MR. THOMAS: Your Honor, we would like to address that. We feel that Mr. Jones has shown a flagrant disregard for this court's orders, and we're asking that the maximum sentence be imposed.

{¶30} "THE COURT: Mr. Nichelson, any comments?

{¶31} "MR. NICHELSON: 01036 was Andrew Jones, correct?

{¶32} "THE COURT: Frederick Jones – yes, correct, that is the victim. The father.

{¶33} "MR. NICHELSON: He has not violated that, your Honor, as far as I can see. He was to have –

{¶34} "THE COURT: Well, he was ordered to have no contact with this lady in another case. I just found sufficient evidence to bind this matter over on a preliminary hearing, so when you say he hasn't violated this, he's violated the law, he's violated a restraining order – yes, madam.

{¶35} "THE CLERK: Do you want the case that he is to have no contact with Jackie Delbrugge? Do you want that one back?

{¶36} "THE COURT: No.

{¶37} "THE CLERK: Okay.

{¶38} "THE COURT: That's set for review.

{¶39} "The plea having been entered, I do sentence at this time. I sentence the defendant to six months in jail; I suspend two months; that leaves four months he will serve in the Belmont County Jail. * * *.

{¶40} "MR. NICHELSON: Your Honor, if I may, you've sentenced in Case 01036?

{¶41} "THE COURT: Correct.

{¶42} "MR. NICHELSON: We've got to object to that. There is no hearing on a violation – there is no motion filed in 873, which is the only one that the court has cited as a violation, and –" (Tr. 42-45).

{¶43} Not once, during the sentencing hearing, did the court address appellant.

{¶44} Appellee relies on *State v. Peters* (Aug. 22, 1990), 9th Dist. No. 89CA004733, for support. In *Peters*, the defendant argued that the court erred in failing to ask him if he wanted to address the court. The appellate court noted that only defense counsel was invited to speak at defendant's sentencing. The appellate court found that the trial court erred in this respect. Id. However, noting that the defendant's counsel spoke eloquently on his behalf, it held that since neither the defendant nor his counsel made a request for the defendant to address the court or otherwise brought the error to the court's attention at a time when the court could have remedied its error, it would not address the issue on appeal. Id.

{¶45} Appellant never asked to speak at the hearing. Although *Peters* tends to support appellee's position, other more recent cases have held that the defendant need not object nor ask to be heard as a prerequisite to reversal and remand for resentencing. See *State v. Bellomy*, 4th Dist. No. 02CA2828, 2002-Ohio-5599, (Although the court allowed the defendant's counsel to speak on her behalf, it erred in not addressing the defendant at all and not affording her the right to make a statement or offer information in mitigation of punishment); *Spiess*, 6th Dist. No. WM-01-015, ("While the failure to afford the right [of allocution] may be invited error or held harmless, in this matter there is no indication in the record of such invitation or

substitute acts which might render the failure to grant the right harmless"); *State v. Miliner*, 2d Dist. No. 18785, 2001-Ohio-7025, (Even though the trial court afforded the defendant's counsel an opportunity to speak, it erred in not addressing the defendant personally and inquiring if he wished to make a statement in his own behalf or present any information in mitigation of punishment).

{¶46} While the trial court in this case did ask appellant's counsel if he had anything to say, the court cut him off and proceeded with sentencing. More importantly, the court never addressed appellant. "Trial courts must painstakingly adhere to Crim.R. 32, guaranteeing the right of allocution. A Crim.R. 32 inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *State v. Green* (2000), 90 Ohio St.3d 352, 359-360. Appellant could have made a statement to the court explaining what he had done in terms of complying with the court's October 9th order. He could have provided other mitigating factors for the court to consider and expressed his remorse for the offense. But the court denied him this opportunity. Furthermore, the court failed to give appellant adequate notice of the sentencing hearing. See *State v. Hankison*, 4th Dist. No. 01CA2792, 2002-Ohio-6161; *State v. Pletka* (Feb. 11, 1993), 2d Dist. No. 91-CA-70. The court informed appellant the day of the preliminary hearing that it would proceed with sentencing in his domestic violence case.

{¶47} Since the court failed to address appellant or provide him with his right of allocution and failed to provide appellant with adequate notice of the sentencing hearing, appellant's assignment of error has merit.

{¶48} For the reasons stated above, appellant's sentence is hereby vacated and the case is remanded for resentencing.

Vukovich and DeGenaro, J., concur.