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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

MICAH DANIEL TAVAI, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 06-1-04244-3

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether the trial court abused its discretion in revoking defendant's SSOSA sentence where the defendant was in violation of the terms of his suspended sentence because he had been terminated from treatment?..... 1

B. STATEMENT OF THE CASE..... 1

1. Procedure..... 1

2. Facts Regarding Offense 3

C. ARGUMENT..... 3

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REVOKING DEFENDANT'S SSOSA WHEN HE WAS TERMINATED FROM THE TREATMENT PROGRAM AND GIVEN MULTIPLE CHANCES AFTER FAILURE TO COMPLY WITH THE CONDITIONS OF HIS PROGRAM. 3

D. CONCLUSION..... 17

Table of Authorities

State Cases

<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	14
<i>State v. Canfield</i> , 154 Wn.2d 698, 703, 116 P.3d 391 (2005)	9, 10
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	14
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	14
<i>State v. Dahl</i> , 139 Wn.2d 678, 682, 990 P.2d 396 (1999)	3, 7, 8, 11
<i>State v. Garrett</i> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994).....	13
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).....	13
<i>State v. Lord</i> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991).....	15
<i>State v. McFarland</i> , 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).....	15
<i>State v. Myers</i> , 86 Wn.2d 419, 545 P.2d 538 (1976)	12
<i>State v. Ramirez</i> , 140 Wn. App. 278, 290, 165 P.3d. 61 (2007).....	3
<i>State v. Robinson</i> , 120 Wn. App. 294, 85 P.3d 376 (2004), <i>review denied</i> , 152 Wn.2d 1031, 103 P.3d 200 (2004).....	11, 12
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	13
<i>State v. White</i> , 81 Wn.2d 223, 225, 500 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004 (1994).....	15

Federal and Other Jurisdictions

<i>Hendricks v. Calderon</i> , 70 F.3d 1032, 1040 (C.A. 9, 1995).....	14
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	13

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	13, 14, 15, 16
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	13
<i>United States v. Layton</i> , 855 F.2d 1388, 1419-20 (9 th Cir. 1988), <i>cert. denied</i> , 488 U.S. 948 (1988).....	15
Constitutional Provisions	
Sixth Amendment, United States Constitution.....	13
Statutes	
RCW 9.94A.670(10).....	4

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

1. Whether the trial court abused its discretion in revoking defendant's SSOSA sentence where the defendant was in violation of the terms of his suspended sentence because he had been terminated from treatment?

B. STATEMENT OF THE CASE.

1. Procedure

On September 8, 2006, the Pierce County Prosecutor's Office charged MICAH DANIEL TAVAI, hereinafter "defendant," with one count of rape of a child in the second degree. CP 1. On February 8, 2007, the defendant pleaded guilty to the offense. CP 6-20; RP¹ (02/08/07) 4-5. The prosecution entered a recommendation for a SSOSA (Special Sex Offender Sentencing Alternative). RP (02/08/07) 5-6.

A sentencing hearing was held March 23, 2007, in front of the Honorable Katherine Stolz. RP (03/23/07) 3. The standard range was 95 to 125 months to life in prison. RP (03/23/07) 7. The court granted the SSOSA and defendant was sentenced to 9 months with credit for time

¹ The Verbatim Report of Proceedings is contained in 5 volumes, none of which are paginated consecutively. Citations to the pages of the record will be preceded by "RP([date of proceeding])." I.e., "RP(02/08/07) 1" refers to the first page of the proceedings of February 8, 2007.

served and the standard range was suspended, providing that defendant complied with the SSOSA requirements. RP (03/23/07) 12.

On September 14, 2007, a review hearing was held in front of the Honorable Katherine Stolz. RP (09/14/07) 3. The State asked the court to set the hearing to determine whether defendant should be revoked from SSOSA for several violations. RP (09/14/07) 4. The court gave the defendant a verbal reprimand for a violation in which he had admitted to his sexual offender treatment provider that he visited a park. RP (09/14/07); CP 46-48. The court scheduled another review hearing for December 14, 2007. RP (09/14/07) 7.

However, on October 3, 2007, the State filed a petition for an accelerated hearing on October 19, 2007, to determine defendant's noncompliance with the SSOSA sentence. CP 57-60. This was based on his termination from treatment because he had been fired from his job due to his attitude and because he admitted visiting friends engaged in criminal activity. CP 57-60.

Following three continuances, a revocation hearing was held on December 14, 2007, in front of the Honorable Katherine Stolz. CP 63, 72, 73. The court found defendant to be in violation of his SSOSA conditions. RP (12/14/07) 11-12; CP 64-68. The court revoked the defendant's SSOSA sentence and he was sentenced to 131.9 months to life in prison.

CP 76-78; RP (12/14/07) 12. Defendant filed a timely notice of appeal.

CP 79.

2. Facts Regarding Offense

Defendant was charged with second degree rape of a child regarding an incident where defendant, then 22 years old, engaged in sexual intercourse with his then 12 year old stepsister. CP 2.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REVOKING DEFENDANT'S SSOSA WHEN HE WAS TERMINATED FROM THE TREATMENT PROGRAM AND GIVEN MULTIPLE CHANCES AFTER FAILURE TO COMPLY WITH THE CONDITIONS OF HIS PROGRAM.

The SSOSA program allows a sentencing court to suspend the sentence of a first time sexual offender provided the offender is shown to be amenable to treatment. *State v. Dahl*, 139 Wn.2d 678, 682, 990 P.2d 396 (1999). Revocation of a SSOSA is reviewed by the court for an abuse of discretion. *State v. Ramirez*, 140 Wn. App. 278, 290, 165 P.3d. 61 (2007). A court may revoke an offender's SSOSA at any time if the court is "reasonably satisfied that an offender has violated a condition of his suspended sentence or *failed to make satisfactory progress in treatment.*" *Dahl*, 139 Wn.2d at 683. (Emphasis added).

- a. Defendant's termination from his job and the treatment program were valid grounds for revoking the SSOSA.

RCW 9.94A.670(10) states:

The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if:

- (a) the offender violates the conditions of the suspended sentence, or
- (b) the court finds that the offender is failing to make satisfactory progress in treatment.

In the present case, defendant's suspended sentence was revoked when he violated the conditions of his SSOSA. RP (12/14/07) 12.

Appendix H of defendant's judgment and sentence outlined the conditions of the SSOSA defendant was to follow, which amongst others included:

- (a)(2) Work at Department of Corrections' approved education, employment, and/or community service;
- (b)(11) Enter and complete a state approved sexual deviancy treatment program through a certified sexual deviancy counselor.
- (b)(21) Avoid places where children congregate. (Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks.)

CP 46-48. Defendant signed this document acknowledging that he fully understood the conditions. *Id.*

On September 14, 2007, a violation hearing was held and the State asked the court to revoke defendant's SSOSA because he admitted to being in a public park, a violation of his SSOSA conditions. RP (09/14/07) 4, 7. The court did not revoke defendant's SSOSA, but told him:

now, you better get your Appendix H and you better study it until you know it by heart because the next time I see you down here and you're not current on your treatment program and they're talking about washing you out, you're showing up places you're not supposed to be, you're going to go to prison, no ifs, ands or buts.

RP (09/14/07) 9.

On October 19, 2007, defendant's community corrections officer sent a report to the court which outlined defendant's violations of his SSOSA conditions as:

Violation 1: Being terminated from sexual deviancy treatment on or about 10/1/07.

Violation 2: Being terminated from employment on or about 9/23/07.

CP 64-68. The report also included supporting facts for the reasons behind such violations that showed defendant's failure to comply with the conditions. *Id.*

During the revocation hearing held on December 14, 2007, the State reminded the court that not only was defendant given a chance by

being given the SSOSA sentence in the first place, but another chance when the court only verbally reprimanded him when he first violated his SSOSA conditions. RP (12/14/07) 5. Furthermore, defense counsel acknowledged defendant's two violations when he discussed defendant's actions and twice said "that was Violation No. 2." RP (12/14/07) 10-11. The court chose to revoke defendant's SSOSA stating "you've been terminated from your treatment program [and] you got fired from your job for poor performance" as the reasons for his revocation. RP (12/14/07) 11.

Based on these facts, the defendant's argument that his job loss was not a valid reason for revoking his SSOSA is entirely incorrect. First, the community corrections officer filed a report specifically pointing to the condition in Appendix H which was violated and wrote a paragraph with the supporting evidence which stated:

Under Appendix "H", the Court ordered the defendant to "Work at Department of Corrections' approved education, employment, and/or community service."

On 4/5/07, [defendant], signed the Department of Corrections Standard Conditions, Requirements and Instructions. On 10/1/07, I received a telephone call from sexual deviancy treatment provider Dan DeWaelche. Mr. DeWaelche informed me that [defendant] had been terminated from his employment.

On 10/1/07, I called and spoke to Barbara of Ultra Poly and subsequently found out that [defendant] was terminated on

9/23/07 for lack of performance. [defendant] never reported this information to me until he was arrested on 10/2/07.

CP 64-68. Second, defense counsel never disputed defendant's job loss as a violation of his SSOSA conditions and actually stated during the hearing that it was "Violation No. 2." RP (12/14/07) 10-11. Therefore, defendant's job loss was a valid ground for revoking his SSOSA because he violated a condition of his suspended sentence.

Defendant's next argument that the court's reliance on defendant's associations with others was not a valid ground for revoking the SSOSA is misunderstood. The court does not cite defendant's association's with others as a violation of a condition of his SSOSA, but merely uses it as supporting evidence that he is not amenable to the treatment program from which he was terminated. The court discusses defendant's ties to his old friends that he should have broken off long ago and how defendant exercises poor judgment making "one poor choice after another." RP (12/14/08) 12. She never states his associations with other persons as a violation of his SSOSA conditions leading to his revocation.

The court's discussion of defendant's association with others is similar to the discussion by the court in *State v. Dahl*, 139 Wn.2d 678, 682, 990 P.2d 396 (1999). There, the defendant appealed his SSOSA revocation citing the trial court's reliance on two incidents of which he

was never given notice of as “violations.” *Dahl*, 139 Wn.2d at 684. The court held that “the two incidents were not raised as independent SSOSA violations, but rather as examples of Dahl’s failure to make progress in treatment.” *Id.* As such, defendant’s argument that his association with others was not a valid ground for revocation is misunderstood and incorrect.

Moreover, these issues aside, defendant’s revocation was still proper as he violated the conditions of his SSOSA when he was terminated by the treatment program. Therefore, defendant’s SSOSA revocation was proper on that basis alone.

b. Defendant’s due process rights were not violated.

Because a revocation of a SSOSA sentence is not a criminal proceeding, the due process rights are not the same as those afforded at the time of trial. *Dahl*, 139 Wn.2d at 683. Instead, the offender facing revocation is afforded only minimal due process rights that are the same as those afforded to an offender during the revocation of probation or parole. *Dahl*, 139 Wn.2d at 683.

i. Defendant's right to allocution was not violated.

Washington State has afforded defendants the right to allocute by statute since its inception. *State v. Canfield*, 154 Wn.2d 698, 703, 116 P.3d 391 (2005). The right to allocute at sentencing is statutory, but because a revocation hearing is not a sentencing hearing, there is no statutory right to allocute at revocation hearings. *Canfield*, 154 Wn.2d at 708. However, a limited right of allocution exists based upon the common law right of allocution and the minimal due process requirements at revocation hearings. *Canfield*, 154 Wn.2d at 708. Therefore, the defendant has a right to allocution during revocation hearings so long as he requests it. *Canfield*, 154 Wn.2d at 708. To preserve the right of allocution, the defendant must give the court an indication of his desire to plead for mercy or offer a statement in mitigation of his sentence. *Canfield*, 154 Wn.2d at 707.

In the present case, defendant failed to ask or inform the court of his desire to plead for mercy or offer a statement in mitigation of his sentence. During the revocation hearing on December 14, 2007, in front of the Honorable Judge Stolz, the defendant spoke five times. RP (12/14/07) 10-12. The first three were in response to factual questions asked by the court and defense counsel. RP (12/14/07) 10-11. The final

two statements by defendant concern discrepancies in the facts where defendant tried to argue to the court his side of what happened. RP (12/14/07) 12. At no time during the hearing does defendant say anything amounting to a plea for mercy or a statement in mitigation of his sentence. Furthermore, defendant's pleas during other hearings are irrelevant when determining whether the right to allocute was preserved during a specific hearing. Moreover, the defendant did in fact address the court on these three separate occasions.

This is identical to the *Demry* case which was consolidated on appeal with *State v. Canfield*. There, the court addressed the issue of a right to allocution during revocation hearings. The court found that during Demry's case, he:

failed to give the court adequate notice that he wished to offer a plea in mitigation of his sentence or to plead for leniency. The record show[ed] that he was simply attempting to reargue the evidence introduced at his hearing. As such, he failed to preserve a right to allocute.

Canfield, 154 Wn.2d at 707-08.

Our case involves the same failure of defendant to provide adequate notice and preserve his right to allocution. As such, in the present case, defendant's right to allocute was not violated.

ii. **Defendant was properly notified of the conditions of his SSOSA that he had violated resulting in the revocation hearing.**

Due process requires the State to inform the offender of the specific violations alleged and the facts the State will rely on to prove those violations. *Dahl*, 139 Wn.2d at 685. In the present case, defendant mistakenly asserts he was not notified of the violations of his SSOSA. But, defense counsel received a copy of the community corrections officer's report on October 19, 2007, which contained defendant's two violations and the facts supporting such incidents. CP 64-68. Because the court did not rely on defendant's associations with other people as its own separate violation, there was no need to put defendant on notice of such a violation. Defendant therefore received notice of the violations the court relied on in revoking his SSOSA.

Furthermore, even if the court finds defendant failed to receive notice of his SSOSA violations, defendant has failed to preserve the issue on appeal by failing to object during the revocation hearing. This is exactly on point with the case *State v. Robinson*, 120 Wn. App. 294, 85 P.3d 376 (2004), *review denied*, 152 Wn.2d 1031, 103 P.3d 200 (2004). There, the defendant argued his due process rights were violated when he was not given proper notice on six of his eight violations. *Robinson*, 120

Wn. App. at 299. But the court held that because Robinson failed to object to notice at the hearing, he had waived the issue on appeal.

Robinson, 120 Wn. App. at 299-300. The court further reasoned that because defendant was prepared to discuss the issue with the court and disputed certain facts alleged in the violations, Robinson had had adequate time to prepare creating no issue regarding notice. **Robinson**, 120 Wn. App. at 300.

Defendant's situation is identical to **State v. Robinson**. Because defendant failed to object to the notice issue at the trial court, the issue is waived on appeal. Moreover, defendant clarified and tried to dispute some of the facts alleged at the revocation hearing making it apparent that he was prepared to address the merits of the allegations. RP (12/14/07) 10-12. Although defendant argues that **Robinson** was wrongly decided and should not be followed by this court, the Supreme Court of Washington believed it to be proper reasoning when it denied review. Furthermore, the Supreme Court case **State v. Myers**, 86 Wn.2d 419, 545 P.2d 538 (1976), is another case directly on point requiring defendant to object to a notice issue at the trial court in order to preserve the issue for appeal.

c. Defendant's counsel was effective.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls

within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defendant's allegations of ineffective assistance of counsel are without merit. First, defendant's association with others was not named as one of the defendant's violations and the court relied only on valid violations in revoking defendant's SSOSA. Therefore, there was no need for counsel to object when all the violations were valid and defendant's contention that counsel failed to object to this matter is wrong. Second, defendant never asserted his desire to allocute during the revocation hearing and counsel therefore did not deprive defendant of this ability. Finally, because defendant was given proper notice of his violations, the argument that defense counsel failed to ensure defendant's due process rights of notice is wrong. As such, defendant has failed to show counsel

was deficient or that defendant was prejudiced by any deficiency.

Strickland, 466 U.S. at 668.

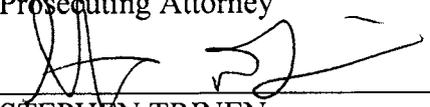
The trial court did not abuse its discretion when it revoked the defendant's SSOSA where the defendant was terminated from treatment (as well as employment) in violation of his conditions. The defendant was not deprived of a right to allocute where he did not request to allocute. The revocation of the SSOSA sentence did not violate the defendant's notice rights where he did not object to a lack of notice and in fact responded to the claimed violations. The defendant's counsel effectively argued on his behalf and the defendant suffered no prejudice as a result of counsel's performance where he had previously been warned that the sentence would be revoked if he was not in compliance.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm the revocation of defendant's SSOSA sentence.

DATED: FEBRUARY 11, 2009

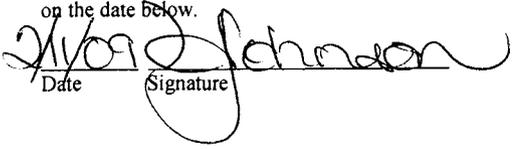
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Certificate of Service:

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 _____ Signature _____

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