

2007

# Utah v. Williams : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee,  
v. : Case No. 20070722-CA  
CINDY WILLIAMS, :  
Defendant/Appellant.

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BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS OF FORGERY, ILLEGAL  
POSSESSION OF COCAINE, AND PROVIDING FALSE PERSONAL  
INFORMATION TO AN OFFICER, IN THE THIRD JUDICIAL  
DISTRICT, SALT LAKE COUNTY, THE HONORABLE TERRY T.  
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NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED

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CINDY WILLIAMS, :  
Defendant/Appellant. :

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BRIEF OF APPELLEE

---

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from convictions of forgery, illegal possession of cocaine, and providing false personal information to an officer, in the Third Judicial District, Salt Lake County, the Honorable Terry T. Christiansen presiding. This Court has jurisdiction over the appeal under Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

Did the trial court abuse its discretion when it denied probation and imposed the statutory indeterminate prison terms, as recommended in the presentence investigation report?

**Standard of Review.** An appeals court “will not overturn a sentence unless it exceeds statutory or constitutional limits, the judge failed to consider all the legally relevant factors[,], or the actions of the judge were so inherently unfair as to constitute abuse of discretion.” *State v. Sotolongo*, 2003 UT App 214, ¶ 3, 73 P.3d 991 (citations and internal quotation marks omitted).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Annotated § 76-3-203, governing indeterminate terms of imprisonment for felony convictions, states:

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

...

(3) In the case of a felony of the third degree, unless the statute provides otherwise, for a term not to exceed five years.

Utah Code Ann. § 76-3-203 (West 2004).

Utah Code Annotated § 76-3-204, governing indeterminate terms of imprisonment for misdemeanor convictions, states:

A person who has been convicted of a misdemeanor may be sentenced to imprisonment as follows:

...

(3) In the case of a class C misdemeanor, for a term not exceeding ninety days.

Utah Code Ann. § 76-3-204 (West 2004).

## STATEMENT OF THE CASE

Defendant pled guilty to forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (West 2004); illegal possession of a controlled substance (cocaine), a third degree felony, in violation of Utah Code Ann. § 58-37-8 (West Supp. 2006); and providing false personal information to a police officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (West 2004). R68-81, 83-84. As part of the plea agreement, the State dismissed charges for a second forgery, heroin possession, and attempted theft by deception, and recommended that any prison term be suspended. R2,



75. In the plea statement defendant acknowledged, “I know that any charge or sentencing concession or recommendation of probation or suspended sentence . . . made or sought be either defense counsel or the prosecuting attorney [is] not binding on the judge.” R76.

The trial court ordered Adult Probation and Parole (AP&P) to prepare a presentence report (PSI). R83. On July 31, 2007, defendant was sentenced to concurrent terms not to exceed five years on the forgery and drug possession convictions, and to a concurrent ninety-day term on the conviction for providing false personal information. R89-90.

Defendant filed a pro se notice of appeal on August 28, 2007. R100-101. Defense counsel filed an amended notice of appeal on September 21, 2001. R105-106.

## STATEMENT OF THE FACTS

### *The crime*

On November 1, 2006, defendant presented a check to be cashed at a Wal-Mart store in Salt Lake County. PSI Addendum at 3; *see also* R3-4. The check was made payable to Leta Rae Williams, drawn on the account of Peak Investment Group, LLC, and purportedly signed by Richard Peak. *See* R3-4. Wal-Mart security staff apparently detained defendant and called the police. *See* R3.

Defendant identified herself as Leta Rae Wise to a responding officer. *Id.* She had in her possession a driver’s license in the name of Leta Rae Williams and a birth certificate in the name of Leta Rae Richardson. *Id.* She admitted to the officer that she knew the check was fraudulent and that she did not have a valid driver’s license. *Id.* The driver’s license she possessed was forged. R4.

Defendant was arrested and booked. *Id.* During the booking process, an officer searched her and found two baggies that field-tested positive for cocaine and heroin. *Id.*

***Facts relevant to sentencing***

As part of the plea agreement, the State agreed to recommend that the court suspend any prison terms. R75; R114:10. At sentencing, defense counsel argued for probation, stating that about a week after the offense, defendant stopped using drugs and had not used drugs since that time. R114:5-7. Counsel stated that defendant was under supervision on an ankle monitor program, that she was on a list awaiting funding for intensive outpatient drug treatment, and that her completion of the ankle monitor program would “roughly coincide” with the availability of the funding for her outpatient treatment. *Id.* Defendant stated that she had not used drugs for nine months, that she was working, and that she was caring for her elderly mother. R114:8-10.

At sentencing, the State did “a no recommendation for prison.” R114:10. The State argued, however, that defendant still needed jail time and that any probation should be a “no-tolerance type.” R114:10-11.

The PSI, on the other hand, recommended that defendant be sentenced to prison. PSI Addendum at 2. The PSI set forth a substantial criminal history beginning in 1982 and continuing through 2007. PSI at 6-8; PSI Addendum at 5.<sup>1</sup> Defendant had been convicted of prescription forgery in 1982 and 1987; illegal use of credit cards in 1990;

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<sup>1</sup> AP&P prepared the PSI for sentencing on another conviction imposed on defendant in December 2006. *See* PSI at 1. AP&P prepared the PSI Addendum for use with the PSI for sentencing defendant in this case. *See* PSI Addendum at 1.

forgery in 1995; theft or retail theft in 1991, 1995, 1996, 2001, 2003, and 2005; and drug or paraphernalia possession in 1990 and 2001. PSI at 5-7. Her criminal history indicated two past prison commitments, paroles after each commitment, and revocations of those paroles. PSI Addendum at 6. The PSI also indicated that defendant had a total of 95 aliases on record, although defense counsel indicated at sentencing that a few of the aliases were actually defendant's names at various points in her marital history. PSI at 1; R114:3.

The PSI and PSI Addendum also showed that defendant was involved in additional criminal activity following the crimes in this case. Defendant was charged with misdemeanor drug possession and giving false information to an officer on November 10, 2006, nine days after the incident in this case. PSI at 1-4, 8. She later pled guilty to those offenses. PSI at 2. At the time of sentencing in this case, she was also charged with forgery and drug possession allegedly committed on February 4, 2007, three months after the crimes here. PSI Addendum at 5.

The trial court addressed defendant's claims of rehabilitation, stating that "It's easy for anyone to stand up before a Court and say, I've changed," but concluding that defendant's "actions sp[oke] a lot louder than [her] words." R114:12. The court noted that defendant's criminal record went "back to 1982," was "basically one crime after another," and was "not getting any better." R114:11. The court observed to defendant, "You make horrible decisions and not only do you use drugs, but you commit crimes to support your drug habit. And so you victimize this community time after time after time after time." R114:12-13.

Stating that “enough is enough,” the court imposed concurrent terms of zero to five years on defendant’s forgery and drug possession convictions and zero to ninety days on her conviction for giving false personal information to a police officer. R114:13.

#### SUMMARY OF ARGUMENT

1. Defendant claims that the trial court denied her probation without considering her character, personality, attitude, or rehabilitative needs. Defendant did not object below to the trial court’s sentencing decision or claim that the trial court had failed to consider any legally relevant factor. Thus, her claim is unpreserved. Because she does not argue any justification for review of her unpreserved claim, this Court should decline to review it.

2. In any event, defendant has not demonstrated that the trial court abused its discretion by sentencing her to prison. She has not shown that her sentence exceeds statutory limits, that the court failed to consider any legally relevant factor, or that the actions of the trial judge were inherently unfair.

## ARGUMENT

### **DEFENDANT’S ARGUMENT IS UNPRESERVED, AND IN ANY EVENT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SENTENCING DEFENDANT TO THE STATUTORY TERMS**

Defendant claims that “the trial court abused its discretion in failing to suspend the execution of [defendant’s] sentence and place her on probation without considering her character, personality, attitude or rehabilitative needs.” Br. Appellant at 6 (boldface, underlining, and upper case omitted). Her claim is both unpreserved and without merit.

#### **A. Because defendant’s claim is unpreserved and she argues no exception to the preservation rule, this Court should decline to review it.**

Defendant asserts that the issue was preserved below. *Id.* at 2. In support, she references the sentencing hearing at 7. *Id.* (citing R114:7). Defendant requested at the hearing, and specifically at that point in the hearing, that the Court “give her the opportunity of probation.” *Id.* She did not, however, argue that failure to grant probation would constitute an abuse of discretion. *See* R114:1-14. She did not claim that the Court had failed to “consider[] her character, personality, and attitude or rehabilitative needs.” Br. Appellant at 6 (boldface, underlining, and upper case omitted).

It is well settled that “claims not raised before the trial court may not be raised on appeal.” *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *see also State v. Thomas*, 1999 UT 2, ¶ 29, 974 P.2d 269 (“Absent any indication that this issue was raised at trial, it cannot be considered for the first time on appeal”) (internal quotation marks and citation omitted); *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996) (declining to address claims not raised in the trial court). To preserve an issue for appeal, a defendant “must

enter an objection on the record that is both timely and specific.” *State v. Rangel*, 866 P.2d 607, 611 (Utah App. 1993). “The objection must ‘be specific enough to give the trial court notice of the very error’ of which counsel [or defendant] complains.” *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998) (quoting *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 460 (Utah App. 1996)). “The purpose of this rule is to allow the trial court the first opportunity to address a claim that it has erred,” and, if necessary, to expeditiously correct the error. *Rangel*, 866 P.2d at 611. The preservation rule “applies to every claim, including constitutional questions,” unless an appellant alleges and demonstrates “exceptional circumstances” or “plain error.” *Holgate*, 2000 UT 74, ¶ 11.<sup>2</sup>

Defendant made no objection that gave the trial court notice of the error she now claims on appeal. As stated, at the sentencing hearing, defense counsel attempted to persuade the trial court that defendant should be given probation. *See* R114:108. Counsel did not, however, argue that the trial court had abused its discretion by denying probation or by failing to consider defendant’s “character, personality, attitude or rehabilitative needs.” Br. Appellant at 6 (boldface, underlining, and upper case omitted); *see also* R114:1-14. Thus, defendant did not preserve the claim she now raises on appeal.

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<sup>2</sup> The “specificity requirement arises out of the trial court’s need to assess allegations by isolating relevant facts and considering them in the context of the specific legal doctrine placed at issue.” *State v. Brown*, 856 P.2d 358, 361 (Utah App. 1993). A general objection usually does not provide that context. “The ‘mere mention’ of an issue without introducing supporting evidence or relevant legal authority does not preserve that issue for appeal.” *Id.* (citation omitted).

*See State v. Garner*, 2008 UT App 32, ¶¶ 11-12, \_\_\_ P.3d \_\_\_ (addressing failure to object at sentencing to trial court's consideration of various factors).

Further, defendant has not argued any justification for review of her unpreserved claim. This Court should therefore decline to review it. *See State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995) (court may decline to consider unpreserved issue where defendant did not argue that "exceptional circumstances" or "plain error" justified review).

**B. In any event, defendant has failed to demonstrate that the trial court abused its discretion by sentencing her to the statutory terms on her convictions.**

Even if defendant had properly preserved her claim, she could not prevail because the trial court properly exercised its discretion when it sentenced her to the statutory terms and denied probation.

**1. Trial courts have wide latitude and discretion when making sentencing decisions.**

Defendant argues that the trial court abused its discretion "by failing to adequately consider [defendant's] character, personality and attitude before denying her the opportunity of probation." Br. Appellant at 7. Specifically, she notes that both defense counsel and the State "recommended that [she] be given the opportunity of probation." *Id.* She continues to claim that she had stopped using drugs and had "stay[ed] clean" from November 2006 to July 2007 when the sentencing hearing was held. *Id.*

Defendant's argument fails because she cannot demonstrate that her sentence exceeds the statutory limits, that the court failed to consider any legally relevant factor, or that the actions of the judge were inherently unfair.

Defendants face a particularly heavy burden when challenging a trial court's sentencing decisions. An appeals court "will not overturn a sentence unless it exceeds statutory or constitutional limits, the judge failed to consider all the legally relevant factors[,] or the actions of the judge were so inherently unfair as to constitute abuse of discretion." *State v. Sotolongo*, 2003 UT App 214, ¶ 3, 73 P.3d 991 (citations and internal quotation marks omitted). Simply put, "the fact that [a defendant] views his situation differently than did the trial court does not prove that the trial court neglected to consider the [legally relevant] factors." *State v. Helms*, 2002 UT 12, ¶ 14, 40 P.3d 626.

"The trial court has broad discretion in imposing sentence within the statutory scope provided by the legislature." *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991). Where the trial court followed the law, it cannot be said that "no reasonable [person] would take the view adopted by the trial court." *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978).

"[A] defendant is not entitled to probation." *State v. Olsen*, 2005 UT App 137U, \*1 (quoting *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991); see also *State v. Sibert*, 310 P.2d 388, 392 (Utah 1957)) ("Probation is not a matter of right, and this is so no matter how unsullied a reputation one convicted of a crime may be able to demonstrate to the trial judge"). Rather, "the court is empowered to place the defendant on probation if it thinks that will best serve the ends of justice and is compatible with the public interest." *Rhodes*, 818 P.2d at 1051 (citation omitted). But the decision to grant or deny probation "is within the complete discretion of the trial court." *Id.* at 1049.



Moreover, the trial court is not bound by the recommendations of the prosecutor or defense counsel. *See State v. Gladney*, 951 P.2d 247, 248 (Utah App. 1998) (“Even if the State had made a recommendation . . . the court would not have been bound by that recommendation. The plea agreement specifically stated that the judge was not bound by any sentencing recommendation.”) (citing *State v. Angus*, 581 P.2d 992, 995 (Utah 1978)).

Finally, a sentencing court is not usually required to state on the record its consideration of every legally relevant factor. *Helms*, 2002 UT 12, ¶ 11. Instead, this Court may assume that the sentencing court considered the factors unless “(1) an ambiguity of facts makes the assumption unreasonable, (2) a statute explicitly provides that written findings must be made, or (3) a prior case states that findings on the issue must be made.” *Id.* Absent these circumstances, this Court “will not assume that the trial court’s silence, by itself, presupposes that the court did not consider the proper factors as required by law.” *Id.*

## **2. The trial court properly exercised its discretion.**

No abuse of discretion occurred in this case. First, the sentences imposed are all within statutory parameters. Defendant’s sentences on her two third degree felony convictions were for terms not to exceed five years. Her sentence on her class C misdemeanor conviction was for a ninety-day term. Those terms do not exceed statutory limits. *See Utah Code Ann. § 76-3-203 & 204.*

Second, nothing suggests that the trial judge failed to consider a legally relevant factor. Defendant asserts that the trial court failed to consider “her character, personality,

attitude or rehabilitative needs.” Br. Appellant at 6. She cites to no authority, however, suggesting that the court was required to consider these matters. Only her citation to *State v. Helms* suggests that a trial court must give “adequate weight to certain mitigating circumstances.” 2002 UT 12, ¶ 15. *Helms*, however, dealt with factors that must be considered in imposing *consecutive* sentences, where statutory law requires the court to “consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant.” *Id.* at ¶ 9 (citing Utah Code Ann. § 76-3-401(4) (1999)). Here, the trial court did not impose consecutive sentences.

In any case, the sentencing court ordered a PSI and reviewed its contents with both parties. *See* R114:3-5, 10-11. The court heard from defendant and defense counsel, both of whom argued that defendant had been “clean” for an extended period, was trying hard, was working, was on a waiting list for intensive out-patient therapy, had “a positive mind set,” and would benefit from probation. *See* R114:5-14. Even assuming that these factors were legally relevant, the record shows that the trial court considered them.

Defendant asserts, however, that the trial court “[in]adequately consider[ed]” these matters. Br. Appellant at 10. She does not cite to any record support for that assertion. *See id.* Her argument appears to be not that the trial court failed to consider the factors at all, but that she disagrees with how the trial court balanced them. This does not help her because her claim, reduced to its essence, is that the trial court viewed her situation differently than she did. As explained, a sentencing court does not abuse its discretion merely because it views a defendant’s situation differently than the defendant does. *Helms*, 2002 UT 12, ¶ 14.

Moreover, as explained, this Court may assume that the trial court considered every legally relevant factor, whether or not it stated such consideration on the record, unless an ambiguity of facts makes the assumption unreasonable or unless statutory or case law explicitly requires findings on the record.

Here, defendant points to no ambiguity of facts and to no statute or case law requiring that the trial court make findings regarding her character, personality, attitude, and rehabilitative needs. This Court therefore will not assume that the trial court did not consider these matters.

Third, the decision not to grant probation was not inherently unfair. As explained a defendant is not legally entitled to probation. *See Olsen*, 2005 UT App 137U, \*1; *Rhodes*, 818 P.2d at 1051; *see also Sibert*, 310 P.2d at 392. Defendant therefore had no right to probation. Further, defendant had acknowledged in her plea statement that any recommendation from the prosecutor was not binding upon the trial judge. *See R76; see also Gladney*, 951 P.2d at 248.

Moreover, based on the record before him, the trial judge could reasonably have determined that imposing prison terms represented a more just disposition than probation. *See, e.g., State v. Nuttall*, 861 P.2d 454, 458 (Utah App. 1993) (no abuse of discretion where trial court emphasized punishing defendant rather than rehabilitating him); *State v. Howell*, 707 P.2d 115, 117-19 (Utah 1985) (recognizing that sentencing judges generally give considerable weight to circumstances of crime). Defendant claimed to have become “clean” about a week after the November 1, 2006 crimes occurred. R114:5. The PSI, however, showed that defendant had been charged and convicted of possessing drugs on

November 10, 2006, nine days after this offense. *See* PSI at 1-2, 8. The PSI Addendum noted that defendant had been arrested again on February 4, 2007, and again charged with possessing drugs. *See* PSI Addendum at 5. Moreover, as explained, defendant had an extensive criminal record showing illegal drug and other criminal activity from 1982 through 2007. *See* PSI at 4-8; PSI Addendum at 5. Based on this record, the trial court did not act unfairly when it determined that incarceration was more appropriate than probation. Such a disposition is well within the discretion of a sentencing court.

On appeal, this Court should decline to overturn the trial court's determination. The trial court was in the most advantaged position to make the highly individualistic assessment required to fashion a just sentence. *See State v. Woodland*, 945 P.2d 665, 671 (Utah 1997) (sentencing "necessarily reflects the personal judgment of the court") (quotations and citation omitted). Certainly, the sentencing court's assessment of defendant's character may have been based at least partially on its personal observation of defendant's body language, demeanor, and tone of voice, none of which are reflected in the record on appeal. *See State v. Pena*, 869 P.2d 932, 939 (Utah 1994).


In this case, the trial court evaluated the evidence, exercised its discretion within the bounds of the law, and imposed a proper statutory penalty for the offense to which defendant entered her plea. Because it cannot be said that "no reasonable [person] would take the view adopted by the trial court," the court did not abuse its discretion. *Gerrard*, 584 P.2d at 887.

## CONCLUSION

Defendant's conviction should be affirmed.

Respectfully submitted this 27<sup>th</sup> day of February, 2007.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of February, 2007, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

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