2011

# West Valley City v. Armand Walljasper : Brief of Appellant

Utah Court of Appeals


Ryan Robinson; West Valley City Attroney; Attorney for Appellee.
Jeremy M. Delicino; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| WEST VALLEY CITY, | : | |
| Plaintiff/Appellee, | : | BRIEF OF APPELLANT |
| v. | : | |
| ARMAND WALLJASPER, | : | Case No. 20110291 |
| Defendant/Appellant. | : | |

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE RANDALL SKANCHY, JUDGE, PRESIDING

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IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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| **v.** | : | |
| **ARMAND WALLJASPER,** | : | **Case No. 20110291** |
| **Defendant/Appellant.** | : | |

## STATEMENT OF JURISDICTION

On February 28, 2011, the trial court imposed sentences on two of Walljasper's previously entered pleas in abeyance. The Defendant/Appellant timely appealed the sentences imposed. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e) (Supp. 2010). The original Sentence, Judgment and Commitment is in Addendum A.

## ISSUE PRESENTED FOR REVIEW

Whether the trial court violated the defendant's right of allocution as protected by Utah Rule of Criminal Procedure 22(a) when it failed to allow the defendant to allocute before pronouncing sentence.

## STANDARD OF REVIEW

This issue involves a question of law, which is reviewed for correctness. Brown v. Glover, 2000 UT 89, ¶ 15, 16 P.3d 540 ("[T]he interpretation of a rule of procedure is a question of law that we review for correctness.").

## CONTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of the following statutes and rules are in Addendum B:

Utah Code Ann. § 77-18-1 (Supp. 2010);

Utah R. Crim. P. 22.

## STATEMENT OF THE CASE

Walljasper was charged in two separate cases of Violations of a Protective Order, class A misdemeanors, in violation of UCA §76-5-108. R. 1-2. The defendant later pled guilty on August 12, 2009, and the defendant's pleas were held in abeyance pursuant to a plea agreement. R. 31A-32. An Affidavit in Support of Order to Show Cause was subsequently filed on November 16, 2009, alleging that the defendant had violated the terms of the plea in abeyance agreement. On February 28, 2011, Walljasper admitted to having violated the terms of his plea in abeyance agreement. R. 56 at 3; R. 50. The court entered the pleas as class A misdemeanors and proceeded to sentence the defendant. R. 56 at 13; R. 50-51.

Before imposing sentence, the court heard from defense counsel, the victim, and the prosecutor. R. 56. The court did not, however, ask the defendant if he wished to address the court before pronouncing sentence. Near the end of the imposition of sentence, defense counsel informed the court that his client wished to allocute, to which the court replied, "Let me just finish this, though." R. 56 at 14. The court subsequently permitted the defendant to allocute, though it made no remark regarding the allocution and simply completed imposing the conditions of probation upon the defendant. R. 56 at 14-16.

## STATEMENT OF THE FACTS

On February 28, 2011, Walljasper admitted to having violated the terms of his plea in abeyance agreement. R. 56 at 3; R. 50. The court entered the pleas as class A misdemeanors and proceeded to sentence the defendant. R. 56 at 13; R. 50-51. After hearing from the victim, defense counsel, and the prosecution, the judge proceeded to sentence the defendant. R. 56 at 13. The court imposed 60 days of additional jail time, and then placed the defendant on probation. R. 56 at 13. When the court asked counsel who was supervising the defendant in his other case, the following exchange took place:

MR. DELICINO [defense counsel]: I believe it will be AP&P. And, Judge, just for the record, I think Mr. Walljasper would like to allocute, if that's possible.

THE COURT: Pardon me?

MR. DELICINO: He'd like to allocute.

THE COURT: Okay.

MR. DELICINO: He'd like to address the Court, if that's possible.

THE COURT: Let me just finish this, though.

Id. at 14. After indicating that Walljasper's probation was to be supervised by Adult Probation and Parole, the court then allowed Walljasper to speak before setting forth the remaining terms of probation. Id. Following Walljasper's allocution, the court immediately returned to the terms of probation, failing to address any of Walljasper's comments. Id. at 16. Once the defendant had finished speaking, the court completed its sentencing, noting:

> THE COURT: The probation will be supervised, as I indicated, by Adult Probation and Parole, it will last for a period of 18 months. And any additional terms and conditions that Adult Probation and Parole may require for purposes of completion of his probation will be part of the probation order.

R.56 at 16.

## SUMMARY OF THE ARGUMENT

The trial court erred when it sentenced Walljasper before complying with his right to allocute. The court allowed defense counsel, the victim, and the prosecutor to address the court before imposing sentence, but extended no such opportunity to Walljasper himself. Only after defense counsel advised the court that his client would like to address the court did the judge permit allocution. By that time, however, the court had already imposed sentence.

In addition, the trial judge failed to take the proper steps to cure his error once the failure to comply with the right of allocution became known. Instead, the trial court insisted on pronouncing sentence before allowing Walljasper to allocute. Further, the trial court made no affirmative effort to re-open the proceedings or to otherwise assure Walljasper his allocution could impact the sentence. Lastly, the trial court did not acknowledge Walljasper's remarks in any fashion and simply imposed the remaining conditions of probation without revisiting the sentence that had already been imposed. Given the circumstances surrounding the sentencing, the trial court's failure constitutes a clear violation of Rule 22(a) and should require the sentence to be vacated in this matter.

## ARGUMENT

### I. THE TRIAL JUDGE VIOLATED WALLJASPER'S RIGHT TO ALLOCUTE BY PRONOUNCING SENTENCE BEFORE ALLOWING WALLJASPER TO SPEAK.

As one federal judge has observed, the right of allocution "reaffirms human dignity in the face of severe punishment." D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2d 147, 154 (2011). It is thus unsurprising that "[a]s early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." Green v. United States, 365 U.S. 301, 304 (1961) (citing Anonymous, 3 Mod. 265, 266, 87 Eng.Rep. 175 (K.B.)). Courts and

commentators alike have recognized the importance of allocution in our criminal justice system. See, e.g. United States v. Alba-Pagan, 33 F.3d 125, 129 (1st Cir. 1994) (defendant allocution "both a rite and a right"); United States v. Garcia-Robles, 640 F.3d 159, 165 (6th Cir. 2011) (defendant's right to allocute is "of the utmost importance"); United States v. Noel, 581 F.3d 490, 508 (7th Cir. 2011) (in dissent) ("the importance of the right to allocute cannot be minimized").[1] Indeed, Justice Douglas himself noted that "the right to be heard is often vital at the sentencing stage before the law decides the punishment of the person found guilty." McGautha v. California, 402 U.S. 183, 237 (1971) (Black, J., concurring).

The recognized purposes of the right to allocute are manifold. One court has noted that the purpose of the right is "to temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances." United States v. Riascos-Suarez, 73 F.3d 616, 627 (6th Cir. 1996) (abrogated on other grounds) (internal quotation marks and citation omitted). Another circuit has explicitly commented on the salutary benefits to the public at large of the right of allocution. The Tenth Circuit remarked that:

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1 See also Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1450 (2005) (recognizing allocution carries a "personal, dignitary, and democratic import beyond its instrumental role with the criminal case"); Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 Fordham L. Rev. 2641, 2643 (2007) (allocution important for "mitigation and humanization").

> Providing a defendant with a meaningful opportunity to speak on his own behalf advances the public perception of fairness.[2] Consequently, a sentencing court undermines its own legitimacy when it invites a defendant to speak only after making clear that his sentence is a foregone conclusion.

United States v. Landeros-Lopez 615 F.3d 1260, 1267 (10th Cir. 2010) (citation omitted).

In a footnote in the Landeros-Lopez decision, the Tenth Circuit provided additional analysis of the benefits of allocution. As the court observed,

> We note that there are additional benefits to defendant allocution. It gives the defendant an opportunity to apologize and express remorse, supplies a forum in which defendants may challenge societal injustice, and may provide answers to victims' questions regarding the crime.

Id. at n.7.[3]

Rule 22(a) of the Utah Rules of Criminal Procedure "codifies the common-law right of allocution, allowing a defendant to make a statement in mitigation or explanation after conviction but *before* sentencing." State v. Wanosik, 2003 UT 46, ¶18, 79 P.3d 937 (emphasis added) (citation omitted). As the Rule expressly provides:

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2 See also United States v. Barnes, 948 F.2d 325, 328 (7th Cir. 1991) (citing the ABA Standards for Criminal Justice and noting that "[a]side from its practical role in sentencing, the right [of allocution] has value in terms of 'maximizing the perceived equity of the process.'").

3 The Seventh Circuit noted that the "right of allocution allows a defendant to personally address the court before sentencing in an attempt to mitigate punishment. With historical roots in the common law, the opportunity to plead for mercy is another provision in a procedural body of law designed to enable our system of justice to mete out punishment in the most equitable fashion possible, to help ensure that sentencing is particularized and reflects individual circumstances. United States v. Barnes, 948 F.2d 325, 328 (7th Cir. 1991).

> *Before* imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed.

Utah R. Crim. P. 22(a) (emphasis added). Section 77-18-1 reiterates the right of allocution, dictating that:

> "At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant."

Utah Code Ann. § 77-18-1(7) (Supp. 2010).

Compliance with the right of allocution requires the trial court to provide "the defendant personally with an opportunity to address the court." Wanosik, 2003 UT 46, ¶¶19, 23. "[T]here are times, such as allocution, where the voice of the individual defendant is most appropriate in the presentation of a personal plea." Id. at ¶18 (citing State v. Young, 853 P.2d 327, 354-55 (Utah 1993)); Green, 365 U.S. at 304 ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.").[4] Thus, the trial court is required at the time of sentencing "to affirmatively provide the defense"—meaning the defendant and his

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4 Additionally, the right of allocution safeguards due process rights by "ensur[ing] that the judge is provided with reasonably reliable and relevant information regarding sentencing." Wanosik, 2003 UT 46 at ¶19 (citing State v. Howell, 707 P.2d 115, 118 (Utah 1985) ("The due process clause of Article 1, Section 7 of the Utah Constitution, requires that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence.")).

attorney—"an opportunity to address the court and present reasonably reliable and relevant information in the mitigation of a sentence. A simple verbal invitation or question will suffice, but it is the court which is responsible for raising the matter." Wanosik, 2003 UT 46, ¶23; see United States v. Byars, 290 F.2d 515, 517 (6th Cir. 1961) ("The defendant, himself, must be given such opportunity and some conduct of the court must let the defendant know that he, as well as counsel, has this right."). Significantly, the right to allocute must be furnished to the defendant *before* the sentence is pronounced. As the Supreme Court in Green observed,

> Trial judges *before* sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak *prior to* sentencing.

365 U.S. at 655 (emphases added).

In this case, it is clear that the sentencing judge failed to provide Walljasper with an opportunity to allocute before sentence was imposed. After hearing from the victim, defense counsel, and the prosecution, the judge proceeded to sentence the defendant. R. 56 at 13. When it appeared that the court had failed to provide the defendant with a timely opportunity to allocute, the following exchange took place.

MR. DELICINO [defense counsel]: … And, Judge, just for the record, I think Mr. Walljasper would like to allocute, if that's possible.

THE COURT: Pardon me?

MR. DELICINO: He'd like to allocute.

THE COURT: Okay.

MR. DELICINO: He'd like to address the Court, if that's possible.

THE COURT: Let me just finish this, though.

Id. at 14. After indicating that Walljasper's probation was to be supervised by Adult Probation and Parole, the court then allowed Walljasper to speak before setting forth some of the terms of probation. Id. Following Walljasper's allocution, the court immediately returned to the terms of probation, failing to address any of Walljasper's comments. Id. at 16.

It is clear that the sentencing judge violated Walljasper's right of allocution. Though the court heard from the victim, defense counsel and the prosecutor, the court never addressed the defendant regarding his right of allocution. In fact, it was only after defense counsel reminded the court that his client would like to allocute that the court recognized this right. The error was brought to the court's attention after the court had already effectively pronounced sentence, and the court still went forward, telling counsel, "Let me just finish this [the sentence], though." Id. at 14. Not only did the judge's actions fail to comport with the requirements set forth by the United States Supreme Court in Green, but his actions contravened the requirements of Utah R. Crim. P 22(a).

Because of the court's failure to provide the defendant with an opportunity to allocute before sentence was pronounced, the sentence must be vacated and re-sentencing ordered.

## II. THE COURT FAILED TO REMEDY ITS ERROR BY PERMITTING A BELATED ALLOCUTION WHERE IT TOOK NO AFFIRMATIVE ACTION TO ADDRESS ITS OVERSIGHT.

Where a trial court initially deprives the defendant of his right to allocution, it is not enough to remedy this failure by allowing the defendant to allocute after sentence has been pronounced. See, e.g., Landeros-Lopez, 615 F.3d at 1267-1268 (right of allocution unfulfilled when "a sentencing court adjudges a sentence prior to allocution"); United States v. Pelaez, 930 F.2d 520 (6th Cir. 1991) (remanding case in which defendant granted opportunity to speak after sentence determination); United States v. Byars, 290 F.2d 515 (6th Cir. 1961) (same). Indeed, "to address the court after sentencing does not serve the purpose underlying the rule." Barnes, 948 F.2d at 331. Although some courts have recognized that a court may "cure" its previous error or oversight, the record must generally reflect a clear indication that the judge recognized his or her error and assured the defendant that the sentence would be re-considered. United States v. Luepke, 495 F.3d 443, 450 (7th Cir. 2007). Absent such assurances, a belated right to allocution is insufficient and thus constitutes error. Id.; see also Pelaez, 930 F.2d at 524 (rejecting government's argument that court's oversight in allocution was cured by belated

invitation to allocute as "the court had no intention of reconsidering the sentence and defendant's right of allocution was thus effectively denied.").[5]

In Luepke, the sentencing judge announced a sentencing range and "called upon counsel for those comments as it relates to that sentence to be imposed." 495 F.3d at 445. The court considered defense counsel's comments and "[w]ithout further presentations from counsel and without inviting any comment from [the defendant] about the appropriate sentence," the court stated the sentence and detailed the terms of confinement and supervised release. Id. Despite announcing the sentence in "seemingly conclusive terms," the court gave the defendant the opportunity to address the court "before *imposing* sentence." Id. (emphasis in original). The court heard from the defendant and noted that "the Court does impose that sentence as previously announced." Id.

The defendant appealed, arguing that the sentencing court's actions effectively denied "him the right to meaningful allocution." Id. at 445-46. The panel in Luepke first noted that the rule governing allocution "did not intend to place on the defendant the burden of changing the judge's mind *after* the judge had reached a firm decision[.]" Id. at 447. The court further observed that addressing the judge after sentencing does not serve

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5 Cf. United States v. Griffin, 530 F.3d 433, 438 (6th Cir. 2008). The court in Griffin held that adequate corrective steps were taken where the district court genuinely reconsidered the sentence and "promptly conceded its error, invited Griffin to speak, and ultimately engaged in a dialogue with him and asked several questions of the defendant." Id.

the purpose of the rule. While the Luepke court noted the possibility that the sentencing judge could attempt to rectify his or her failure to safeguard the right of allocution, the court set forth a narrow range of circumstances where the court's failure might be excused. As the court noted,

> [A] trial judge, realizing after sentencing that the right of allocution has been neglected, may rectify the situation by, in effect, setting aside the sentence, reopening the proceeding, and inviting the defendant to speak. [citations omitted] Under this approach, the trial court must genuinely reconsider the sentence in light of the elicited statement.

Id. at 448 (citing Barnes, 948 F.2d at 331 n.5).

Given the sentencing court's failure, the court in Luepke held that "the district court's belated invitation to Mr. Luepke to speak after the announcement of the sentence [did not] alter[], in any significant way, the detriment to the defendant from the court's earlier error." Id. at 450. Because it was not apparent that the trial court "genuinely reconsider[ed] the sentence in light of the elicited statement," the failure to permit timely allocution was error. Id. As the panel in Luepke held, "the district court erred in announcing a definitive sentence without first inviting Mr. Luepke to speak. We also conclude that the district court's later invitation to speak cannot be characterized as an adequate repair of the damage." Id.[6]

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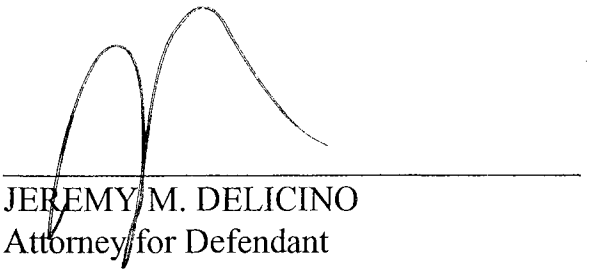
6 See also Landeros-Lopez, 615 F.3d at 1266 ("Belatedly inviting the defendant to speak after announcing his sentence does not satisfy" the rules governing allocution).

In this case, the court took no affirmative steps to ensure the defendant that it would reconsider the sentence already imposed. Indeed, the court offered no assurance to the defendant that it would duly consider his statement in its sentence, nor did the court offer any comment whatsoever following the defendant's statement. After the defendant allocuted, the court directly proceeded to finish imposing the conditions of probation with nary an acknowledgment of the defendant's remarks. See United States v. Gonzalez, 529 F.3d 94, 97 (2nd Cir. 2008) (considering whether a sentencing court "gave the defendant's statements full consideration, and responded by giving reasons for his decision to adhere to the previously announced sentence"); United States v. Feng Li, 115 F.3d 125, 133 (2nd Cir. 1997) (rule governing allocution "demands that each defendant be allowed a meaningful right to express relevant mitigating information before an attentive and receptive district judge"). While it is clear that a court may "cure" its initial oversight, errors cannot be cured by merely affording the defendant the right to speak when it will have no bearing on the court's sentence. Such an approach effectively renders inert the "anciently recognized right of a defendant to speak to the court before sentence is imposed." Hill v. United States, 368 U.S. 424, 434 (1962).

## CONCLUSION

The sentence of the district court should be vacated and the case remanded for resentencing because of the court's violation of Utah Rule of Criminal Procedure 22(a).

DATED this 12th day of October, 2011.



JEREMY M. DELICINO
Attorney for Defendant

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was mailed/hand delivered on this 12th day of October, 2011, to:

Ryan D. Robinson
West Valley City Attorney
3600 Constitution Blvd.
West Valley City, UT 84119

**IN THE UTAH COURT OF APPEALS**

| | | |
|---|---|---|
| **WEST VALLEY CITY,** | : | |
| **Plaintiff/Appellee,** | : | **ADDENDUM** |
| **v.** | : | |
| **ARMAND WALLJASPER,** | : | **Case No. 20110291** |
| **Defendant/Appellant.** | : | |

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RESPECTFULLY submitted on the 12th day of October, 2011.

JEREMY M. DELICINO
Attorney for Armand Walljasper

Addendum A

"Sentence, Judgment and Commitment"

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| WEST VALLEY, | : | MINUTES |
| Plaintiff, | : | ORDER TO SHOW CAUSE |
| | : | SENTENCE, JUDGMENT, COMMITMENT |
| | : | |
| vs. | : | Case No: 091900728 MO |
| ARMAND WALLJASPER, | : | Judge: RANDALL SKANCHY |
| Defendant. | : | Date: February 28, 2011 |

PRESENT
Clerk: marcyt
Prosecutor: ROBINSON, RYAN D
Defendant
Defendant's Attorney(s): DELICINO, JEREMY M

DEFENDANT INFORMATION
Date of birth: August 24, 1977
Video
Tape Number: 1:31

This case involves domestic violence.

CHARGES
1. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Guilty - Disposition: 02/28/2011 Guilty

HEARING

The above-entitled case comes before the Court for an order to show cause. Defendant admits allegations 1 and 2. Based on defendant's admissions, the Court finds defendant in violation of probation and probation is revoked.

The Court enters the plea in this case.

ALSO KNOWN AS (AKA) NOTE

ARMAND ALEJANDRO WALLJASPER
ARMOND WALJASPER

SENTENCE JAIL
Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 305 day(s).

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

This case is concurrent to any other sentence.

ORDER OF PROBATION

The defendant is placed on probation for 18 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 60 day(s) jail.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation & Parole.
Defendant is to comply with any treatment and conditions
recommended by APPD.

Date: 28 Febry 2011

RANDALL SKANCHY
District Court Judge

Addendum B

"Utah Code Ann. § 77-18-1 (Supp. 2010) and Utah R. Crim. P. 22(a)

Utah Code Ann. § 77-18-1(7)

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

Utah R. Crim. P. 22(a)

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.