

29173-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT A. STRENGE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The Superior Court of Spokane County, State of Washington, erred in refusing, at the end of presentation of all evidence in this case, to allow Mr. Strenge the opportunity for allocution. [RP 42]. Further, Mr. Strenge's attorney did not inform him of the right to allocution, or the requirement to invoke this right at sentencing to ask the court for leniency. Ineffective assistance of counsel resulted in denial of the right to allocution.
2. The Superior Court of Spokane County, State of Washington, erred by failing to acknowledge alternative dispositions for the violations of the suspended sentence, including imposition of up to 60 days jail time for each violation, suspending the remaining sentence for continuation of sex offender treatment with added condition. [RP 29, 43-47]. Further, Mr. Strenge's attorney did not argue for sanctions under RCW 9.94A.633 as permitted under RCW 9.94A.670(12), constituting ineffective assistance of counsel.

3. The Superior Court of Spokane County, State of Washington, abused its discretion by revoking the Special Sex Offender Sentencing Alternative in light of testimonial evidence that Robert Streng was amenable to treatment and had not been in the program long enough to become appropriately involved in treatment. [RP 29-30].

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT DENY THE DEFENDANT HIS RIGHT TO ALLOCUTION WHEN, IN FACT, THE DEFENDANT EXERCISED HIS RIGHT TO ALLOCUTION DURING SENTENCING?
- B. HAS THE DEFENDANT SHOWN THAT THE TRIAL COURT ERRED BY NOT CONSIDERING ALTERNATIVE DISPOSITIONS SHORT OF A FULL REVOCATION OF THE SSOSA SENTENCE WHEN NO LESSER ALTERNATIVE DISPOSITIONS WERE REQUESTED?
- C. HAS THE DEFENDANT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE?

III.

STATEMENT OF THE CASE

On September 15, 2009, the defendant pled guilty to Rape of a Child in the Second Degree. CP 2-13. The defendant was granted the SSOSA option and he was sentenced to a range of 102 months to the statutory maximum of life. CP 5. All but 44 days of actual confinement was suspended. CP 5.

Lincoln Hathaway is a Community Corrections Officer. 6/3/10 RP 5. Mr. Hathaway testified that he has supervised a number of similar cases over the years. 6/3/10 7. Mr. Hathaway stated that he did not believe the defendant should be maintained in the community. 6/3/10 RP 7. According to Mr. Hathaway, the defendant was never honest with him on any supervision subjects. 6/3/10 RP 7. The defendant only admitted wrongdoing when “push came to shove.” 6/3/10 RP 7. Mr. Hathaway noted that the contact with the minor child had gone on for a long period and there were still questions about the contact with the victim. 6/3/10 RP 8.

Despite contact between the victim and the defendant being a large part of the problem, when the defendant was arrested and dropped at the jail, within an hour or two the defendant had made two phone calls to the victim’s house and had phone contact with the victim. 6/3/10 RP 8.

Mr. Hathaway noted that Mr. Edward Averett, (potential replacement treatment provider) did not contact him about this defendant. 6/3/10 RP 9. Mr. Hathaway stated that it was not safe for the defendant to remain in the community. 6/3/10 RP 9.

Ms. Sharon Hinze testified that she is a certified sex offender treatment provider and licensed mental health counselor. 6/3/10 RP 15. Ms. Hinze worked with the defendant for two months prior to his judgment and sentence and three months after the defendant received SSOSA. 6/3/10 RP 16.

Ms. Hinze testified that she normally does not recommend revocation so early in the treatment period, but the defendant in this case provided her with sheets that noted telephone contacts with the victim's mother but in spite of proof to the contrary, no contact of any kind is listed involving the victim. 6/3/10 RP 16.

Ms. Hinze noted the victim contacts that the defendant had admitted to Ms. Hathaway. 6/2/10 RP 17. Despite admitting multiple contacts to Ms. Hathaway, the defendant denied all but one contact to Ms. Hinze. As it turns out, the defendant told the original treatment evaluator one thing and the polygraphers something else. 6/3/10 RP 17.

Ms. Hinze stated that she recommended revocation in this case because the defendant was not amenable to treatment. 6/3/10 RP 17. Ms. Hinze would no longer treat the defendant. 6/3/10 RP 19. Ms. Hinze noted that Mr. Averett did not contact her, despite attempts by Ms. Hinze to contact Mr. Averett. 6/3/10 RP 18.

Mr. Averett testified that he spoke with the defendant and concluded that the defendant should be punished for violating the terms of his SSOSA. 6/3/10 RP 29. Mr. Averett stated that the defendant needed to have restrictions on his ability to contact the victim, i.e. his cell phone should be terminated. 6/3/10 RP 29. Mr. Averett concluded that the defendant would be truthful from then on because he had already had one chance. 6/3/10 RP 33.

Following arguments, the trial court revoked the SSOSA sentence and sentenced the defendant to the remainder of the previously suspended 102 month sentence. 6/3/10 RP 47.

The defendant appealed this sentence. CP 73.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT IMPROPERLY DENY THE DEFENDANT HIS RIGHT TO ALLOCUTION.

The defendant assigns error based on a claim that the trial court denied the defendant the right of allocution and did not inform the defendant of his right to allocution. Brf. of App. 26-27. The defendant also claims that his counsel was ineffective for failing to inform him of the right to allocution and his need to exercise that right. Brf. of App. 27.

According to the defendant's briefing, "Had Mr. Strenge been aware of the right, he could have argued for leniency, and/or informed the court of his remorse" etc. Brf. of App. 27.¹

The defendant undertakes some legerdemain with the facts. The defendant did not provide the court with the transcript of the original sentencing. The original sentencing transcript contains the following:

THE COURT: Mr. Strenge, sir, you have an absolute right to what the lawyers and myself refer to an allocution. Allocution, sir, just another way of saying if there is anything that you would like to say that would assist the Court or would help me to better understand you situation, sir, it is your absolute right to make that comment. At the same time, you are not require to say anything, and you

¹ This claim is interesting in light of defendant's "Additional Grounds for Review" No. 4 in which the defendant claims defective representation because his counsel advised him not to make any statements. If that is so, the defendant was never going to make a second allocution and has no basis for a claim of error.

need to rest assure, Mr. Strenge, if you choose not to say anything, I do not hold that against you in any way. But if there is anything you would like me to know, sire, this is your opportunity.

THE DEFENDANT: I guess I'd just like to go on record as apologizing to the victim, the victim's family, to my son, and to my friends. That's it.

10/28/09 RP 20.

The State had to ferret out this earlier transcript. The defendant's briefing does not mention the earlier transcript even though the appellate counsel had to know of the allocution exchange with the trial court. Appellate counsel was defendant's counsel at the original sentencing. The defendant's suspended sentence was revoked in June of 2010. From the time of the trial court's explanation of allocution to the revocation, was approximately eight months. It is outside the realm of credulity that both the defendant and his counsel did not remember the trial court's explanation of allocution.

The defendant's claim that the trial court did not give the defendant his right to allocution is certainly counterfactual. As for the claim that his trial counsel did not inform him of his right to allocution and the need to exercise such right, the defendant has only his bald assertion that he was not informed by his counsel. The ineffective counsel aspect of this argument will be discussed in a separate section below.

Even if one were to ignore the factual peculiarities in defendant's arguments, his claim fails as it cannot be raised for the first time on appeal. The United States Supreme Court has said that the denial of the right of allocution is "an error which is neither jurisdictional nor constitutional," nor is it "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962).

At a revocation hearing, the inquiry is different than that of a standard sentencing. The court has already decided to sentence the defendant to prison and for how long. At sentencing, the defendant has an absolute liberty interest at stake, but at a revocation hearing the defendant's enjoyment of this liberty interest is conditioned upon complying with terms of the suspension imposed. *State v. Canfield*, 154 Wn.2d 698, 705, 116 P.3d 391 (2005).

The right to allocution at a SSOSA revocation hearing is grounded in statute. RCW 9.94A.500(1). Because the defendant's complaint is grounded in statute, it cannot be raised for the first time on appeal.

A revocation hearing is not a sentencing hearing for purposes of the statutory right of allocution. However, we recognize a limited right of allocution based upon the common law right of allocution and the minimal due process requirements at revocation hearings. Thus, while allocution itself is not a right of constitutional magnitude, the constitutional "right to be heard in person" includes a

right to allocution if the defendant requests it. Since we generally do not hear such claims of error for the first time on appeal, none of the defendants here are entitled to relief on that grounds.

State v. Canfield, 154 Wn.2d at 708.

“Generally, appellate courts will not consider an issue raised for the first time on appeal unless it rises to the level of a manifest error affecting a constitutional right.” *State v. Quigg*, 72 Wn. App. 828, 866 P.2d 655 (1994); *State v. Van Auken*, 77 Wn.2d 136, 460 P.2d 277 (1969). *See also State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); *State v. McCullough*, 56 Wn. App. 655, 657, 784 P.2d 566, *review denied*, 114 Wn.2d 1025 (1990); RAP 2.5(a). “The proper way to approach errors raised for the first time on appeal is, first, to determine whether the error is truly of constitutional magnitude; if the error fails this test, the court will refuse review.” *Scott, supra*, at 688. Since the courts have already held that the right of allocution is not a constitutional issue, the defendant cannot raise this issue for the first time on appeal.

Further, the defendant was given opportunities to address the sentencing court. The prosecutor asked whether the defendant had been offered the opportunity to address the facts and verify the stipulation. RP 40. The defendant was asked if he stipulated to the facts, to which the defendant replied in the affirmative. RP 42. At no point did the defendant

ask for allocution. In argument, the defendant claims he was not aware of his right of allocution. The defendant supplies no proof of this claim. The defendant's assertions are presented as if they are fact, but there is nothing in the record to substantiate the defendant's claim of lack of knowledge. In fact, the record indicates the defendant's assertions are not accurate.

Because the defendant attempts to raise this issue for the first time on appeal, the defendant's arguments fail.

B. "ALTERNATIVE DISPOSITIONS" WERE NOT REQUESTED.

The defendant argues that the sentencing court failed to acknowledge "alternative dispositions" for his repeated violations of the conditions of his SSOSA sentence.

It is not clear from the defendant's arguments why a trial court should have *ever* considered giving the defendant sanctions and putting him back in the community. The record is replete with evidence that the defendant lied, multiple times, to his counselor, DOC personnel and Mr. Averett, the potential new treatment doctor. In short, the defendant was completely non-compliant.

The cases cited by the defendant in his brief do not stand for the proposition that a sentencing judge *has* to impose lesser punishments than full revocation of a SSOSA sentence.

Clearly, the sentencing court had the authority to revoke the defendant's suspended sentence. *State v. Partee*, 141 Wn. App. 355, 361-62, 170 P.3d 60 (2007). The defendant's counter to simply revoking the defendant's suspended sentence is to argue that the defendant should have been placed back in the community in the care of Dr. Averett and the defendant have his cell phone confiscated.

The facts showed that in spite of being under the threat of having to go to prison for a lengthy period, the defendant had been having ongoing contact with the victim. When the victim's mother confronted the victim, the victim admitted contacts with the defendant by telephone and in person. DOC decided to search the defendant's residence and discovered incriminating cell phone bills. Despite the information in possession of DOC, the defendant denied contact with the victim and feigned innocence.

While being transported to jail, the defendant was told that DOC would recommend revocation of SSOSA due to the defendant's lack of cooperation and continued prevarications. The defendant admitted to having contact with the victim for the previous 3+ months.

According to sex offender treatment provider, Sharon Hinze, the defendant's behavior on supervision had been extremely poor. Despite being told to remove all photos of the victim from his residence, the

defendant kept pictures of the victim concealed by other photos in picture frames. Ms. Hinze noted clear classic sex grooming behavior on the part of the defendant. Ms. Hinze's report shows a chilling obsession on the part of the defendant plus the ability to "beat" the lie detector in spite of continuing violations.

According to the DOC report, the defendant went so far as to continue contacts with the victim *from* the Spokane County Jail.

In light of the dismal compliance record of the defendant and his obvious danger to the community, it cannot be said that the sentencing court violated its discretion in revoking the defendant's SSOSA.

Despite the clear showing that Mr. Averett's weakly supported report did not have the safety of the victim and the public in mind, the defendant argues that he should have been ordered to continue sex offender treatment with Mr. Averett. The defendant excuses his behavior with claims that it takes a longer period of time than he was allowed, to be properly treated. It is quite plain from Mr. Averett's testimony that Mr. Averett was not bothered by the probability that the defendant would re-offend and Mr. Averett seemed to consider additional harm to the victim and the public as acceptable happenings.

The defendant has not shown that the sentencing judge erred in rejecting Mr. Averett's assertions that were entirely disproved by the actions of the defendant over a several month period of time.

The defendant has not shown that the trial court thought it could not impose lesser sanctions than a complete revocation of his SSOSA. Since the sentencing court was not asked to consider lesser sanctions, there is nothing in the record on that point, either way. However, it is very plain that the trial court was concerned for the safety of the public. RP 45-46. Given the short time between the original sentencing and the revocation hearing, it was extraordinarily unlikely that lesser sanctions would have been granted in any event.

The defendant has not shown that the trial court abused its discretion in completely revoking the SSOSA suspended sentence. Alternative sanctions would have returned the defendant to the community where he was a clear danger. If the threat of many months in prison was not enough to force the defendant to control his actions, 60 day sanctions would have been far less likely to protect the victim (who was impregnated by the defendant) and the public.

C. THE DEFENDANT HAS NOT SHOWN PREJUDICE FROM HIS TRIAL COUNSEL'S PERFORMANCE.

Defense counsel is strongly presumed to be effective.

State v. McDonald, 138 Wn.2d 680, 696, 981 P.2d 443 (1999).

To show ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and that such deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting *Strickland*, 466 U.S. at 697) (alteration in original). Moreover, because the defendant must prove both ineffective assistance and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *Lord*, 117 Wn.2d at 884.

State v. Aaron, 95 Wn. App. 298, 305, 974 P.2d 1284 (1999).

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The defendant argues that his counsel was ineffective because defense counsel did not inform him of his right to allocution and did not argue for probation violation sanctions as opposed to a complete revocation.

The defendant claims he was not told by his defense counsel that he had a right of allocution and that the defendant needed to ask for the chance to speak to the court. There is nothing in the record to support this claim. “In order to show ineffective assistance of counsel, the defendant must show deficient representation *based on the record established in the proceedings below.*” *McFarland, supra.*, (emphasis added)

The defendant has a double problem showing prejudice from the performance of his defense counsel. In the first place, the defendant cannot prove that his defense counsel never told him about his right to allocution plus the defendant cannot show that the defendant’s alleged lack of allocution affected the outcome of the hearing. While it might be *possible* that an allocution might have swayed the sentencing court, there is no proof that any amount of allocution would *probably* have changed the outcome. As noted previously, the defendant exercised his right to allocution during the original sentencing. The defendant knew about allocution and was completely informed by the trial court only a few months before the SSOSA revocation hearing.

The defendant cannot show that his counsel did not discuss his right of allocution nor can the defendant show that adding more allocution to what he told the court in the original sentencing would have changed

the outcome of the revocation hearing. The defendant cannot show prejudice from any alleged actions or inactions of his counsel.

The second ineffective assistance of counsel argument from the defendant is that his defense counsel should have argued for sanctions instead of complete revocation.

The record shows that defense counsel *did* ask that the SSOSA not be revoked and that the defendant perhaps have additional restrictions placed on him. Defense counsel asked for the trial court to return the defendant to a SSOSA status. RP 39-41. This approach by defense counsel was in the nature of an “all or nothing” strategy. Such a strategy is not evidence of deficient performance by defense counsel. *State v. Grier*, -- Wn.2d --, 246 P.3d 1260, 1273 (2011).

The strategy appears to have been to minimize the nature of the violations, emphasize the defendant’s age and assure the court that, in spite of his history of non-compliance, the defendant would now comply with the SSOSA sentence. RP 39-41.

Asking for 60 day sanctions would not have been consistent with the strategy of “all or nothing.”

The defendant has not shown prejudice from the performance of his counsel. The defendant’s arguments are, therefore, without merit.

V.

CONCLUSION

For the reasons stated, the revocation of the defendant's SSOSA should be affirmed.

Dated this 25th day of March, 2011.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29173-1-III
 v.)
)
ROBERT A. STRENGE,) CERTIFICATE OF MAILING
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on March 25, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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3/25/2011
(Date)

Spokane, WA
(Place)


(Signature)