

[Cite as *Garfield Hts. v. Gale*, 2004-Ohio-6100.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83900

CITY OF GARFIELD HEIGHTS	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee :	:	
	:	and
-vs-	:	
	:	OPINION
JOHANNA GALE	:	
	:	
Defendant-Appellant :	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION: NOVEMBER 18, 2004

CHARACTER OF PROCEEDING: Criminal appeal from
Garfield Heights Municipal Court
Case No. CRB 0302122

JUDGMENT: Reversed and Remanded.

DATE OF JOURNALIZATION:

APPEARANCE:

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PATRICIA ANN BLACKMON, P.J.

{¶ 1} Appellant Johanna Gale appeals the trial court’s sentence and assigns the following errors for our review:

{¶ 2} “I. The trial court failed to address the appellant personally and ask whether she wished to make a statement in her own behalf or present any information in mitigation of punishment in violation of Crim.R. 32(A)(1), *State v. Campbell* (2000), 90 Ohio St.3d 320 and the Due Process Clause of the Fourteenth Amendment.”

{¶ 3} “II. The trial judge abused her discretion by imposing the maximum 90 day sentence to be served immediately when she failed to follow Crim.R. 32(A)(1), failed to get a pre-sentence investigation and report, failed to comply with R.C. 2929.22, and issued her “standard sentence” so there would not be “anarchy” in the streets.”

{¶ 4} Having reviewed the record and applicable law, we reverse the trial court’s judgment and remand for further proceedings consistent with this opinion. The apposite facts follow.

{¶ 5} The City of Garfield Heights charged Gale with resisting arrest and obstruction of official business, both second degree misdemeanors. The charges resulted from an altercation between Gale’s husband, brother-in-law, and the police. The police arrived at the Gale home after receiving threats made to Papa John’s Pizza by the Gales concerning the Gales’ dissatisfaction with

the pizzas they had received. On October 24, 2003, Gale appeared without counsel, pled not guilty to the charges, and the court scheduled the matter for a pretrial. At the pretrial, Gale appeared without counsel, retracted her previous plea, and entered a no contest plea to the charges.

{¶ 6} After Gale's change of plea, the court heard from the parties involved. Officer DePinty testified the police arrived at the Gale's residence because Papa John's Pizza reported they had received threatening phone calls from members of the Gale home. According to Officer DePinty, when they arrived, Johanna Gales' husband and her brother-in-law were highly intoxicated and disorderly. During the arrest of Johanna Gale's husband, he started to fight with the police. At which time, Gale jumped on Officer Bailey screaming, "I can't afford my husband to go to jail." Officer DePinty proceeded to pull Gale off Officer Bailey in order to arrest her for obstructing the arrest of her husband. However, in the process both Officer DePinty and Gale fell to the ground. Gale got up and ran inside her house despite Officer Bailey advising her she was under arrest.

{¶ 7} According to Gale, the first part of Officer DePinty's version is correct, except she contends she did not physically attack Officer Bailey. Gale said she was standing on the wet porch. She was shoved between two police officers, slipped and began falling along with Officer DePinty to the ground. Officer DePinty told her to go inside the house. While she was going inside the house, Officer Bailey told her she was being arrested. Gale told him that she was going to check on her children in the house.

{¶ 8} When asked why her husband and brother-in-law were calling Papa John's Pizza, Gale stated they ordered a pizza, but when it arrived, it contained sausage instead of ground beef and her husband is allergic to sausage. They called Papa John's for a replacement, but when it was

redelivered, it still contained sausage. They called Papa John's and requested a refund, which the delivery person brought to them.

{¶ 9} After hearing from the parties, the trial court sentenced Gale to ninety days in jail and suspended the fines and court cost. Gale now appeals.

{¶ 10} In the first assigned error, Gale argues the trial court failed to allow her to present any evidence in mitigation of punishment. We agree.

{¶ 11} Crim.R. 32(A)(1) provides in relevant part that:

{¶ 12} "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall also address the defendant personally and ask him if he wishes to make a statement in his own behalf or present any evidence in mitigation of punishment."

{¶ 13} This language requires that the sentencing judge expressly inform the defendant of his right to speak and permit him the opportunity to be heard in mitigation of his punishment.¹ In the instant case, the record affirmatively demonstrates that the trial court failed to afford Gale the opportunity to present evidence in mitigation of punishment prior to imposing the sentence.

{¶ 14} The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into consideration when determining the sentence to be imposed.²

¹See *State v. Black* (Apr. 25, 1979), 1st Dist. No. C-780454; *State v. Davis* (1983), 13 Ohio App.3d 265; *State v. Hays* (1982), 2 Ohio App.3d 376; *Hamilton v. Brown* (1981), 1 Ohio App.3d 165.

²*Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 828; see, also, *State v. Hlavsa* (Oct. 19, 2000), Cuyahoga App. No. 77199.

{¶ 15} Furthermore, a judge must painstakingly guarantee the right of allocution at sentencing because it is more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse.³

{¶ 16} Therefore, the failure to grant allocution should be presumed prejudicial unless shown harmless. Regardless of the standard applied here, the error cannot be found harmless because Gale was denied the opportunity to present evidence in mitigation of punishment.

{¶ 17} For the foregoing reasons, we must sustain Gale's first assigned error.

{¶ 18} In the second assigned error, Gale argues the trial court abused its discretion in imposing a ninety-day prison sentence. We note each offense carries a maximum penalty of ninety days in jail and a \$750 fine. Thus, the sentence imposed was within the guidelines.

{¶ 19} "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable * * *."⁴

{¶ 20} The sentencing criteria for misdemeanors are set forth in R.C. 2929.22. The pertinent sections read:

In determining whether to impose imprisonment or a fine, or both, for a misdemeanor, and in determining the term of imprisonment and the amount and method of payment of a fine, the court will consider the risk that the offender will commit another offense and the need for protecting the public from the risk, the nature and circumstances of the offense, the history, character, and condition of the offender and his need for correctional or rehabilitative treatment, and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on him.

³*State v. Green*, 90 Ohio St.3d 352, 359-360.

⁴*State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 21} The above establishes criteria and guidelines which the court must consider in exercising its discretion. Therefore, a failure to weigh these criteria and guidelines can only be considered an abuse or failure to exercise the required judicial discretion.⁵

{¶ 22} Generally, appellate courts have refused to review sentences so long as they were within the statutory limits. This is based on the trial court being in the best position to weigh the relevant factors necessary to determine the appropriate sentence.

{¶ 23} Although a trial judge possesses wide discretion in sentencing, he or she is not free to ignore sentencing guidelines established by the Supreme Court.⁶ The exercise of that discretion mandates a judicious consideration of the circumstances of each offense and of the offender.⁷ A court's failure to consider such factors amounts in effect to a failure to exercise the judicial discretion vested in it.⁸

{¶ 24} We turn to a consideration of the record to ascertain whether the trial court complied with the mandate of R.C. 2929.22. It shows that upon Gale stating her version of the events, the following transpired:

⁵*State v. Scott* (July 12, 1976), 1st Dist. No. C-76514.

⁶*Woosley v. United States* (C.A.8, 1973), 478 F.2d 139, 144,

⁷*United States v. Tucker* (1972), 404 U.S. 443; *Williams v. Oklahoma* (1959), 358 U.S. 576; *Williams v. New York* (1949), 337 U.S. 241; *Burns v. United States* (1932), 287 U.S. 216.

⁸*United States v. Daniels* (C.A.6, 1971), 446 F.2d 967.

{¶ 25} “Judge Nicastro: This is what we’re going to do: I’m suspending the fines and costs, you’re sentenced to 90 days in jail. You can go with this officer, thank you.”⁹

{¶ 26} There is no requirement that the trial court state affirmatively that it has considered the factors enumerated in R.C. 2929.22 or make any finding of fact relating thereto.¹⁰ Where, however, the record itself reveals affirmatively a lack of such consideration, it may be concluded the trial court did not consider the statutory standards.¹¹

{¶ 27} We conclude that Gale’s second assigned error has merit. Accordingly, we remand for a re-sentencing hearing consistent with this opinion.

Judgment reversed and remanded.

This cause is reversed and remanded.

It is, therefore, ordered that said appellant recover of said appellee her costs herein.

It is ordered that a special mandate be sent to Garfield Heights Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, J., and

TIMOTHY E. McMONAGLE, J., CONCUR.

⁹Tr. at 11.

¹⁰*Cincinnati v. Clardy* (1978) 57 Ohio App.2d 153.

¹¹*Id.*

PATRICIA ANN BLACKMON
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).