

2007

# State of Utah v. Mary Jean Johnson : Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Debra M. Nelson; Heather J. Chesnut.

Mark Shurtleff.

---

## Recommended Citation

Reply Brief, *State of Utah v. Mary Jean Johnson*, No. 20070280 (Utah Court of Appeals, 2007).

[https://digitalcommons.law.byu.edu/byu\\_ca3/161](https://digitalcommons.law.byu.edu/byu_ca3/161)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 MARY JEAN JOHNSON, : Case No. 20070280-CA  
 :  
 Defendant/Appellant. : Appellant is incarcerated.

---

**APPELLANT'S REPLY BRIEF**

Appeal from a judgment of conviction for Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (2003); and Possession of a Forgery Device, a third degree felony, in violation of Utah Code Ann. § 76-6-502 (2003); and Falsely Making, Encoding or Signing a Financial Transaction Card, a third degree felony, in violation of Utah Code Ann. § 76-6-506.1 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Stephen L. Henriod, presiding.

DEBRA M. NELSON (9176)  
HEATHER J. CHESNUT (6934)  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK SHURTLEFF (4666)  
**ATTORNEY GENERAL**  
Heber M. Wells Building  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854

Attorney for Appellee

FILED  
UTAH APPELLATE COURTS  
APR 18 2008

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 MARY JEAN JOHNSON, : Case No. 20070280-CA  
 :  
 Defendant/Appellant. : Appellant is incarcerated.

---

**APPELLANT'S REPLY BRIEF**

Appeal from a judgment of conviction for Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (2003); and Possession of a Forgery Device, a third degree felony, in violation of Utah Code Ann. § 76-6-502 (2003); and Falsely Making, Encoding or Signing a Financial Transaction Card, a third degree felony, in violation of Utah Code Ann. § 76-6-506.1 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Stephen L. Henriod, presiding.

DEBRA M. NELSON (9176)  
HEATHER J. CHESNUT (6934)  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorneys for Appellant

MARK SHURTLEFF (4666)  
**ATTORNEY GENERAL**  
Heber M. Wells Building  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854

Attorney for Appellee

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
ARGUMENT.....	1
POINT. APPELLANT’S SENTENCING ISSUE WAS PROPERLY PRESERVED FOR APPELLATE REVIEW, BUT EVEN IF THE ISSUE WERE UNPRESERVED, RULE 22(E), UTAH RULES OF CRIMINAL PROCEDURE, ALLOWS THIS COURT TO REVIEW APPELLANT’S CHALLENGE TO HER SENTENCE.....	1
CONCLUSION.....	5

## TABLE OF AUTHORITIES

Page

### Cases

<u>Beltran v. Allan</u> , 926 P.2d 892 (Utah Ct. App. 1996).....	2
<u>State v. Brooks</u> , 908 P.2d 856 (Utah 1995) .....	3
<u>State v. Cram</u> , 2002 UT 37, 46 P.3d 230 .....	2
<u>State v. Helm</u> , 2002 UT 12, 40 P.3d 626 .....	4
<u>State v. Higginbotham</u> , 917 P.2d 545 (Utah 1996).....	3
<u>State v. Hoffhine</u> , 2001 UT 4, 20 P.3d 265 .....	2
<u>State v. Samora</u> , 2004 UT 79, 99 P.3d 858.....	3
<u>State v. Schweitzer</u> , 943 P.2d 649 (Utah 1997) .....	4
<u>State v. Wanosik</u> , 2001 UT App 241, 31 P.3d 615 .....	3

### Rules

Utah R. Crim. P. 22(e) .....	1, 2, 3, 4
------------------------------	------------

---

IN THE UTAH COURT OF APPEALS

---

THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. :  
MARY JEAN JOHNSON, : Case No. 20070280-CA  
Defendant/Appellant. : Appellant is incarcerated.

---

**ARGUMENT**

POINT. APPELLANT’S SENTENCING ISSUE WAS PROPERLY PRESERVED FOR APPELLATE REVIEW, BUT EVEN IF THE ISSUE WERE UNPRESERVED, RULE 22(E), UTAH RULES OF CRIMINAL PROCEDURE, ALLOWS THIS COURT TO REVIEW APPELLANT’S CHALLENGE TO HER SENTENCE.

As argued in Appellant’s Opening Brief and noted in the state’s Fact section, Appellant argued for the trial court to follow Adult Probation and Parole’s (AP&P), recommendation of probation. R. 116:4; Appellee Brief 7. Yet, the state argues that Appellant’s sentencing issue is unpreserved because in addition to the argument for probation, Appellant did not thereafter object to the trial court’s imposition of consecutive sentences. Appellee Brief 9. However, once Appellant had made her argument that she sought probation rather than imposition of a prison term, she preserved her sentencing issue for appeal and was not required to further object once the trial court had articulated its determination. The general rule in Utah does not “require a party to continue to object once a motion [or argument] has been made, and the trial court has rendered a decision on

the issue.” State v. Hoffhine, 2001 UT 4, ¶14, 20 P.3d 265; Beltran v. Allan, 926 P.2d 892, 901 (Utah Ct. App. 1996) (Billings, J., dissenting) (“It is well established that the law does not require litigants to do a futile or vain act.”). Furthermore, Rule 22(e) of the Utah Rules of Criminal Procedure allows this Court to review claims regarding the legality of an Appellant’s sentence at any time. See Utah Rule of Crim. P. 22(e).

Utah case law establishes that the doctrine of waiver only “has application if defendants fail to raise claims at the appropriate time at the trial level, so the judge has an opportunity to rule on the issue.” State v. Cram, 2002 UT 37, ¶9, 46 P.3d 230. Two policy reasons exist for the preservation rule; first, the rule “give[s] the trial court an opportunity to ‘address the claimed error, and if appropriate, correct it,’ and second, . . . ‘a defendant should not be permitted to forgo making an objection with the strategy of enhancing the defendant’s chances of acquittal and then, if that strategy fails, . . . claiming on appeal the Court should reverse.’” Id. at ¶10 (citation omitted). The second policy reason does not have application in this case where Ms. Johnson had already been convicted and only challenges the trial court’s imposition of consecutive prison terms rather than probation. R. 116:5. Furthermore, there is no strategic reason for failing to mention something that would assist the trial court in ensuring the defendant received probation for which she was arguing.

In this case, Ms. Johnson brought to the trial court’s attention that she was arguing for the court to follow AP&P’s recommendation of probation. R. 116:3. AP&P stated

that its recommendation for probation was made “to address public safety issues, as well as Ms. Johnson’s needs.” R. 123:3. The presentence report took into account Ms. Johnson’s history, character, rehabilitative needs and the gravity and circumstances of the offenses. Id. Defense counsel’s argument to follow AP&P’s recommendation, and by extension not to impose a harsher sentence, was clearly before the trial court and was therefore preserved. But even if the issue were unpreserved, under Utah Rules of Criminal Procedure Rule 22(e), this Court has jurisdiction to consider Ms. Johnson’s challenge of the imposition of her consecutive prison terms. Id. Utah Rule of Criminal Procedure 22(e), allows this Court to correct an illegal sentence “at any time,” which means this Court is permitted to consider the legality of Ms. Johnson’s sentence regardless of whether she properly preserved the issue below. Utah R. Crim. P. 22(e); State v. Wanosik, 2001 UT App 241, ¶28 n.11, 31 P.3d 615.

When an Appellant is challenging her sentence and not the underlying conviction, the language of rule 22(e) is “sweeping.” State v. Brooks, 908 P.2d 856, 860 (Utah 1995). The Supreme Court has not listed “all types of errors that may qualify for review under rule 22(e).” State v. Samora, 2004 UT 79, ¶13, 99 P.3d 858. But it has determined that rule 22(e) is broad enough to encompass violations to rules and statutes. See, e.g., id. (holding “that a sentence imposed in violation of rule 22(a) of the Utah Rules of Criminal Procedure may be considered a ‘sentence imposed in an illegal manner’ under rule 22(e)”); State v. Higginbotham, 917 P.2d 545, 551 (Utah 1996) (remanding for




resentencing under rule 22(e) because statute did “not authorize a consecutive, determinate two-year term as was given here”). In this case, rule 22(e) has application when a trial court’s imposition of sentence drastically deviates from the presentence report’s recommendation that it cannot be said that it considered the statutorily required factors. In fact, the record indicates that the trial court actually considered improper factors when imposing consecutive sentences. See Appellant’s Opening Brief 6-15.

Therefore, this Court has jurisdiction to review Ms. Johnson’s challenge to the trial court’s imposition and execution of her prison terms rather than imposition of probation. The trial court’s abuse of discretion is apparent in its imposition of a “clearly excessive [consecutive prison] sentence” that deviates so far from AP&P’s recommendation of probation that “no reasonable [person] would [have] take[n] the view adopted by the trial court.” State v. Schweitzer, 943 P.2d 649 (Utah 1997) (citation omitted). Had the trial court given “adequate weight to [the] mitigating circumstances” as noted in the presentence report, it would have followed more closely AP&P’s recommendation. State v. Helm, 2002 UT 12, ¶15, 40 P.3d 626 (citation omitted).

CONCLUSION

This Court should reverse because the trial court abused its discretion by imposing three consecutive terms of zero to five years.

SUBMITTED this 18<sup>th</sup> day of April, 2008.

  
\_\_\_\_\_  
DEBRA M. NELSON  
HEATHER CHESTNUT  
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 18<sup>th</sup> day of April, 2008.

  
\_\_\_\_\_  
DEBRA M. NELSON

DELIVERED this \_\_\_\_\_ day of April, 2008.