IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-CR-137

Cole G. Strack
Appellant-Defendant

–v–

State of Indiana
Appellee-Plaintiff

Decided: May 2, 2022

Appeal from the Wells Superior Court
No. 90D01-2003-F6-51
The Honorable Max C. Ludy, Jr., Senior Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 21A-CR-922

Per Curiam Opinion

Chief Justice Rush and Justices David, Massa, Slaughter, and Goff concur.

Per curiam.

At sentencing, a criminal defendant who enters an open guilty plea has a right to allocution distinct from the right to present evidence on his or her behalf. We grant transfer to clarify this distinction. But finding the trial court's error was not reversible, we ultimately affirm Strack's sentence.

Facts and Procedural History

Without a plea agreement, Cole G. Strack pleaded guilty to four charges, including operating a vehicle while intoxicated and possession of marijuana, and admitted to being a habitual vehicular substance offender. The State questioned Strack at his plea hearing to establish a factual basis for the guilty plea. The trial court accepted Strack's guilty plea and ordered a presentence investigation report.

At the sentencing hearing, Strack's mother and father testified. Thereafter, the trial court had this exchange with the parties:

> THE COURT: […] Any additional witnesses?
>
> [STRACK'S COUNSEL]: Would you permit me to present Cole's facts in summation, Your Honor?
>
> THE STATE: What do you mean Cole's facts in summation?
>
> THE COURT: His facts?
>
> [STRACK'S COUNSEL]: The facts I, I was going to ask him about and have, he's, he's nervous today as can be…
>
> THE STATE: Judge, the State would, the State wants to be able to cross exam[ine], if he's going to testify and present evidence, the State's going to cross it.

> [STRACK'S COUNSEL]: Why, I understand that they wouldn't lose their right to cross examine him.
>
> THE STATE: Judge, he can testify. He's got to establish the evidence.
>
> THE COURT: Yeah, if your client has anything to say he needs to testify.
>
> [STRACK'S COUNSEL]: Certainly, Your Honor. I'd like to call Cole, Cole Strack.

Tr. Vol. 2, p. 40.

Strack testified and was cross-examined, over objection, about his continued alcohol use, both related to domestic battery charges pending separately and the present case, in which he endanged his young daughter by driving intoxicated with her in the vehicle. After Strack's testimony, both sides presented closing arguments. The trial court then allowed Strack to speak, stating:

> THE COURT: Mr. Strack, you're not required to say anything at the time of sentencing, but you have that right. Is there anything additional you'd like to say, sir?
>
> THE DEFENDANT: I'd just like to say that most of my criminal history was before I had a child. And, this was a real eye-opener for me. Being in jail for three months is, is for lack of a better word, very sobering. And I, I think I've learned my lesson and I'd like to move on with, with my life, with my daughter and I.

Tr. Vol. 2, p. 58.

The trial court dismissed two of the counts on double jeopardy grounds and sentenced Strack to a total of six years, with two suspended to probation. The Court of Appeals affirmed. *Strack v. State*, 178 N.E.3d 1253

(Ind. Ct. App. 2021). We now grant transfer, vacating the Court of Appeals opinion. *See* Ind. Appellate Rule 58(A).

Discussion and Decision

For an individual who enters an open guilty plea, the right to present evidence at sentencing and the right of allocution are distinct, as we clarify below. But we conclude Strack is not entitled to relief because he exercised both rights and any error by the trial court was harmless.

Before being sentenced for a felony, a criminal defendant is "entitled to subpoena and call witnesses and to present information in his own behalf." Ind. Code § 35-38-1-3. A defendant is not required to testify at sentencing, but when a defendant chooses to testify for evidentiary purposes, he or she must be placed under oath and subject to cross-examination. *Biddinger v. State*, 868 N.E.2d 407, 413 (Ind. 2007).

"But a statement in allocution is not evidence. Rather it is more in the nature of closing argument where the defendant is given the opportunity to speak for himself or herself" to the trial court before the court pronounces the sentence. *Id.* Through allocution, the defendant may explain his or her views of the facts and circumstances without being "put to the rigors of cross-examination." *Id.*

Though long recognized as a principle in common law, Indiana first codified the right of allocution in 1905. Today, the statutory right of allocution is found in Indiana Code section 35-38-1-5:

> When the defendant appears for sentencing, the court shall inform the defendant of the verdict of the jury or the finding of the court. The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in the defendant's own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement. Sentence shall then be pronounced, unless a

> sufficient cause is alleged or appears to the court for delay in sentencing.

Because this statutory right is based on "the verdict of the jury or the finding of the court[,]" it does not extend to sentencing on a guilty plea or probation revocation. *See Biddinger*, 868 N.E.2d at 412; *Vicory v. State*, 802 N.E.2d 426, 429 (Ind. 2004).

But the "Indiana Constitution places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges." *Biddinger*, 868 N.E.2d at 412 (quoting *Vicory*, 802 N.E.2d at 429). Article 1, Section 13 of the Indiana Constitution provides, "In all criminal prosecutions, the accused shall have the right…to be heard by himself and counsel[.]" Informed by these principles, we have found that defendants who ask to give allocution in guilty plea and probation revocation cases also have the right to do so. *Biddinger*, 868 N.E.2d at 412; *Vicory*, 802 N.E.2d at 429. And where the defendant has pleaded guilty without a plea agreement, as here, this right to allocution is separate and distinct from the right to present sentencing testimony.

Here, though, Strack ultimately exercised both these discrete rights—first testifying for evidentiary purposes, then after closing arguments, accepting the trial court's invitation to give allocution. Although Strack was not denied either right, he claims that the trial court committed fundamental error by incorrectly advising, before he testified, that if he had "anything to say he need[ed] to testify." Strack argues that, instead of informing him of his right to allocution, the trial court essentially forced him to testify and submit to cross-examination or lose the ability to speak on his own behalf.

Because Strack's counsel did not object to the trial court's advisement or process, we review only for fundamental error. "Fundamental error is an exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal." *Kelly v. State*, 122 N.E.3d 803, 805 (Ind. 2019). But fundamental error occurs only when the error "makes a fair trial impossible or constitutes clearly blatant violations of basic and

elementary principles of due process presenting an undeniable and substantial potential for harm." *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009). Strack bears the heavy burden of showing fundamental error on appeal. *See Isom v. State*, 170 N.E.3d 623, 651 (Ind. 2021). Likewise, "a defendant claiming that he was denied his right to allocution carries a strong burden in establishing his claim." *Vicory*, 802 N.E.2d at 429.

In both *Biddinger* and *Vicory*, denying allocution was error, but not reversible. In *Biddinger*, after a jury trial had already begun, the defendant pleaded guilty to felony aggravated battery. 868 N.E.2d at 409. At sentencing, the trial court denied the defendant's allocution request, but the defendant filed a written copy of his statement under seal as an offer of proof. *Id.* at 409–10. Although the trial court erroneously denied allocution, we found the error harmless because much of Biddinger's statement had already been introduced at trial and he "fail[ed] to establish how the excluded portion of his statement would have made a difference in the sentence the trial court imposed." *Id.* at 412–13.

Similarly, in *Vicory*, we found the trial court erred by not granting a defendant's allocution request at his probation revocation hearing. 802 N.E.2d at 430. But we also found reversal unnecessary because "Vicory testified at his hearing and because he has not identified any statement or argument he would have made had the court permitted him to read his statement[.]" *Id.*[1]

Strack complains that cross-examination elicited evidence that he endangered his young daughter riding with him when he operated a vehicle while intoxicated and that he continued using alcohol after the incident. But other sentencing testimony had already introduced that information. Likewise, the presentence investigation report disclosed Strack's pending domestic battery charges, and the trial court took care not to allow testimony about the elements of that charged offense.

[1] A defendant who chooses to testify for evidentiary purposes does not thereby negate his or her right of allocution. To the extent *Vicory* can be read to suggest otherwise, *see* 802 N.E.2d at 430, we hereby disapprove of that suggestion.

Excluding the charges dismissed on double jeopardy grounds, Strack faced a maximum of 11 years of incarceration. *See* I.C. § 35-50-2-7; I.C. § 35-50-3-3; I.C. § 9-30-15.5-2. Strack was sentenced to an aggregate of six years, only four of which were to be executed.

We find that Strack has not proved his sentence would have been different had he not testified and been subject to cross-examination. As we did in *Williams v. State*, 164 N.E.3d 724, 725 (Ind. 2021), we remind trial courts to be clear and accurate in their sentencing hearing colloquies. But here, Strack was able to exercise both his right to present evidence and his right to allocution. We therefore find any error was harmless and did not affect his substantive rights such that reversal is warranted.[2] Having granted transfer, we affirm Strack's sentence.

Rush, C.J., and David, Massa, Slaughter, and Goff, JJ., concur.

ATTORNEY FOR APPELLANT
Stacy R. Uliana
Bargersville, Indiana

ATTORNEYS FOR APPELLEE
Theodore E. Rokita
Attorney General of Indiana

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

[2] In the Court of Appeals, Strack argued that the trial court erred by failing to consider the negative impact of his incarceration on his daughter and his open guilty plea as mitigating factors. We summarily affirm the Court of Appeals resolution of these issues in Section II of its opinion. *See* Ind. App. R. 58(A)(2). On Strack's assertion of cumulative error, we find any errors here in sentencing taken together do not justify reversal. Strack has a substantial history of alcohol-related crimes, including three other convictions for operating while intoxicated. Almost all of his previous sentences were suspended, which the trial court found relevant when imposing a partially executed sentence.