

NO. 46791-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHAD STANDS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan, Judge

No. 13-1-02821-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has the defendant failed to preserve his claim that the scope of his allocution was improperly limited when he made no objection to the scope of his allocution in the trial court?

2. Did defendant receive his statutory right to allocution when the court read all defense submitted written mitigation materials and defendant was allowed to make a pre-sentencing statement to the court without interruption?

B. STATEMENT OF THE CASE.

On August 20th, 2014, Chad Stands (“defendant”) pleaded guilty to two counts of third degree assault (counts I, II), one count of first degree malicious mischief (count III), and one count of attempting to elude (count IV). CP 57-66; 3RP 2-6. According to the affidavit for probable cause, law enforcement signaled for the defendant to stop his car after observing suspicious driving behavior.¹ CP 98. The defendant then led police on a high speed chase in a car reported as stolen. *Id.* While being pursued, the defendant traveled southbound in northbound lanes along Pacific Avenue, ignored traffic signals, and reached speeds of up 60 mph in a 35 mph zone

¹ The defendant agreed to the use of the affidavit of probable cause to establish the factual basis for his plea. CP 65.

and 90 mph on Interstate 5. CP 98-99. The defendant intentionally rammed his vehicle into a marked patrol car with a deputy seated inside. CP 99. He then attempted a similar maneuver on another patrol car with two officers seated inside, but was unsuccessful. CP 99-100. The defendant's vehicle was eventually disabled and he was taken into custody. *Id.*

The defendant accepted a plea agreement that allowed him to avoid a third strike conviction for second degree assault. 4RP 10, 12². The agreement stipulated a joint sentencing recommendation for exceptional sentences of 60 months for both counts I and II to reflect the aggravating circumstances of the defendant's crime and below standard range sentences of 40 and 20 months respectively for counts III and IV. CP 58,60. The joint recommendation requested that all four sentences be served consecutively. CP 60, 65.

At the initial sentencing hearing, the defendant asked that his sentencing be postponed to allow him time to submit letters of support and other materials from a mitigation package originally prepared for settlement negotiations. 3RP 7-8. The court rescheduled the hearing,

² The Verbatim Report of Proceedings is contained in 5 volumes, designated as follows: 1RP-10/25/13; 2RP-1/30/14; 3RP-8/20/14; 4RP-10/17/14; 5RP-10/22/14.

received the materials submitted by the defense, and reviewed them before imposing sentence. 3RP 8; 4RP 5-7, 12-13; CP 101, 1-25.

At the rescheduled sentencing hearing, the defendant expressed a desire for the court to review not only the mitigation materials submitted to the court, but also to review documents his defense attorney chose not to submit with the mitigation materials. 4RP 4-6; CP 1-25. The Honorable Vicki Hogan invited the defendant to express his concerns about those documents during the allocution, but the defendant did not specifically reference the omitted materials during his allocution. 4RP 7, 10-12.

The defendant was then afforded the opportunity to make a statement to the court prior to sentencing and he spoke without interruption. 4RP 10-12. Following his statement the court imposed its sentence, which conformed to the joint recommendation. 4RP 12-13. The defense did not raise any complaint or objection that the defendant was not given sufficient time or opportunity to allocute. 4RP 10-13. The defendant timely filed notice of appeal. CP 22.

C. ARGUMENT.

1. DEFENDANT’S CLAIM THAT HIS RIGHT TO ALLOCUTE WAS VIOLATED IS BOTH PROCEDURALLY BARRED AND MERITLESS.

The right of allocution is a statutory right that affords a criminal defendant the opportunity to address the court prior to sentencing to plead for mercy or mitigation. *See In re Echeverria*, 141 Wn.2d 323, 340, 6 P.3d 573 (2000); *See also Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962). The Washington statute provides that “The court shall...allow arguments from...the offender...as to the sentence to be imposed.” RCW 9.94A.500(1). Allocution is not a constitutional right and is purely statutory in nature. *State v. Canfield*, 154 Wn.2d 698, 708, 116 P.3d 391 (2005).

Allocution is a limited right that is satisfied once a defendant has been given adequate opportunity to make a statement requesting mercy or mitigation at sentencing. *See e.g., Echeverria*, 141 Wn. 2d at 338; *State v. Ellison*, _Wn. App_, 346 P.3d 853, 856 (Wash. Ct. App. 2015); *See also U.S. v. Kellogg*, 955 F.2d 1244, 1250 (9th Cir. 1992). The court has wide discretion to limit arguments presented in a defendant’s allocution that are irrelevant to sentencing or mitigation. *See Ellison*, _Wn. App_, 346 P.3d at 855-856; *Canfield*, 154 Wn.2d at 701.

- a. The assigned error regarding allocation is not reviewable due to the defendant's failure to preserve the issue in the lower court.

An alleged violation of the right to allocation cannot be raised for the first time on appeal. *State v. Hatchie*, 161 Wn.2d 390, 406, 166 P.3d 698; 707 (2007); *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 1985 (2005), (*overruled in part on other grounds*). To properly preserve an allocation claim, a defendant must make a specific and timely objection to the delivery of the sentence and request, as remedy, a new sentencing hearing before a different judge. See *Canfield*, 154 Wn.2d at 707; *State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996); *State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993); *State v. Crider*, 78 Wn. App. 849, 860, 899 P.2d 24 (1995). If the court fails to correct the error and continues with sentencing; the issue is then properly preserved for appeal. See *Aguilar-Rivera*, 83 Wn. App at 203. An objection must specify the particular ground on which it is based and be made in a timely manner in order to preserve the question for review. See *State v. Guloy*, 104 Wn. 2d 412, 422, 705 P.2d 1182 (1985).

The defendant failed to raise any specific objection to the allocation or sentencing process. 4RP 10-13. Prior to sentencing, the court provided the defendant the opportunity to speak. 4RP 10-12. During his allocation, the defendant initially expressed some dissatisfaction with the

court's decision not to review certain written materials related to the plea negotiations that were never submitted to the court. 4RP 11. He then completed his statement without interruption and did not raise any objections to the scope of his allocution. 4RP 10-13. The court then delivered sentence, conforming to the joint recommendation. 4RP 13-15.

The only statement even remotely approaching an objection to sentencing occurred after the court was completing post-sentencing administrative matters when the defendant stated "I want to appeal this." 4RP 16-17. He did not specify a particular aspect of the trial he wished to appeal and this statement occurred well after the allocution and sentencing. 4RP 17-19. A general statement alluding to a desire to file an unspecified appeal does not constitute a particularized objection to the allocution or sentencing process. Further, the defendant's statement could not be considered a timely objection because it was given after allocution and sentencing had occurred. Therefore, the assigned error has not been preserved for appeal.

- b. The defendant was fully afforded his right to allocution and had ample occasion to present mitigating factors to the court before sentencing.

A defendant's right of allocution is not an unlimited mandate to address the court. *See Ellison*, __ Wn. App __, 346 P.3d at 855; *Echeverria*,

141 Wn.2d at 336. To meet the statutory burden imposed by RCW 9.94A.500(1), the court is only required to provide a defendant sufficient opportunity to make a statement related to his sentencing. *Echeverria*, 141 Wn.2d at 341. It is within a trial court's discretion to limit the content of statements made or documents submitted during allocution to pleas for mercy or presentation of mitigating factors. See *Crider*, 78 Wn. App. at 857-858; *Ellison*, _ Wn. App. _, 346 P.3d at 856; *Echeverria*, 141 Wn.2d at 336; *Canfield*, 154 Wn.2d at 703.

The defendant was fully afforded his right to allocute. The court considered all written mitigation materials submitted by the defense and the defendant verbally addressed the court immediately prior to sentencing. 4RP 5, 7, 10-12. Defense counsel purposefully omitted certain documents related to plea negotiations from the materials submitted to the court so as not to undermine the plea agreement. 4RP 4-5. While the defense did not submit these documents to the court, the defendant was permitted to address their perceived relevance in his allocution statement. 4RP 4-5, 11.

The content of these materials is not specified and the defendant has not made the omitted documents part of the record on review. 4RP 5-6, 11, 17. The only indication of the documents' content in the non-sealed record comes from verbatim transcripts that refer to them as related to the

plea agreement and include the defense describing them as “inconsistent with our [plea] agreement.” 4RP 4-7.

Defendant did not challenge the effectiveness of his attorney. This is probably due to the fact that a strategic decision by counsel not to submit certain documents to the court so as not to violate the terms of a plea agreement cannot be the basis for a deficient performance.

Therefore, defendant cannot show that his right to allocute was violated by their omission based upon the record before this court. Defendant cannot even show that the omitted documents would be relevant to sentence mitigation and so would not be proper in an allocution setting. In such a case, the court would be within its discretion to limit³ the inclusion or discussion of these materials in the defendant’s allocution. See *Ellison*, _Wn. App._, 346 P.3d at 856; *Echeverria*, 141 Wn.2d at 336-37. The court is only required to “allow arguments from...the offender.” RCW 9.94A.500(1). There is no requirement that any documents be reviewed by the court and the right is satisfied after the defendant is

³ Some of the defendant’s arguments appear to suggest that the court erred in not admitting certain document during allocution. The defendant assigned no error concerning the admissibility of documents, rendering the claim non-reviewable. Br. Of App. p. 1; RAP 12.1(a). A review of admissibility is unnecessary because error was not properly assigned. Br. of. App. p 1.

permitted to address the court prior to sentencing. *Echeverria*, 141 Wn.2d at 336-37; *Ellison*, _Wn. App._, 346 P.3d at 855-56.


Consequently, even if there was some admissible content in these documents, defendant fails to show how he was harmed when the court permitted him to address this information in his allocution and when the court ultimately sentenced him according to the joint recommendation. A direct statement by the defendant that puts forth factors he believes will mitigate the impending sentence is the hallmark of the allocution right and its limit. See *Ellison*, _Wn. App._, 346 P.3d at 856; *Echeverria*, 141 Wn.2d at 336; *Canfield*, 154 Wn.2d at 701, 708. The court provided the defendant the opportunity to allocute and explicitly invited the defendant to address the perceived mitigation value of these documents. 4RP 7, 11-12. Therefore, his allocution right was satisfied, no matter the contents of the documents in question.

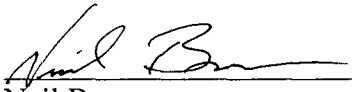
D. CONCLUSION.

The defendant's sentence should be affirmed because the alleged allocation error is unreviewable and meritless.

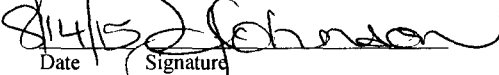
DATED: AUGUST 14, 2015

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date: 8/14/15 Signature

PIERCE COUNTY PROSECUTOR

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