

NO. 48162-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

I.M.B.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Marilyn Haan, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENT OF ERROR..... 1

The trial court erred in failing to afford I.M.B. her right of allocation before imposing disposition..... 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

Whether I.M.B. is entitled to a new disposition hearing because the trial court failed to allow I.M.B. to exercise her right of allocation before imposition of disposition and the court’s error was not harmless? 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT..... 3

The trial court erred in failing to afford I.M.B. her right of allocation before imposing disposition.....3

E. CONCLUSION 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Page

Cases

<i>Green v. United States</i> , 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed 2d 670 (1961)	4
<i>In re Personal Restraint of Echeverria</i> , 141 Wn.2d 323, 6 P.3d 573 (2000)	7
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	2
<i>State v. Aguilar-Rivera</i> , 83 Wn. App. 199, 920 P.2d 623 (1996).....	6, 8
<i>State v. Avila</i> , 102 Wn. App. 882, 10 P.3d 486 (2000).....	7
<i>State v. Beer</i> , 93 Wn. App. 539, 969 P.2d 506 (1999).....	8
<i>State v. Chow</i> , 77 Hawai'i 241, 883 P.2d 663 (App. 1994)	5
<i>State v. Crider</i> , 78 Wn. App. 849, 899 P.2d 24 (1995).....	5
<i>State v. Gonzales</i> , 90 Wn. App. 852, 954 P.2d 360 (1998)	6
<i>State v. Happy</i> , 94 Wn.2d 791, 620 P.2d 97 (1980)	4
<i>State v. Hatchie</i> , 161 Wn.2d 390, 166 P.3d 698 (2007)	7
<i>State v. Roberson</i> , 118 Wn. App. 151, 74 P.3d 1208 (2003).....	6, 7, 8

Statutes

RCW 13.40.020(1).....	3
RCW 13.40.0357	3, 7
RCW 13.40.150(3)(d).....	5, 7
RCW 9.94A.500(1).....	5

RCW 9A.56.050(1)..... 1

Other Authorities

CrR 7.1(a)(1)..... 4, 5

Federal Criminal Rule 32(a) 4

Paul W. Barrett, *Allocution* (Missouri L.Rev. 115 (1994))..... 4

Sentencing Reform Act of 1981 5

A. ASSIGNMENT OF ERROR

The trial court erred in failing to afford I.M.B. her right of allocution before imposing disposition.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether I.M.B. is entitled to a new disposition hearing because the trial court failed to allow I.M.B. to exercise her right of allocution before imposition of disposition and the court's error was not harmless?

C. STATEMENT OF THE CASE

The Cowlitz County prosecutor charged 14 year-old I.M.B. with a single count of Theft in the Third Degree.¹ Clerk's Papers (CP) 1-2. The court heard a confession hearing prior to trial and found I.M.B.'s statements to a police officer admissible. RP² 6-19. The court entered written findings of fact and conclusions of law to support its oral ruling. CP 16-18.

The court heard the non-jury trial on September 24, 2015. RP 22-63. Asset protection officer Joseph Tagliarino and his partner noticed I.M.B. and her father, Terrance Brannan, walk into the Walmart on Longview's Ocean Beach Highway. RP 24-27. The officers followed the pair into the grocery department. I.M.B. pushed a grocery cart. RP 28. Her father placed a few food items in the cart. RP 28, 36. Mr. Brannan walked

¹ RCW 9A.56.050(1)

² There is a single volume of verbatim report of proceedings (RP) for this appeal.

past the registers and out two doors into a vestibule. RP 28-29. There was no effort to pay for the items. RP 49. The two asset protection officers stopped Mr. Brannan and I.M.B. outside of the store. RP 29. Mr. Brannan said he was a single father on disability and that is why he took the items. RP 30. The grocery items taken totaled \$42.37.

Longview Police Officer Brian Price went to the store's loss prevention office to investigate the shoplifting complaint. RP 37-39. He read Mr. Brannan and I.M.B. their *Miranda*³ rights. Both waived their rights, and both admitted to the theft. RP 40-41. Officer Price cited Mr. Brannan for the misdemeanor theft and referred I.M.B. to juvenile court. RP 41.

In his testimony, Mr. Brannon took full responsibility for the theft. He had already pleaded guilty, been sentenced, and done his time. RP 46-49, 51. Per Mr. Brannan, I.M.B. had merely followed him out the doors and may not have even noticed him leaving as she was probably on her Smartphone. RP 48, 49, 53. He stole the items on impulse as they walked out the door. RP 47.

I.M.B. did not testify. RP 55.

The trial court discounted Mr. Brannan's testimony and found I.M.B. guilty as charged. RP 62-63.

³*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

The court immediately held a disposition hearing. RP 64-69. I.M.B. had no criminal record. RP 64; CP 4. She faced a local sanction standard range sentence including: (a) 0-30 days of confinement; (b) 0-12 months of community supervision; (c) 0-150 hours of community restitution; or (d) \$0-\$500 fine. RCW 13.40.020(1); RCW 13.40.0357.

The prosecutor asked the court to impose 6 months of probation and 45 hours of community restitution (referred to as community “service” in the record). RP 64. Defense counsel agreed with the 6 month probation but felt I.M.B. should have to do no more than 15 hours of community service. RP 66. The court did not give I.M.B. an opportunity to make a statement before sentencing. RP 66. Instead, the court followed the state’s recommendation but gave I.M.B. credit for 13 hours she already served in custody. RP 65, 68.

The court memorialized its oral findings and conclusions on the verdict in writing. CP 19-21.

I.M.B. appeals all parts of her order of disposition. CP 15.

D. ARGUMENT

The trial court erred in failing to afford I.M.B. her right of allocution before imposing disposition.

I.M.B. is entitled to a new disposition hearing before a different judge because she was denied her right to allocution at the disposition hearing.

The right of allocution is deeply rooted in the common law. As early as 1689, it was recognized that a court's failure to ask a defendant if they had anything to say before sentence was imposed required reversal. *See* Paul W. Barrett, *Allocution* (Missouri L.Rev. 115, 122 (1994)). In *Green v. United States*, 365 U.S. 301, 304-05, 81 S.Ct. 653, 5 L.Ed 2d 670 (1961), the United States Supreme Court held that under Federal Criminal Rule 32(a), which codified the common-law rule of allocution, a defendant must be personally afforded the opportunity to speak before imposition of sentence. The court reasoned that “[t]he most persuasive counsel may not be able to speak for the defendant as the defendant might, with halting eloquence, speak for himself.” *Id.* at 304.

In *State v. Happy*, 94 Wn.2d 791, 793, 620 P.2d 97 (1980), the State Supreme Court relied on *Green* in concluding that the defendant's right to speak must be clear. The court emphasized that CrR 7.1(a)(1) required the trial court to “ask the defendant if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.” *Id.* The court vacated Happy's sentence and remanded for resentencing because the trial court only asked Happy if he had “any legal cause why sentence should not be imposed.” *Id.* at 792-94. The court held that the trial court failed to strictly comply with the rule and consequently denied Happy his right of allocution. *Id.* at 794.

Criminal Rule 7.1(a)(1) was repealed and superseded by statute with the advent of the Sentencing Reform Act of 1981. *State v. Crider*, 78 Wn. App. 849, 855-59, 899 P.2d 24 (1995). See RCW 9.94A.500(1)(at sentencing, the court shall allow argument from the defendant); See also RCW 13.40.150(3)(d)(at a disposition hearing, the court shall afford a respondent an opportunity to speak). In *Crider*, Division Three of this court observed there was no evidence of legislative intent to diminish the right of allocution and concluded that allowing allocution means soliciting a statement from the defendant prior to imposition of sentence just as it has for the past 300 years. *Id.* at 859. The court vacated *Crider*'s sentence and remanded for resentencing because the trial court extended *Crider* an opportunity to speak for the first time only after sentence had been imposed. *Id.* at 861. The court concluded that allowing allocution after imposition of sentence is "a totally empty gesture," even when the court stands ready and willing to alter the sentence because the defendant is arguing from a disadvantaged position. *Id.* (citing *State v. Chow*, 77 Hawai'i 241, 883 P.2d 663, 668 (App. 1994)). The court held that harmless error cannot apply because allocution is a fundamental right, "[h]armless error had no allure when the burden on a sentencing court in offering allocution is so minimal and the adverse effect on a defendant so potentially impactful." *Crider*, 78 Wn. App. at 861.

In *State v. Aguilar-Rivera*, 83 Wn. App. 199, 920 P.2d 623 (1996), after orally announcing Aguilar-Rivera's sentence, the trial court was reminded by defense counsel that Aguilar-Rivera had not yet been given his right to allocution. The court apologized and invited him to speak on his own behalf. *Id.* at 200. Division One of this court concluded that "[a]lthough it is clear to us that the sentencing judge sincerely tried to listen to allocution with an open mind, the judge's oversight effectively left Aguilar-Rivera in the difficult position of asking the judge to reconsider an already-imposed sentence." *Id.* at 203. The court held that the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court has orally announced the sentence it intends to impose, the remedy is to send the defendant before a different judge for a new sentencing hearing. *Id.*

In *State v. Roberson*, 118 Wn. App. 151, 74 P.3d 1208 (2003), this court remanded for a new disposition hearing where although Roberson never requested an opportunity to address the court directly, "the trial court never asked Roberson if he wanted to speak." *Id.* at 160-62. This court reasoned that it could not conclude that the court's failure to ask Roberson if he wished to speak as harmless error because he received a high manifest injustice disposition, unlike in *State v. Gonzales*, 90 Wn. App. 852, 854, 954 P.2d 360 (1998) (error harmless where Gonzalez

received the lowest possible standard range sentence) and *State v. Avila*, 102 Wn. App. 882, 898, 10 P.3d 486 (2000) (error harmless where sentence was well below the maximum prescribed under the statute). *Id.* at 161-62.

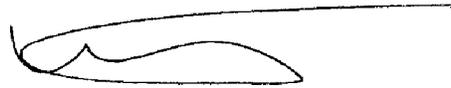
It is well settled that a criminal defendant in Washington has a statutory right of allocution. *In re Personal Restraint of Echeverria*, 141 Wn.2d 323, 335, 6 P.3d 573 (2000). Under the current juvenile allocution statute, the trial court must allow argument from the offender on the sentence to be imposed. RCW 13.40.150(3)(d). The record reflects that the trial court here failed to afford I.M.B. an opportunity to speak on her behalf. After hearing from the state and defense counsel, the court immediately imposed sentence depriving I.M.B. of her right to allocution. RP 68. Importantly, I.M.B. had no chance to object. *See State v. Hatchie*, 161 Wn.2d 390, 405-06, 166 P.3d 698 (2007)(absent an objection, no claim of error is preserved). Although the court sentenced I.M.B. to six months of probation and 45 hours of community service, the sentence was not at the lowest point of her standard range of zero months of supervision and zero hours of community service. RCW 13.40.0357 (local sanction disposition). As in *Roberson*, this court cannot conclude that the error was harmless because I.M.B. did not receive the lowest possible standard range sentence.

A remand is required because the trial court erred in denying I.M.B. her right to allocution before imposition of sentence and she is entitled to a new hearing before a different judge. *Roberson*, 118 Wn. App. at 162; *State v. Beer*, 93 Wn. App. 539, 546, 969 P.2d 506 (1999); *Aguilar-Rivera*, 83 Wn. App. at 203.

E. CONCLUSION

This court should vacate I.M.B.'s sentence and remand the matter for a new hearing before a different judge.

Respectfully submitted March 24, 2016.



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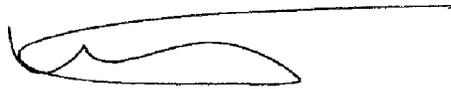
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Cowlitz County Prosecutor's Office, at appeals@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to I.M.B., 4 Crestmont Avenue, Longview, WA 98632.

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

Signed March 24, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for I.M.B.

LISA E TABBUT LAW OFFICE

March 24, 2016 - 9:58 AM

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