[Cite as *State v. Goff*, 2012-Ohio-1125.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA95-09-026
	:	O P I N I O N
- vs -		3/19/2012
	:	
JAMES R. GOFF,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. 95-5-008CR

Richard W. Moyer, Clinton County Prosecuting Attorney, Andrew McCoy, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

David J. Graeff, P.O. Box 1948, Westerville, Ohio 43086-1948, and W. Joseph Edwards, 341 South Third Street, Columbus, Ohio 43215, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, James R. Goff, appeals from his conviction in the Clinton County Court of Common Pleas upon successfully petitioning this court to reopen his direct appeal. For the reasons outlined below, we confirm our prior judgment affirming appellant's conviction, reverse and vacate our prior judgment affirming appellant's sentence, and remand this matter for the sole purpose of resentencing.

{¶ 2} On January 24, 1995, appellant was indicted on alternate counts of aggravated

murder with death penalty specifications for the killing of Myrtle Rutledge, an 88-year-old woman, as well as three counts of aggravated burglary, two counts of aggravated robbery, and two counts of grand theft with specifications. Except for one count of grand theft and the accompanying grand theft specifications, a jury found appellant guilty on all counts.

{¶ 3} On August 11, 1995, after hearing extensive mitigating evidence during the penalty-phase hearing, the jury recommended appellant be sentenced to death.

{¶ 4} On August 18, 1995, after weighing the mitigating and aggravating factors, but without first providing appellant with an opportunity to exercise his right of allocution, the trial court accepted the jury's recommendation and sentenced appellant to death. The trial court also sentenced appellant to a ten to 25-year term of imprisonment for aggravated burglary, a consecutive ten to 25-year term of imprisonment for aggravated robbery, and a consecutive two-year term of imprisonment for grand theft. Appellant appealed his conviction and death sentence to this court raising 24 assignments of error.

{¶ 5} On April 21, 1997, this court affirmed appellant's conviction and death sentence. *State v. Goff*, 12th Dist. No. CA95-09-026, 1997 WL 194898 (Apr. 21, 1997). The Ohio Supreme Court subsequently affirmed appellant's conviction and death sentence on June 17, 1998. *State v. Goff*, 82 Ohio St.3d 123, 1998-Ohio-369. The United States Supreme Court then denied appellant's petition for certiorari on June 24, 1999. *Goff v. Ohio*, 527 U.S. 1039, 119 S.Ct. 2402 (1999).

{¶ 6} On April 26, 2000, the trial court denied appellant's motion for postconviction relief. This court affirmed the trial court's decision on March 5, 2001. *State v. Goff*, 12th Dist. No. CA2000-05-014, 2001 WL 208845 (Mar. 5, 2001). The Ohio Supreme Court declined review on June 27, 2001. *State v. Goff*, 92 Ohio St.3d 1430 (2001).

{¶ 7} On September 13, 2000, the trial court denied appellant's Civ.R. 60(B)(5) motion for relief from judgment. This court affirmed the trial court's decision on June 11,

2001. *State v. Goff*, 12th Dist. No. CA2000-10-026, 2001 WL 649820 (June 11, 2001). The Ohio Supreme Court declined review on September 5, 2001. *State v. Goff*, 93 Ohio St.3d 1414 (2001).

{¶ 8} This court also denied appellant's App.R. 26(B) application to reopen his direct appeal, a decision the Ohio Supreme Court subsequently affirmed on March 19, 2003. *State v. Goff*, 98 Ohio St.3d 327, 2003-Ohio-1017. As part of its decision affirming this court's decision denying appellant's application to reopen his appeal, the Ohio Supreme Court found appellant "ha[d] failed to raise a genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal before the court of appeals, as required by App.R. 26(B)(5)." (Internal quotation marks omitted.) *Id*. at ¶ 6.

{¶ 9} On May 1, 2002, appellant filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Ohio alleging 25 constitutional errors. The District Court denied all of appellant's habeas corpus claims and dismissed the action on December 1, 2006. *Goff v. Bagley*, S.D.Ohio No. 1:02-CV-307, 2006 WL 3590369 (Dec. 1, 2006). However, after appellant filed a motion requesting a certificate of appealability, the District Court certified 17 claims for appellate review. *Goff v. Bagley*, S.D.Ohio No. 1:02-CV-307, 2007 WL 2601096 (Sept. 10, 2007). Included within those claims was the issue of whether appellant received ineffective assistance of appellate counsel resulting from his appellate counsel's failure to raise on direct appeal the issue of appellant's right to allocution before sentencing. *Id*. at *10-11, *15, *21.

{¶ 10} On April 6, 2010, the United States Sixth Circuit Court of Appeals issued a decision finding appellant had received ineffective assistance of appellate counsel resulting from his appellate counsel's failure to raise on direct appeal the issue of his right to allocution before sentencing. *Goff v. Bagley*, 601 F.3d 445, 467 (6th Cir.2010). In so holding, the Sixth Circuit found the Ohio Supreme Court's decision "rejecting [appellant's] Ohio Rule of

Appellate Procedure 26(B) application on the merits constitutes an unreasonable application of federal law." *Id*. Thereafter, in defining the scope of the remedy afforded to appellant resulting from this error, the Sixth Circuit stated:

> [W]e conclude that the only appropriate remedy that we can provide is to grant the writ of habeas corpus *unless* the Ohio Courts reopen [appellant's] direct appeal. This *narrow relief* will allow us to neutralize the constitutional violation without overstepping the bounds of our power in this case. Therefore, we **GRANT** [appellant's] petition for a writ of habeas corpus *unless* the Ohio courts reopen [appellant's] direct appeal within 120 days to allow [appellant] to raise his allocution argument. (Emphasis by italics added.)

Id. at 473.

{¶ 11} Furthermore, under a heading entitled "Conclusion," the Sixth Circuit stated:

> Because we conclude that [appellant] received ineffective assistance of appellate counsel in regard to his right to allocution under Ohio law, we **REVERSE** the decision of the district court and **GRANT** [appellant's] petition for a writ of habeas corpus *unless* the Ohio courts reopen [appellant's] direct appeal within 120 days to permit his counsel to raise this issue on direct appeal. We **AFFIRM** the denial of a writ of habeas corpus on all other issues raised in this appeal. (Emphasis by italics added.)

Id. at 482.

{¶ 12} On applications to reopen the appeal filed by both appellant and the state, this court reopened appellant's direct appeal to allow appellant to raise his allocution argument in accordance with the Sixth Circuit's directive. Having reopened appellant's direct appeal, appellant has raised four assignments of error for review. For ease of discussion, appellant's fourth assignment of error will be addressed out of order and his first, second, and third assignments of error will be addressed together.

{¶ 13} Assignment of Error No. 4:

{¶ 14} WHEN THE COURT FINDS INEFFECTIVE ASSISTANCE OF COUNSEL OCCURS AS A MATTER OF LAW, DURING THE REPRESENTATION ON DIRECT

APPEAL, AND ORDERS RE-SENTENCING OF THE ACCUSED IN A CAPITAL CASE, THE COURT OF APPEALS, UPON RE-OPENING OF THE DIRECT APPEAL, SHALL ORDER THE CASE TO BE REMANDED FOR RESENTENCING TO ALLOW FULL ALLOCUTION OF THE DEFENDANT, CONSISTENT WITH THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

{¶ 15} In his fourth assignment of error, appellant argues that the trial court erred by denying him his right to allocution at his August 18, 1995 sentencing hearing. We agree.

{¶ 16} "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, ¶ 85. Although not considered a constitutional right, "the right of allocution is firmly rooted in the common-law tradition." *State v. Copeland*, 12th Dist. No. CA2007-02-039, 2007-Ohio-6168, ¶ 6, citing *Green v. United States*, 365 U.S. 301, 304, 81 S.Ct. 653 (1961); *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶ 100-103. This right is "both absolute and not subject to waiver due to a defendant's failure to object." *State v. Collier*, 2nd Dist. Nos. 2006 CA 102 and 2006 CA 104, 2007-Ohio-6349, ¶ 92.

{¶ 17} Pursuant to Crim.R. 32(A)(1) as it was in effect at the time of appellant's direct appeal, a rule we find analogous to the rule of law in effect today:

> Before imposing a sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and also *shall 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*. (Emphasis added.)

{¶ 18} In addition, pursuant to former R.C. 2947.05, which was also in effect at the time of appellant's direct appeal:

> Before sentence is pronounced, the court shall inform the defendant of the verdict of the jury or of the finding of the court and *shall ask the defendant whether he has anything to say as to why judgment should not be pronounced against him*. (Emphasis added.)

{¶ 19} The language of these two provisions "clearly mandates that a court give both defense counsel and the defendant an opportunity to speak prior to the imposition of sentence." *Defiance v. Cannon*, 70 Ohio App.3d 821, 827 (3rd Dist.1990), citing *Silsby v. State*, 119 Ohio St. 314 (1928).

{¶ 20} In this case, the record is devoid of any evidence indicating the trial court addressed appellant's right to allocution at his August 18, 1995 sentencing hearing. This was error. Therefore, because we find the trial court erred by failing to afford appellant his right to allocution, and because nothing in the record indicates this error was invited or harmless, we sustain appellant's fourth assignment of error, reverse and vacate our prior judgment affirming his sentence, and remand this matter for the sole purpose of resentencing. *See, e.g., Hamilton v. Brown*, 1 Ohio App.3d 165 (12th Dist.1981) (trial court's failure to comply with former R.C. 2947.05 required remand for the "sole purpose" of resentencing); *State v. Haley*, 2nd Dist. Nos. 94-CA-89, 94-CA-108, and 94-CA-109, 1995 WL 418736, *5 (remedy for denying a defendant's right to allocution rights is remand for resentencing); *State v. Brown*, Tenth Dist. No. 93APA11-1570, 1994 WL 250240, *4 (remedy for failure to grant allocution is a remand to the trial court for resentencing). Upon remand, the trial court is instructed to personally address appellant and afford him his right to allocution before imposing its sentence.

{¶ 21} Assignment of Error No. 1:

{¶ 22} WHEN THE COURT FINDS INEFFECTIVE ASSISTANCE OF COUNSEL OCCURS AS A MATTER OF LAW, DURING REPRESENTATION ON DIRECT APPEAL, AND ORDERS RE-SENTENCING OF THE ACCUSED IN A CAPITAL CASE, THE COURT OF APPEALS, UPON RE-OPENING OF THE DIRECT APPEAL, SHALL ORDER THE CASE TO BE REMANDED FOR RE-SENTENCING TO EITHER (1) LIFE WITH PAROLE AT

TWENTY YEARS, OR AT THIRTY YEARS, CONSISTENT WITH THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

{¶ 23} Assignment of Error No. 2:

{¶ 24} WHEN THE COURT FINDS INEFFECTIVE ASSISTANCE OF COUNSEL OCCURS AS A MATTER OF LAW, DURING REPRESENTATION ON DIRECT APPEAL, AND ORDERS RE-SENTENCING OF THE ACCUSED IN A CAPITAL CASE, THE COURT OF APPEALS, UPON RE-OPENING OF THE DIRECT APPEAL, SHALL ORDER THE CASE TO BE REMANDED FOR RESENTENCING TO EITHER (1) LIFE WITH PAROLE AT TWENTY YEARS, OR AT THIRTY YEARS, UNDER THE RULE OF LAW ESTABLISHED BY *RING V. ARIZONA* (2002), 536 U.S. 584, CONSISTENT WITH THE FIFTH, SIXTH EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

{¶ 25} Assignment of Error No. 3:

{¶ 26} UNDER *STATE V. JOHNSON*, 128 OHIO ST.3D 153, 2010-OHIO-6314, THE TRIAL COURT ERRED IN FAILING TO MERGE THE UNDERLYING OFFENSE WITH THE SPECIFICATION WHEN THE EVIDENCE SHOWS THEY WERE COMMITTED BY THE SAME CONDUCT, CONTRA THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

{¶ 27} In his first, second, and third assignments of error, appellant argues that upon remand for resentencing the trial court cannot sentence him to death. Appellant also argues that upon remand for resentencing the trial court must merge certain offenses as allied offenses of similar import. However, based upon the Sixth Circuit's directive affording appellant with the "narrow relief" that only allowed him to raise "his allocution argument" if the Ohio courts reopened his direct appeal, we find any issues regarding appellant's sentence upon remand are not properly before this court. *See Goff*, 601 F.3d 445 at 473 and 482. It is the trial court, and not this court, that must decide what sentence to impose after affording

appellant with his right to allocution.[1] To hold otherwise would overstep this court's authority to affirm, modify, or reverse the judgment originally appealed. *See* App.R. 12(A) and App.R. 26. Accordingly, appellant's first, second, and third assignments of error are overruled.

{¶ 28} In light of the foregoing, we confirm our prior judgment affirming appellant's conviction. However, because we find the trial court erred by failing to afford appellant with his right to allocution at his August 18, 1995 sentencing hearing, we reverse and vacate our prior judgment affirming appellant's sentence and remand this matter for the sole purpose of resentencing.

{¶ 29} Judgment affirmed in part, reversed and vacated in part, and remanded for resentencing.

POWELL, P.J., and PIPER, J., concur.

1. This is not to say that appellant is precluded from raising these arguments upon remand to the trial court. However, because appellant must be afforded his right to allocution before his sentence is imposed, we find appellant's arguments regarding his sentence upon remand should be raised in the first instance with the trial court.