

NO. 48162-6-II
Cowlitz Co. Cause NO. 14-8-00217-6

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

STATE OF WASHINGTON,

Respondent,

v.

I.M.B.,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERRORS

1. The trial court properly afforded I.M.B. her right of allocution before imposing disposition.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERRORS

1. Whether the trial court properly afforded I.M.B. her right of allocution before imposing disposition?

III. STATEMENT OF THE CASE

Statement of Facts

The State concurs with I.M.B.'s rendition of the Statement of the Case with the following exception:

1. During the disposition hearing on September 24, 2015, the court afforded I.M.B. the opportunity to make a statement before sentencing. Report of Proceedings 66. The court asked I.M.B., "Do you have anything you wish to say?". RP 66. I.M.B. did not respond to the question, and instead, her attorney spoke on her behalf. RP 66.

IV. ARGUMENT

1. **THE TRIAL COURT PROPERLY AFFORDED I.M.B. HER RIGHT OF ALLOCUTION BEFORE IMPOSING DISPOSITION.**

I.M.B. is not entitled to a new disposition hearing before a different judge because she was properly afforded her right to allocution at the disposition hearing.

The right of allocution is a statutory protection afforded to criminal defendants. This right is derived from Federal Criminal Rule 32(a) which provides, before imposing sentence, the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. *Green v. United States*, 365 U.S. 301, 304, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961). This right is also protected under Washington law¹ which requires the court to allow arguments from the offender at sentencing as to the sentence to be imposed. *See* RCW 9.94A.500(1). Juveniles are also afforded this protection in Washington. *See* RCW 13.40.150(3)(d) (during a disposition hearing, the court shall afford the respondent an opportunity to speak before entering a dispositional order).

¹ RCW 9.94A.110 was recodified as RCW 9.94A.500 in 2001, no significant changes were made to the allocution provision.

In *In re Echeverria*, 141 Wn.2d 323, 336, 6 P.3d 573 (2000), the court discussed the procedure a trial court should follow in order to properly afford a defendant his or her right to allocution. The court held a trial court should address the defendant during the sentencing hearing, ask whether they wish to say anything to the court in mitigation of sentence, and allow arguments from the defendant as to the sentence to be imposed. *Id.* The court also clarified the defendant's chance to make an argument does not need to occur immediately prior to sentencing, but rather it just needs to occur at some point during the sentencing hearing. *Id.* The court held because Echeverria was afforded the opportunity to address the court during the sentencing hearing, he was properly afforded his right to allocution. *Id.*

State v. Happy, 94 Wn.2d 791, 793, 620 P.2d 97 (1980), is another Washington case which outlines the correct procedure for affording a defendant his or her right to allocution. In that case, the trial court incorrectly asked Happy only whether there was any legal cause why the sentence should not be imposed. *Id.* The court held asking a defendant only about whether there was legal cause for a sentence was not broad enough and did not satisfy the right to allocution. *Id.* The court outlined, in order for allocution to be properly afforded, the trial court must directly address the defendant and ask whether he wishes to make a statement on his own

behalf. *Id.* Addressing only the defendant's attorney or asking only for legal cause does not comply with the statute. *Id.*

However, a defendant has no obligation to speak on his or her own behalf. In *State v. Canfield*, 154 Wn.2d 698, 707, 116 P.3d 391 (2005), Canfield did not request the right of allocution. The court held that if the right to allocution is not requested, then the issue cannot be raised for the first time on appeal. The court emphasized that a defendant must give the court some indication of his wish to plead for mercy or offer a statement in mitigation of his sentence. *See also State v. Hatchie*, 133 Wn. App. 100, 118, 135 P.3d 519 (2006), *aff'd*, 161 Wn.2d 390, 166 P.3d 698 (2007) (a defendant waives his statutory right to allocution if he does not request an opportunity to exercise that right).

Lastly, even when a trial court fails to properly afford a defendant the right of allocution, Washington courts have held inadvertent failure is not always a reversible error. In *State v. Avila*, 102 Wash. App. 882, 897, 10 P.3d 486 (2000), the court reasoned even though the juvenile court failed to provide for the respondent's allocution, the error was harmless. The court clarified a harmless error occurs when the sentence is well below the statutory maximum. *Id.*

The record reflects the trial court here properly afforded I.M.B. the opportunity to speak on her own behalf. The trial court correctly followed the procedure outlined in both *Echeverria* and *Happy*, by directly asking I.M.B. if she had anything she wished to say. RP 66. I.M.B. did not answer the trial court's question, nor did she make any indication she wished to speak on her own behalf. RP 64-69. Additionally, I.M.B. did not raise an objection, thus failing to preserve the right to review this matter on appeal. RP 64-69.

Finally, even if the court finds the trial court did fail to afford I.M.B. the right to allocution, the error should be held harmless because the sentence was well below the statutory maximum. I.M.B. was not sentenced to any detention or fines, was given only half of the maximum probation time and was sentenced to 40 hours of community service out of the 150 hour maximum. RP 68-69; RCW 13.40.0357.

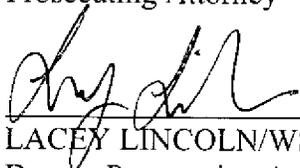
V. CONCLUSION

The trial court correctly followed the procedure for affording I.M.B. the right to allocution, thus its ruling should be affirmed.

Respectively submitted this 20th day of May, 2016.

RYAN JURVAKAINEN/WSBA #37864
Prosecuting Attorney

By:



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Deputy Prosecuting Attorney
Representing Respondent

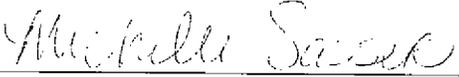
**AMENDED
CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 13th, 2016.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

May 23, 2016 - 3:17 PM

Transmittal Letter

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Comments:

Brief of Respondent with Page 1 (which was omitted by accident) with Amended Certificate of Service to Lisa Tabbut

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