

2007

The State of Utah v. Patrick Henry Valdez : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 PATRICK HENRY VALDEZ, : Case No. 20070614-CA
 :
 Defendant/Appellant. : Appellant is incarcerated.

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for Theft by Receiving Stolen Property, a third degree felony, in violation of Utah Code Ann. § 76-6-408 (2003); Attempted Burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (2003); Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (2003); and two counts of Attempted Theft by Receiving Stolen Property, third degree felonies, in violation of Utah Code Ann. § 76-6-408 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Deno Himonas, presiding.

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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 HIS SENTENCE.

As argued in Appellant's Opening Brief and noted in the state's Fact section, defense counsel argued for the trial court to give Mr. Valdez the opportunity for probation or otherwise follow Adult Probation and Parole's (AP&P) recommendation of concurrent sentences. R. 55:5; Appellee Brief 6-7. Yet, the state argues that Appellant's sentencing issue is unpreserved because in addition to the argument for probation, or in the alternative concurrent sentences, defense counsel did not thereafter object to the trial court's imposition of consecutive sentences. Appellee Brief 9-11. However, once defense counsel had made his argument that Appellant sought probation, or in the alternative concurrent sentences, he preserved his 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 Mr. Valdez had already been convicted and only challenges the trial court’s imposition of consecutive prison terms rather than probation. R. 55. Furthermore, there is no strategic reason for failing to mention something that would assist the trial court in ensuring the defendant received

probation or concurrent sentences for which he was arguing.

In this case, Mr. Valdez brought to the trial court's attention that he was arguing for probation, or in the alternative, for the court to follow the presentence recommendation of concurrent sentences. R. 55:5. Defense counsel argued in mitigation that Mr. Valdez's attitude and desire to get help for his lifelong addiction should be taken into account. R. 55:3. The presentence report, although initially leaning towards probation, recommended concurrent sentences. R. 43:3. The state agreed with the presentence report's recommendation of concurrent sentences given Mr. Valdez's attitude and believed it was important that the Board have the power to decide how long Mr. Valdez remains incarcerated. R. 55:6. Given defense counsel's argument to impose probation or to otherwise follow the presentence report's and state's recommendation of concurrent sentences, Mr. Valdez's sentencing issue 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 Mr. Valdez's challenge of the imposition of his 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 Mr. Valdez's sentence regardless of whether he 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 his 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 and the state’s recommendation so that it cannot be said that it considered the statutorily required factors.

Therefore, this Court has jurisdiction to review Mr. Valdez’s challenge to the trial court’s imposition of his consecutive prison terms. The trial court’s abuse of discretion is apparent in its imposition of a “clearly excessive [consecutive prison] sentence” that deviates from the presentence report’s and the state’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 by the presentence report, defense counsel and the state, it would have more closely reflected the recommendations

made for sentencing. 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 five consecutive terms of zero to five years in prison without considering all of the statutory factors and imposing consecutive sentences that were clearly unfair and excessive.

SUBMITTED this 18th day of April, 2008.



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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, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 18th day of April, 2008



DEBRA M. NELSON

DELIVERED this _____ day of April, 2008
