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The State of Utah v. Cindy Williams : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
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 Plaintiff/Appellee, :
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 v. :
 :
 CINDY WILLIAMS, : Case No. 20070722-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); Illegal Poss/Use of Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(I) (Supp. 2006); and False Personal Information to Police Officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Terry Christiansen, 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 HER SENTENCE.

In response to Appellant’s sentencing argument, the state asserts that the issue is unpreserved because Appellant did not specifically argue that “failure to grant probation would constitute an abuse of discretion.” Appellee Brief 7. However, Appellant was not required to argue the appellate standard of review when addressing the sentencing issue before the trial court. Appellant’s argument before the trial court to follow the state’s and defense counsel’s recommendation of probation properly preserved the issue for appellate review. 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. 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. Williams had already been convicted and only challenges the trial court’s imposition and execution of concurrent prison terms rather than probation. R. 114:13. 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. Williams brought to the trial court’s attention that she was

arguing for the court to follow defense counsel's and the state's recommendation for probation. R. 114:5-8, 10-12; 91. In addition to the recommendations for probation, Ms. Williams herself addressed the court, asking it for the opportunity for probation to continue "interim group, . . . ankle monitor, enter First Step [House and] prove" herself. R. 114:8. The trial court then stated that it was still trying "to decide why [it] shouldn't just put [Ms. Williams] back in prison." R. 114:11. Appellant's argument to follow the recommendations for probation 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. Williams' challenge of the imposition and execution of her concurrent 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. Williams' 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 both the defense counsel’s and the state’s recommendation that it cannot be said that it considered the statutorily required factors. In fact, the record indicates that the trial court considered only Ms. William’s criminal history when imposing concurrent sentences. See Appellant’s Opening Brief 6-11.

Therefore, this Court has jurisdiction to review Ms. Williams’ challenge to the trial court’s imposition and execution of her concurrent prison terms rather than imposition of probation which was supported by her character, personality and attitude. The trial court abused its discretion in failing to give “adequate weight to [the] mitigating circumstances.”” State v. Helm, 2002 UT 12, ¶15, 40 P.3d 626 (citation omitted).

CONCLUSION

As more fully set for in the Opening Brief, Appellant, Ms. Williams, respectfully asks this Court to remand for a new sentencing hearing.

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