IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, v. MICAH DANIEL TAVAI,	No. 37133-2-II UNPUBLISHED OPINION

Van Deren, C.J. — Micah Daniel Tavai appeals the revocation of his special sex offender sentencing alternative (SSOSA)[1] sentence and reinstatement of his suspended sentence, arguing that the sentencing court erred by considering his employment termination as a violation of his SSOSA conditions. He also contends that the sentencing court abused its discretion when it considered his association with individuals involved in possible criminal activity and the nature of his newly secured employment. Tavai argues that he did not receive his minimal due process rights to allocute and to written notice of the violations relied on by the State to terminate his SSOSA. Finally, he contends that he received ineffective assistance of counsel when his counsel failed to adequately represent him on the issues he now raises on appeal. Finding no error or abuse of discretion by the trial court, we affirm the sentencing court's revocation of the

[1] Former RCW 9.94A.670 (2006).

community custody portion of Tavai's SSOSA sentence.

FACTS

Tavai pleaded guilty to second degree rape of a child. At sentencing, the court offered Tavai an opportunity to allocute and he apologized to the court and to the victim's family. Tavai was sentenced to confinement for 131.9 months to life.[2] Then the State recommended that the court impose a SSOSA, which the court granted, along with nine months' confinement.

Following his release after the nine months' confinement, Tavai found employment at Ultra Poly, a manufacturing plant, and began sex offender treatment with Daniel DeWaelsche. During treatment, DeWaelsche expressed concern that Tavai continued to "associate with individuals [who] might have gang affiliations or be involved in illegal activities." Clerk's Papers (CP) at 51. In September 2007, DeWaelsche reported that Tavai had visited friends at a park and then "went to a bar to shoot pool with some other friends." CP at 51. DeWaelsche informed Tavai that going to a bar and a park were both treatment violations and Tavai "indicated he was not aware of this but would not violate these rules again." CP at 51. DeWaelsche also advised Tavai that "if he violates additional rules he will be terminated from this agency's sex offender treatment program." CP at 52. DeWaelsche concluded his evaluation by noting his willingness to continue Tavai's treatment.

Tavai's community corrections officer (CCO), Lynne Hudson, reprimanded him for "being in a bar and a park." CP at 55. She noted that Tavai's presence in a bar did not violate the conditions of his judgment and sentence but that his presence in a park did violate a condition.

[2] The sentencing court later corrected this sentence to reflect the standard range maximum, sentencing Tavai to confinement for 125 months to life.

On September 14, the sentencing court reviewed Tavai's SSOSA. The State requested that the sentencing court revoke the SSOSA or, at minimum, impose 60 days of confinement per violation. Hudson testified that "he is clearly -- you know, he is borderline, you know, being revoked as far as I'm concerned." Report of Proceedings (RP) (Sept. 14, 2007) at 5. When provided an opportunity to speak, Tavai emphasized his honesty, discussed his plans to turn his life around, and explained his interest in avoiding jail.

The sentencing court declined to revoke Tavai's SSOSA at this hearing but it cautioned him to carefully review Appendix H of his judgment and sentence[3] and remain "current on your treatment program . . . . because if they wash you out, you're going to jail." RP (Sept. 14, 2007) at 9. The sentencing court also explained, "You better drop all your old buddies that have gang affiliations. Otherwise, you're going to be back down here and I'm going to be sending you to prison." RP (Sept. 14, 2007) at 10. The sentencing court further stated that Tavai:

> Better not go around places where you have friends who are stupid enough to be using alcohol or drugs. Because one of the reasons people re-offend on these cases is because they're drinking and they don't have, shall we say, the control or just that they might have otherwise, so no alcohol.

RP (Sept. 14, 2007) at 10. The sentencing court concluded:

> [I]f I have to see you again and they're expressing concerns about your progress in any way, shape, or form, I'm not going to be giving you another chance. You're just going to go to prison because I'm not going to have another victim out there because you can't obey what the court tells you to do.

RP (Sept. 14, 2007) at 10.

On September 23, 2008, Ultra Poly terminated Tavai's employment for "lack of performance." CP at 65. At their last meeting on September 26, Tavai disclosed to DeWaelsche

[3] Appendix H of the judgment and sentence lists various conditions of Tavai's SSOSA.

that "he had been terminated from his job . . . due to his job performance. He also stated other employees indicated that his attitude was poor and he was very argumentative." CP at 67. Tavai also mentioned that "he and a friend discovered two mutual friends murdered in their apartment," explaining that "one of the men grew marijuana" and that "he was aware that this friend was a gang member and drug dealer." CP at 67.

DeWaelsche reported that "it is evident that [Tavai] continues to associate with individuals who engage in criminal activities . . . , which increases the likelihood of him being involved [in] or accused of other crimes." CP at 67. DeWaelsche concluded that "I no longer view him as a viable treatment candidate" and terminated Tavai's treatment program. CP at 67.

On October 2, Tavai reported to Hudson's office "and was arrested and taken into custody without incident and booked into Pierce County Jail." CP at 65. Tavai did not report Ultra Poly's termination of his employment to Hudson "until he was arrested," at which time Tavai "stated he found new employment at the Happy Days as a dishwasher beginning . . . the day he was arrested." CP at 65. Based on Tavai's termination from treatment, Ultra Poly's termination of his employment, and his poor adjustment to supervision, Hudson recommended that the court revoke his SSOSA.

The State based its revocation petition on Tavai's termination from his treatment program. At Tavai's bail hearing, he expressed a desire to address the court. The court denied him the opportunity because "[t]he court would like to protect Mr. Tavai's rights this afternoon and will not be hearing anything about the merits of the revocation." RP (Oct. 3, 2007) at 6.

At the last SSOSA revocation hearing, the State explained that Tavai was in custody after termination of his SSOSA treatment program and loss of employment, both of which were

conditions of his SSOSA. The State then mentioned Tavai's personal association with two murdered individuals who "had a marijuana grow op on their site" as evidence that "he's clearly still associating with people who are walking on the wrong side of the law; and he can't comply with the conditions that are required to successfully complete SSOSA." RP (Dec. 14, 2007) at 5.

The State further supported its argument for revocation, mentioning that Tavai

> made a couple of statements that were concerning to Dr. DeWaelsche, who is his treatment provider, as well as Ms. Hudson, and that was that he only took the SSOSA, so he could avoid going to prison; and that's simply not a person who is a good candidate for this program.

RP (Dec. 3, 2007) at 5-6. The State asked that Tavai's SSOSA "be revoked and [Tavai] sentenced to prison." RP (Dec. 14, 2007) at 6.

Tavai's attorney did not argue that Tavai had complied with his SSOSA conditions. Instead, he focused on the contention that "it's his associations with other people that precipitated this whole thing." RP (Dec. 14, 2007) at 6. Tavai's attorney also contended that DeWaelsche terminated him from the treatment program "because of his association with these people who were murdered in their home." RP (Dec. 14, 2007) at 6-7. His attorney also explained that he had secured Department of Assigned Counsel funds to reevaluate Tavai for treatment and that Tavai's mother had offered him a place to live and financial support after release to continue his SSOSA program in the community. Tavai's attorney then requested that the court impose a 120 day sanction and "one more chance" because "[Tavai's] associations" were the reason for the hearing. RP (Dec. 14, 2007) at 9.

The sentencing court then asked whether there was "[a]nything else from anyone?" RP (Dec. 14, 2007) at 9. The State said, "I presume . . . they're not contesting the violations . . . ;

but I guess I can read between the lines, they're not contesting the violations." RP (Dec. 14, 2007) at 9. The State referred to the employment violation and Tavai's attorney responded, pointing out that, after his termination,[4] Tavai had secured employment at the "Happy Days restaurant, washing dishes," and had notified Hudson of the change at their post-arrest meeting on October 2. RP (Dec. 14, 2007) at 10.

When the sentencing court asked if Happy Days was a "fast-food joint," Tavai replied that it was "like, a, um, like, a bar, casino. It's a casino, like, um, where they, um, serve food." RP (Dec. 14, 2007) at 11. When the sentencing court stated that a bar or a casino was "not exactly the place where you should be employed," Tavai responded that, "It was, like -- I was working, like, during the day, like, when all the kids were, like, at school, you know. All I did was washing dishes." RP (Dec. 14, 2007) at 11.

Commenting on Tavai's efforts since the September hearing, the sentencing court noted:

> You've been terminated from your treatment program. You got fired from your job for poor performance; and obviously, you need to keep the job to keep in treatment because you have to pay for your treatment; and I would think that the thought of the amount of jail time that's hanging over your head would give you some reason to tow [sic] the line, and I think I agree with the treatment provider. I don't think he's a good candidate to be out in the community anymore.

RP (Dec. 14, 2007) at 11-12.

Addressing the information about Tavai's association with friends involved in criminal

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[4] There was a brief exchange about the termination:

> [DEFENSE COUNSEL]: . . . [D]id you quit, or did you get canned over there?
> [TAVAI]: No. I got, like, laid off.
> [DEFENSE COUNSEL]: Okay.
> THE COURT: Well, apparently, what they said is that he was terminated for poor performance.
> [CCO]: He was terminated, yes.

RP (Dec. 14, 2007) at 10.

activities, the sentencing court stated, "Now, granted, he may have ties to these old friends; but those are ties he should have broken off a long time ago, and he apparently couldn't; and I am, at this time, going to revoke the SSOSA and sentence him to prison." RP (Dec. 14, 2007) at 12. Tavai then interjected, "[Judge], on the 23rd of the month, I wasn't -- I wasn't at the homicide scene. You can even ask the investigators that." RP (Dec. 14, 2007) at 12. The sentencing court commented, "[T]here's a lot of things that are going on besides that, all of which show poor judgment." RP (Oct. 3, 2007) at 12. Tavai replied, "Ma'am, I was in that casino the 23rd of the month," to which his attorney responded, "She's already ruled." RP (Dec. 14, 2007) at 12.

Tavai appeals.

ANALYSIS

I. Special Sex Offender Sentencing Act Conditions

Tavai argues that the sentencing court erroneously based the SSOSA revocation on termination of his employment because that termination did not violate the condition that he work at an approved location. The State argues that Ultra Poly's termination of his employment violated the conditions of Tavai's SSOSA and that he conceded the violation at the revocation hearing. We hold that the sentencing court properly based revocation of Tavai's SSOSA on DeWaelsche's termination of Tavai's treatment.[5]

A. Standard of Review

We review de novo the sentencing court's interpretation of a sentencing condition and we

[5] The sentencing court should have entered written findings and conclusions or, at least, issued a clear, discrete, and coherent ruling reciting the facts relied on in reaching a decision. Though less than ideal and leaving much room for improvement, the sentencing court here marshaled enough details to articulate the factual and legal basis for its decision sufficient for our review.

review for abuse the sentencing court's discretion in revoking the SSOSA. *State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), *review denied*, 163 Wn.2d 1025 (2008); *see State v. Badger*, 64 Wn. App. 904, 908-09, 827 P.2d 318 (1992). A sentencing court abuses its discretion "'when [its] decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Rohrich*, 149 Wn.2d at 654 (quoting *Blackwell*, 120 Wn.2d at 830). "A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take,' *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990), and arrives at a decision 'outside the range of acceptable choices.' *State v. Rundquist*, 79 Wn. App. [786,]793[, 905 P.2d 922 (1995)]." *Rohrich*, 149 Wn.2d at 654 (quoting *Blackwell*, 120 Wn.2d at 830).

A sentencing court may revoke a SSOSA at any time "if [it] is reasonably satisfied that an offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment." *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). After revoking a SSOSA, a sentencing court reinstates the suspended sentence. *See* former RCW 9.94A.670(10). The statute specifically states that, "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." Former RCW 9.94A.670(10).

B. Tavai Admitted He Violated SSOSA Conditions

Tavai agreed to comply with the following conditions while under a SSOSA in the community:

> (2) Work at Department of Corrections' [(DOC)] approved education, employment, and/or community service;
> . . . .
> (8) Notify [CCO] of any change in address or employment; . . .
> . . . .
> 11. Enter and complete a state approved sexual deviancy treatment program through a certified sexual deviancy counselor.
> 12. You shall not change sexual deviancy treatment providers without prior approval from the Court and your community corrections officer.
> . . . .
> 21. Avoid places where children congregate. (Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks.)
> . . . .
> 23. Follow all conditions imposed by your sexual deviancy treatment provider.

CP at 47-48.

Tavai also agreed to "attend and complete sexual deviancy treatment with: Dan DeWa[e]lsche." CP at 38. Finally, Tavai agreed to "participate in crime-related treatment or counseling services," "comply with any crime-related prohibitions," and "comply w[ith] SSOSA treatment." CP at 37.

DeWaelsche terminated Tavai's treatment program. Hudson, in her notice of violation to the sentencing court, pointed to Tavai's violations of his SSOSA conditions based on his termination from treatment and Ultra Poly's termination of his employment. She also referred to the incident involving Tavai's murdered friends and clarified that Tavai was not a person of interest but was wanted for questioning and generally discussed Tavai's "adjustment." CP at 66. She noted that he found housing and employment after release from jail but that Ultra Poly had

terminated his employment, he disregarded supervision, and he previously received a "reprimand for being in a park which is a violation of his conditions of supervision." CP at 65-66. Furthermore, Tavai indicated that "the reason he took the SSOSA [was] so that he [would] not have to go to[] prison." CP at 66. Also, his criminal history included two counts of "felony drug possession[ ]" and his "behavior indicate[d] a blatant disregard [of] the law[,] his Court ordered conditions[,] and the Community." CP at 66. Hudson recommended that the sentencing court revoke Tavai's SSOSA.

Tavai's attorney sought to explain why the admitted violations should not result in revocation. First, his attorney argued that his termination from treatment was based on his associations, that Tavai hoped to secure a new treatment provider, and that his mother could supply financial support and a place to live after release. Second, counsel argued that Tavai had remedied his termination of employment by securing a new job and notifying his CCO when they met. The sentencing court asked about Tavai's new employment and Tavai explained that it was at "a bar, casino," which the sentencing court stated was "not exactly the place where you should be employed." RP (Dec. 14, 2007) at 11.

Tavai argues that the sentencing court abused its discretion to the extent that it based the revocation on violation of a condition that he not work in a bar or gambling facility and not associate with certain individuals. But the record is clear that there were only two violations at issue and that the violations were not contested. The sentencing court considered these extraneous matters because of arguments made by the State and Tavai's attorney.[6]

[6] As we mentioned earlier, the State suggests that the sentencing court's "reliance on defendant's associations" was used "as supporting evidence that he [was] not amenable to the treatment program from which he was terminated." Br. of Resp't at 7. If this argument extends beyond Tavai being a "viable treatment candidate," we need not reach this argument because the

Tavai does not explain how the sentencing court's decision was manifestly unreasonable or based on untenable grounds in light of his admitting the violations. Tavai violated two conditions of his SSOSA—that he remain in treatment and that he work at a DOC approved employment site and inform Hudson of any change in employment—and Tavai contested neither the evidence nor the violations. These violations support the revocation of Tavai's SSOSA without additional evidence. We hold that the court did not abuse its discretion when it revoked Tavai's SSOSA and reinstated his suspended sentence.

C. SSOSA Revocation Decision Relied on Treatment Termination

Tavai does not contend that the sentencing court abused its discretion when it relied on termination from his treatment program as a ground for revocation.[7] The State argues that the sentencing court did not cite Tavai's associations as violations of a condition but used them to determine whether Tavai was "amenable to the treatment program from which he was terminated." Br. of Resp't at 7. Although the State refers to the wrong standard, the record discloses that the sentencing court took this information into account because DeWaelsche relied on it in terminating Tavai from treatment and because both the State and Tavai addressed this evidence as either supporting or mitigating the two admitted violations of Tavai's SSOSA conditions.

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violations alone support the revocation decision and consideration of Tavai's associations can be linked to the grounds the treatment provider used to terminate treatment. CP at 61.

[7] Furthermore, Tavai does not contend that the sentencing court abused its discretion in considering a violation of the condition that he work at approved DOC employment; instead, Tavai argues that the sentencing court abused its discretion to the extent it relied on its holding that his termination violated the "shall . . . . [w]ork" condition. CP at 46-47. Since we hold that the sentencing court did not abuse its discretion in ruling that Tavai violated the treatment condition of his SSOSA, we need not reach this argument.

II. Tavai's Associations

Tavai next argues that the sentencing court erred because it revoked his SSOSA based on a condition that he not associate with "'people on the wrong side of the law,'" which was not a condition of his SSOSA and, in doing so, violated Tavai's First Amendment right to freedom of association. Br. of Appellant at 13. But Tavai's counsel argued to the sentencing court that "it's his associations with other people that precipitated this whole thing." RP (Dec. 14, 2007) at 6. He also argued that Tavai's "associations" were the reason for the revocation hearing. RP (Dec. 14, 2007) at 9.

The statute allowing the sentencing court to revoke Tavai's SSOSA for his failure to comply with any conditions on his sentence does not implicate Tavai's right of association. *See* former RCW 9.94A.670(10). Moreover, the sentencing court did not revoke Tavai's SSOSA because of his associations. In fact, the sentencing court pointed out after ruling that it did not base its decision on Tavai's associations, despite his counsel's arguments. Instead, the sentencing court revoked Tavai's SSOSA because DeWaelsche terminated his treatment program, which the sentencing court seemed to characterize as caused by "poor choice[s]." RP (Dec. 14, 2007) at 12. In other words, Tavai's associations did not lead to the revocation; rather, DeWaelsche's termination of the treatment program led to the revocation.

If Tavai wished to challenge the rules of his treatment program or DeWaelsche's termination of his treatment as unconstitutional, his remedy was to file a personal restraint petition or to have challenged DeWaelsche's termination of treatment as unconstitutional and developed a record that would aid us on appeal. But because Tavai did not choose to pursue these options, the record is insufficient to determine the merits of Tavai's constitutional claims on this issue.

III. Opportunity to Be Heard/Right to Allocute

Tavai further argues that where a defendant attempts to speak at a SSOSA revocation hearing and received opportunities to allocute in previous hearings, the attempt to speak puts the sentencing court on notice that the defendant invokes the right to allocute. The State argues that Tavai did not properly invoke his right to allocute and that Tavai's attempts to speak were attempts to reargue the evidence.

A. Standard of Review

We review alleged due process violations de novo. *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006). Offenders facing SSOSA revocations have minimal due process rights, including "the opportunity to be heard." *Dahl*, 139 Wn.2d at 683 (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)).

B. Right to Allocute

"Allocution is the right of a criminal defendant to make a personal argument or statement to the court before the pronouncement of sentence." *State v. Canfield*, 154 Wn.2d 698, 701, 116 P.3d 391 (2005). "In recognizing the common law right of allocution, the United States Supreme Court has observed that '[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.'" *Canfield*, 154 Wn.2d at 703 (alteration in original) (quoting *Green v. United States*, 365 U.S. 301, 304, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961)). The denial of the right to allocute "'is neither jurisdictional nor constitutional,' nor is it 'a fundamental defect that inherently results in a complete miscarriage of justice.'" *Canfield*, 154 Wn.2d at 702-03 (quoting *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962)).

In a SSOSA revocation hearing, a defendant's right "to be heard in person[,]" [*Morrissey*, 408 U.S. at 489,] requires that "the defendant must be allowed to allocute if he so chooses." *Canfield*, 154 Wn.2d at 706. "[W]here a defendant asserts his right to allocution, the court should allow him to make a statement in allocution." *Canfield*, 154 Wn.2d at 707. There is no formal requirement for preserving this right to allocute,[8] but "the defendant must give the court some indication of his wish to plead for mercy or offer a statement in mitigation of his sentence." *Canfield*, 154 Wn.2d at 707.

In *Canfield*, our Supreme Court consolidated three cases[9] involving the question of whether a defendant has the right to address the court personally before the revocation of a suspended sentence. 154 Wn.2d at 701-02. Canfield and Speirs violated terms of their SSOSA suspended sentences, while Demry violated the terms of his community placement. *Canfield*, 154 Wn.2d at 701-02. Canfield and Speirs did not attempt "to address the court personally," which the court held did not preserve a right to allocute. *Canfield*, 154 Wn.2d at 707.

In contrast to Canfield and Speirs, Demry addressed the sentencing court but the court held that Demry failed to preserve his right to allocute because the record showed that he "failed to give the court adequate notice that he wished to offer a plea for mitigation [and] that he was simply attempting to reargue the evidence introduced at his hearing." *Canfield*, 154 Wn.2d at

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[8] In a SSOSA revocation, the sentencing court is not required to offer the defendant an opportunity to allocute in the absence of a request by the defendant. *See Canfield*, 154 Wn.2d at 705. But it is a better practice for a sentencing court to acknowledge and allow the defendant to allocute as part of his minimal due process right to an opportunity to be heard, "There is no reason to deny a defendant the opportunity to allocute at revocation since allowing a defendant a few moments of the court's time is minimally invasive." *Canfield*, 154 Wn.2d at 705 (citing *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991)).

[9] The three petitioners were Canfield, Demry, and Speirs. *Canfield*, 154 Wn.2d at 698.

707-08. Our Supreme Court reviewed the facts of Demry's exchange with the sentencing court:

> While the court was reviewing and signing the order modifying probation and jail commitment, the following exchange occurred between Demry and the court:
>
> MR. DEMRY: Your Honor, may I please say something?
> THE COURT: Go ahead.
> MR. DEMRY: What Mr. Lewis did, judge, is, he didn't took—
> THE COURT: Actually, Mr. Demry, let me interrupt.
> I thought you had something else to ask. I've already concluded the hearing and any testimony. Let me interrupt for a moment.
> I have signed the order and we are in recess.
>
> DRP at 72. Mr. Lewis was Demry's parole officer. The exchange here indicates that the court initially granted Demry's request to speak. Since Demry sought only to reargue the evidence, however, the trial judge appropriately concluded the hearing. The purposes of allocution are to allow a defendant to make a plea for leniency or in mitigation of his sentence. Relitigation of the evidence is not appropriate.

Canfield, 154 Wn.2d at 707 n.3.

The court's decision does not describe in depth the record of Demry's hearing or illuminate the meaning of the phrase "relitigation of evidence." But our Supreme Court has stated that if a defendant "offers a version of the facts or disputes evidence, the defendant is offering testimony, not making a plea for mercy." *State v. Benn*, 120 Wn.2d 631, 675, 845 P.2d 289 (1993).

Tavai argues that his prior opportunities to speak to the sentencing court, some of which occurred before other sentencing court judges, provided notice to the court hearing the revocation matter of his desire to address the court. Tavai also argues that answering questions posed to him provided notice of his desire to address the court. Finally, Tavai argues that he did provide notice of his desire to address the court but that "the judge - and counsel - effectively

refused to allow him to allocute even after the ruling." Br. of Appellant at 18.

Tavai cites no support for his assertions that prior opportunities to address the court and merely answering questions invoke the right to allocute in a subsequent revocation hearing. Tavai attempted to speak to the court personally after its revocation ruling, which brings his case closer to Demry's case than either Canfield's or Speirs's.

Tavai made two statements relevant to the preservation issue, "[Judge], on the 23rd of the month, I wasn't -- I wasn't at the homicide scene. You can even ask the investigators that" and "Ma'am, I was in that casino the 23rd of the month." RP (Dec. 14, 2007) at 12. It appears that Tavai's statements address facts about the homicide incident and his whereabouts on September 23, 2007. It does not seem that Tavai contested that he knew the men; instead he explained that he was not at the crime scene but was at the casino where it appears he awaited the arrival of his friends. We conclude that these statements reargue the facts surrounding his involvement with his slain friends and, thus, were not a proper topic for allocution. Because Tavai statements were "relitigation of evidence," we hold that he did not preserve this issue for appeal.

C. Harmless Error[10]

Even if we were to hold that Tavai properly invoked his right to allocution, minimal due process violations are subject to harmless error analysis. *See Dahl*, 139 Wn.2d at 688. On appeal, the State must demonstrate that a constitutional error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *State v. Garza*, 99 Wn. App. 291, 297, 994 P.2d 868 (2000). Denial of the right to allocute in sentencing may sometimes not be harmless error. *See State v. Roberson*, 118 Wn. App. 151, 161, 74 P.3d 1208 (2003).

[10] The State does not address whether any error was harmless.

In *Roberson*, the juvenile offender violated the terms of a plea agreement and appealed the 65 week manifest injustice disposition for first degree child molestation. 118 Wn. App. at 154. At the hearing, Roberson did not request "an opportunity to address the court directly" and "the trial court never asked Roberson if he wanted to speak." *Roberson*, 118 Wn. App. at 160-61. We held that the "trial court did not 'afford' Roberson an opportunity to speak at his disposition hearing as required in RCW 13.40.150(3)(d)." *Roberson*, 118 Wn. App. at 161. Based on a "65-week manifest injustice disposition upwards" from "the standard range of 15 to 36 weeks" and a dispute about whether the appropriate charge for sentencing was first degree child molestation or fourth degree assault with sexual motivation or indecent exposure, we stated that "we cannot say here that the trial court's failure to ask Roberson if he wished to speak was harmless error." *Roberson*, 118 Wn. App. at 157-58, 161. Remanding the case to a different judge to resolve the dispute, we stated that "the court must afford Roberson an opportunity to address the court." *Roberson*, 118 Wn. App. at 162.

The information Tavai supplied related to his whereabouts on September 23, i.e., that he was not at the homicide scene and was at the casino where he may have secured new employment following termination from Ultra Poly. This information is insufficient—given all of the information before the sentencing court, including the admitted violations of his SSOSA conditions and the fact that he failed to inform his CCO of his new job until after arrest—to convince the court that Tavai deserved "one more chance." RP (Dec. 14, 2007) at 6. Thus, any error is harmless.

IV. Notice

Tavai argues that the State violated his due process right to notice when it referred to his

employment termination violation and associations with others in his revocation hearing but did not mention the employment violation and the association issue in its petition for revocation. We disagree.

A. Standard of Review

We review alleged due process violations de novo. *Cantu*, 156 Wn.2d at 831. Sexual offenders facing SSOSA revocation have minimal due process rights, including the right to "written notice of the claimed violations." *Dahl*, 139 Wn.2d at 683.

B. Notice

Before a sentencing court modifies a sentence, it must provide the defendant with written notice of the claimed violations so that a defendant has the opportunity to prepare a defense. *Morrissey*, 408 U.S. at 489; *Dahl*, 139 Wn.2d at 683-84. Notice does not require written notice of all the evidence that might be presented at the revocation hearing and cannot require disclosure of the factors that the court will consider in determining whether those violations warrant revocation. *See Dahl*, 139 Wn.2d at 683-86.

Due process required that Tavai have written notice of the specific instances in which he is accused of violating his SSOSA. The State's October 3 petition for a hearing did not list Ultra Poly's termination of Tavai's employment as a violation nor did it detail the evidence related to any violation. Tavai's attorney received notice of DeWaelsche's treatment termination in correspondence filed on October 5. On October 17, the court set a hearing and two days later Tavai's CCO submitted a notice of violation to the court and Tavai's counsel that listed two violations, supporting evidence, and other generalized concerns. The revocation hearing occurred almost two months later. At the hearing, Tavai's attorney addressed the violations and discussed reasons why the court should not revoke Tavai's SSOSA.

The State's petition referred to violation of the SSOSA's treatment condition, DeWaelsche's report disclosed his grounds for revoking Tavai's treatment program that included

the employment termination, and the CCO's notice of violation mentioned the employment violation, the treatment violations, and the evidence supporting Tavai's violations. At the revocation hearing, 56 days after Hudson's notice of violation, Tavai's counsel actually addressed the loss of employment and treatment termination, as well as associational concerns and the evidence supporting the violations.

Tavai received proper written notice from documents supporting the State's petition—both DeWaelsche's report and the CCO's request to terminate Tavai's SSOSA sentence—well in advance of the termination hearing. It was not error for the sentencing court to consider Tavai's employment termination violation and the evidence offered by DeWaelsche and the CCO supporting the State's position that Tavai violated his SSOSA conditions to determine whether Tavai and the community would continue to benefit from the SSOSA.

C. Failure to Object

A "person accused of violating the conditions of sentence has some responsibility" for protecting his minimual due process rights. *State v. Robinson*, 120 Wn. App. 294, 297, 85 P.3d 376 (2004). At a minimum, the accused must notify the court, through an objection, to a violation of due process. *Robinson*, 120 Wn. App. at 297.

In *Robinson*, DOC released the defendant from prison subject to community placement conditions. Later, DOC alleged eight violations of the community placement conditions in a document Robinson may not have received; the State sent Robinson another notice alleging two violations. *Robinson*, 120 Wn. App. at 297-98. Robinson did not object to the court's consideration of the eight violations; in fact, he admitted violations 3 to 8 in the DOC document and objected to violations 1 and 2. *Robinson*, 120 Wn. App. at 298, 300 & n.3. At the hearing,

Robinson did not object to testimony or evidence related to violations 1 and 2. *Robinson*, 120 Wn. App. at 298.

When Robinson appealed, Division One of this court addressed the notice requirement, due process, and waiver:

> In *State v. Nelson*, 103 Wn.2d 760, 697 P.2d 579 (1985), the court held that a defendant could not sit by while his due process rights were violated at a hearing and then allege due process violations on appeal. While the issue involved in *Nelson* was using hearsay statements, improper notice should be treated in the same manner, as notice is also an element of due process under *Morrissey*."

Robinson, 120 Wn. App. at 299. Division One then noted, "Because Robinson did not object to notice at the modification hearing, he waived the notice requirements and we will not address the issue on appeal." *Robinson*, 120 Wn. App. at 299-300. Furthermore, Division One pointed out that "it is apparent that Robinson was prepared to address the merits of the allegations at the hearing. Robinson admitted to six of the alleged violations, and the two remaining allegations were covered in the notices that were served on Robinson." *Robinson*, 120 Wn. App. at 300 n.3.

Tavai argues that *Robinson* was wrongly decided and that we should not follow it because *Nelson* did not involve notice; instead, *Nelson* involved an appeal based on the rights of cross-examination and confrontation where the defendant used similar material at trial, claiming it was proper. Tavai distinguishes notice, on one hand, and confrontation and cross-examination, on the other, noting that oure Supreme Court in *Dahl* did not recognize a limit for notice as it did the "'good cause'" limitation or restriction on hearsay evidence existing with regard to the rights of confrontation and cross-examination. Br. of Appellant at 26 (quoting *Dahl*, 139 Wn.2d at 683). Tavai's description and characterization of *Dahl* and *Nelson* are incomplete. *See* 139 Wn.2d at 685-87; 103 Wn.2d at 760.

Dahl did not reach the preservation of notice issue on appeal because the court held that notice was proper when the State used the non alleged violations to support "the State's contention that [Dahl] had failed to make reasonable progress in his treatment program." *Dahl*, 139 Wn.2d at 685. Similarly in *State v. Myers*, 86 Wn.2d 419, 430, 545 P.2d 538 (1976), the defendant's "notice of violations furnished to him did not include several of the reasons for revocation discussed by the judge in his subsequent oral opinion." Our Supreme Court noted that "[e]ach of these situations, however, came into the case without objection from [Myers] or as a result of [Myers's] own testimony or questioning by [Myers's] counsel." *Myers*, 86 Wn.2d at 430. Based on Myers's failure to object, seek a continuance, or claim surprise, the court held that "[u]nder these circumstances lack of formal written notice did not deny [defendant] his due process rights." *Myers*, 86 Wn.2d at 431.

Here, Tavai failed to object to lack of notice in the petition, he did not seek a continuance, and he did not claim surprise. He did not object to discussion of Ultra Poly's termination of his employment. He did not object to any of the evidence supporting the violations. In fact, Tavai did not contest any of the violations or the supporting evidence; his attorney merely pleaded for leniency based on the nature of the evidence and other mitigating factors. Thus, Tavai was not denied his due process rights. Thus we do not analyze whether any such error was harmless.

V. Ineffective Assistance of Counsel

Tavai argues that his counsel was ineffective because he did not object to void or nonexistent conditions, did not protect his due process right to allocution, and failed to object to lack of notice and that these failures were prejudicial. But we have held that the sentencing court did not rely on Tavai's associations as a violation, the sentencing court only relied on valid

violations, Tavai did not invoke his right to allocute, and Tavai received proper notice. Thus, his counsel was not deficient and Tavai was not prejudiced.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.