

[Cite as *State v. Gordon*, 2009-Ohio-4819.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 08 MA 91
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
WESLEY R. GORDON)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Struthers Municipal Court of Mahoning County, Ohio
Case No. 07 CRB 390

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Carol Clemente-Wagner
Assistant Prosecuting Attorney
6 Elm Street
Struthers, Ohio 44471

For Defendant-Appellant:

Atty. Douglas B. Taylor
11492 Youngstown-Pittsburgh Rd.
New Middletown, Ohio 44442

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 9, 2009

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WAITE, J.

{¶1} Appellant Wesley R. Gordon contends on appeal that he was not afforded the right to allocution when he was sentenced in Struthers Municipal Court on one count of assault. Appellee has not responded to this appeal. The record reflects that Appellant was not given an opportunity to make a statement prior to the imposition of the sentence, and the case is hereby remanded for resentencing.

{¶2} A complaint was filed against Appellant on July 10, 2007, accusing him of felonious assault, R.C. 2903.11, a second degree felony. The victim, Charles E. Richardson, filed the complaint. Appellant was arrested on August 11, 2007. On November 30, 2007, Appellant agreed to plead guilty to first degree misdemeanor assault. The court accepted the plea, and ordered a presentence investigation to be completed. Sentencing took place on April 21, 2008. Appellant was represented by counsel at the hearing. Counsel requested that Appellant be placed on probation. The court sentenced Appellant to 180 days in jail, to be reviewed after 60 days had been served. The court filed its judgment entry that same day, and this appeal followed on April 28, 2008. Appellant filed his brief on October 23, 2008, and after a number of extensions, the state filed a notice that it would not be filing a brief in this appeal. Because Appellee has not filed a brief, App.R. 18(C) allows us to accept Appellant's statement of the facts and issues as correct and reverse the judgment if it is reasonable to do so.

ASSIGNMENT OF ERROR

{¶13} “THE TRIAL COURT WAS IN ERROR WHEN IT DID NOT COMPLY WITH CRIMINAL RULE 32(A)(1) BY NOT AFFORDING THE DEFENDANT THE RIGHT OF ALLOCUTION.”

{¶14} Appellant argues that he should have been afforded the right to make a statement before sentencing, known as the right of allocution. The right of allocution has existed in both English and American jurisprudence since the 17th century. *State v. Lundberg*, 2nd Dist. No. 22708, 2009-Ohio-1641. Although the right exists in common law, it is also firmly imbedded in the Ohio Rules of Criminal Procedure, Crim.R. 32(A):

{¶15} “(A) **Imposition of sentence.** Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

{¶16} “(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.”

{¶17} A Crim.R. 32 inquiry represents a defendant's last opportunity to plead his case or express remorse, and courts must painstakingly adhere to the rule. *State v. Green* (2000), 90 Ohio St.3d 352, 359-330, 738 N.E.2d 1208.

{¶18} “The right of a defendant to make a final statement prior to sentencing* * * applies to both misdemeanor and felony convictions.” *State v. Robenolt*, 7th Dist. No. 04 MA 104, 2005-Ohio-6450, ¶14.

{¶19} “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.” *State v. Campbell* (2000), 90 Ohio St.3d 320, 326, 738 N.E.2d 1178. The error may be harmless for example, if defense counsel makes a statement to the judge on the defendant's behalf and the defendant has delivered to the judge an unsworn statement or letter in mitigation of sentencing. *State v. Reynolds* (1998), 80 Ohio St.3d 670, 687, 687 N.E.2d 1358. There was no waiver or harmless error in this case.

{¶10} Appellant was not afforded an opportunity to make a final statement prior to sentencing. After his counsel asked for probation, the judge said, “[h]ere’s what we’re doing” and announced the sentence. (Tr., p. 3.) Because there is no argument from the state and the record supports the alleged error, the sentence is vacated and the matter remanded to the Struthers Municipal Court for resentencing.

Donofrio, J., concurs.

DeGenaro, J., concurs.