

2008

Utah v. Gregory D. Lineberry : Brief of Appellee

Utah Court of Appeals

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Case No. 20080461-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

GREGORY D. LINEBERRY,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for possession of a prohibited item in a correctional facility, a second degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Royal I. Hansen presiding.

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No Oral Argument Requested

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State of Utah,
Plaintiff/ Appellee,

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GREGORY D. LINEBERRY,
Defendant/ Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for possession of a prohibited item in a correctional facility, a second degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUES

1. Did the trial court properly deny defendant's motion to reduce his conviction from a second to a third degree felony pursuant to Utah Code Ann. § 76-3-402?

Standard of Review. This Court reviews the trial court's denial of a motion to reduce a conviction for an abuse of discretion. *See State v. Boyd*, 2001 UT 30, ¶¶ 31-32, 25 P.3d 985.

2. Has defendant shown that the trial court based its denial of his section 402 motion on unreliable information or that error, if any, was plain?

Standard of review. To establish plain error, defendant must show that (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) the error was harmful. *State v. Lee*, 2006 UT 5, ¶ 26, 128 P.3d 1179.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute relevant to the issues on appeal is reproduced in the **Addendum**:

Utah Code Ann. § 76-3-402 (West Supp. 2008).

STATEMENT OF THE CASE

The State charged defendant, a prison inmate, with possession of items prohibited in a correctional facility, a second degree felony, in violation of Utah Code Ann. § 76-8-311.3 (West 2004). R1. Following trial, the jury returned a guilty verdict. R115-18.

Sentencing was held May 15, 2008. Defendant moved the court to reduce the degree of his conviction under Utah Code Ann. § 76-3-402. R121: *see also* R154:5. The court denied the motion and sentenced defendant to an indeterminate prison term of one to fifteen years, to run consecutively to the term defendant was then serving on another offense. R122.

Defendant timely appealed. R124.

STATEMENT OF FACTS

Discovering the handcuff key

Shortly after 9:00 a.m. on December 21, 2006, inmate Glenn Hunter told corrections officer Dennis Gordon that defendant, his cellmate, had a handcuff key. R153:18-19. He said that the key was in the waistband of defendant's sweat pants. R153:18.

Inmates in defendant's prison section, section 2 at Uintah 4, were scheduled to leave their cells for recreation at 9:30 a.m. that day. R153:19. After receiving Hunter's report, Lieutenant Gordon had the section locked down. R153:19. The inmates in that section "were not allowed recreation until [the handcuff key] incident was over with." R153:127. Gordon "did not want [defendant] to have an opportunity to come out for rec[reation], and maybe pass the handcuff key." R153:127.

At approximately 9:30 a.m., Gordon, case manager Scott Smith, and Captain Marty O'Bray brought defendant into an interview room, had him remove the sweat pants, and searched the pants. R153:20, 116. Officer Gordon felt a hard object in the waistband and asked defendant if he knew what it was. R153:20. Defendant said that he did not. R153:20.

Officer Gordon "worked the object through the opening of the sweat pants," removed it, and found that "it was a silver colored handcuff key." R153:23. Asked

about the key, defendant said that “he didn’t know where it came from.” R153:25. He did not make any other statements about the sweat pants or the handcuff key. R153:24.

Defendant’s version – “borrow[ing] a set of sweat pants”

Defendant testified that the sweat pants were not his. See R153:113-14. He said that he borrowed them, but did not know what inmate had lent them to him. See R153:113-14. He gave the following explanation:

I didn’t own anything, so I continually borrowed things. We were out on rec[reation] that day, and I was running around in my jumpsuit, because I sent everything into the laundry. I seen that they were going to come to pull me out of the section to talk to me, so I yelled out if I could borrow a set of sweat pants. They were hanging on the rail. I got an affirmative, put the sweats on and went down.

R153:113.¹

Rebuttal – the prison log and the property release

The prison log for that day showed that sections 4, 5, and 6 came out for recreation at 9:40 a.m. R153:127. The log reflected, however, that sections 1, 2 and 3

¹ In his opening statement, defense counsel suggested that defendant had borrowed the sweat pants from his cell mate, who “set up [defendant],” who “[l]ent him those pants, knowing full well that there was a handcuff key in there, and then informed the authorities that [defendant] had possession of a handcuff key.” R153:13.

started recreation at 11:10 a.m. R153:127. Defendant was in section 2. R153:19. Lieutenant Gordon testified that defendant, who was transferred to maximum security following the discovery of the key, “did not have rec[reation] that morning.” R153:127; *see also* R153:86.

When defendant was transferred to maximum security, he was wearing the sweat pants from which the key had been taken. R153:89. As part of prison policy, defendant could not retain his clothing in maximum security. R153:87-88. Defendant did not ask that the sweat pants be returned to anyone in his former housing unit. *See* R153:89. Rather, he filled out a property release form, releasing them with his other clothing to his mother. *See* R153:89, 123.

Sentencing

At sentencing, defense counsel requested “that the Court consider sentencing [defendant] one degree lower.” R154:5. In support of his motion, counsel explained that defendant, though convicted, still insisted that he was innocent and had already faced prison discipline for the incident. R154:4-5. Counsel also argued that “[t]he Board of Pardons is going to have whatever say they want to have, regardless of what your sentence is.” R154:5.

The prosecutor objected to any section 402 reduction. R154:7. He argued that “a handcuff key is a big deal.” R154:7. He further stated, “There was information that we had that [defendant] was trying to get this key to Troy [Kell] on death row.

Whether that be true or not, . . . having a handcuff key is very serious,” “having a handcuff key is a serious security risk.” R154:7-8.

The trial court concluded that a reduction was not appropriate and denied defendant’s motion. R154:8.

SUMMARY OF ARGUMENT

The trial court properly denied defendant’s motion for a section 402 reduction in the degree of his conviction. Neither the circumstances of the case nor defendant’s character and history suggested that imposition of a second degree felony conviction would be unduly harsh.

Defendant has not shown that the trial court based its denial of his section 402 motion on unreliable information. The prosecutor referred to the possibility that defendant was trying to get the handcuff key to Troy Kell at sentencing. Defendant did not object to or attempt to refute that statement. Because he had the opportunity to object, defendant was not denied due process.

Moreover, defendant has not shown that the trial court considered the statement about Kell or that it was erroneous. Even had defendant made that showing, he could not prevail on his plain error claim because his motivation for securing the key was merely tangential. The court denied the motion because defendant’s possession of the handcuff key within the prison was a serious security risk, no matter what use defendant had intended for the key. Defendant has not

shown that absent the prosecutor's comments about Kell and absent any consideration of those comments, there is a reasonable likelihood that the trial court would have granted the motion to reduce.

For these reasons, defendant has demonstrated neither error nor plain error.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A SECTION 402 REDUCTION IN THE DEGREE OF HIS CONVICTION

Applicable law and background. An appellate court affords the district court wide latitude and discretion when reviewing issues of sentencing. *State v. Boyd*, 2001 UT 30, ¶ 31, 25 P.3d 985 (addressing denial of section 402 motion to reduce). An appellate court will set aside a sentence imposed by the trial court only when the sentence "represents an abuse of discretion," that is, "only when it is inherently unfair or clearly excessive." *Id.* (citing *State v. Woodland*, 945 P.2d 665, 671 (Utah 1997) (internal quotation marks and citations omitted)). Such discretion is necessary because sentencing "necessarily reflects the personal judgment of the court." *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978) (citation omitted).

At sentencing, defendant moved to reduce the degree of his conviction under section 402. R154:5. That section provides:

If at the time of sentencing the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, and after having given any victims present at the sentencing and the prosecuting attorney an opportunity to be heard, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute, the court may enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

Utah Code Ann. § 76-3-402(1) (West Supp. 2008).

Claim and analysis. On appeal, defendant claims that the trial court abused its discretion when it denied his motion to reduce. Br. Appellant at 6. He claims that the trial court should have granted the motion because (1) he recklessly, not intentionally, possessed the handcuff key, (2) his cellmate, Glenn Hunter, may have “orchestrated” the incident to “curry favor with officers,” (3) no one was injured, (4) he maintained his innocence in refusing a plea offer, and (5) he was disciplined at the prison. Br. Appellant at 6-8.

Defendant’s claim is unpreserved in part. Defendant argued at sentencing that the court should grant the motion because, despite the jury verdict, he was innocent and because he had already faced prison discipline for his possession of the handcuff key. *See* R154:4-6. He did not claim that he was entitled to a reduction because he had acted only recklessly, because another inmate may have set him up, or because no one was hurt. To the extent he now relies on these matters in claiming an abuse of discretion, his claim is unpreserved. *See State v. Johnson*, 774

P.2d 1141, 1144 (Utah 1989) (stating that in criminal cases “a contemporaneous objection or some form of *specific* preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim on appeal”) (emphasis in original).

Even assuming defendant had asserted all of these claims at sentencing, the trial court still properly denied his motion. First, given the jury verdict, defendant’s insistence on his innocence weighed against a reduction. *See* R113 (verdict). Second, defendant cites to no authority suggesting that prison discipline should affect sentencing. Third, defendant did not show that he acted only recklessly. In convicting him, the jury found that he had the requisite mental state, i.e., that he acted intentionally, knowingly, *or* recklessly. *See* R111 (elements instruction); R113. Fourth, defendant did not show that he was an innocent person, the victim of another inmate’s “orchestration.” *See* R153:13 (opening statement). The jury necessarily rejected that claim when it found that defendant acted intentionally, knowingly, or recklessly. *See* R111, 113.

Even more significantly, the circumstances of this offense did not merit, let alone require, that the trial court exercise its discretion to reduce the degree of his conviction. *See* Utah Code Ann. § 76-3-402(1). As the prosecutor argued, defendant’s possession of the key created a “serious security risk.” R154:8. Had the key not been discovered, it could have used it to permit defendant’s or another

inmate's escape or possible injury or murder of guards and other prisoners. Moreover, defendant's character and history did not militate in favor of a reduction. See Utah Code Ann. § 76-3-402(1). Defendant was not a first-time offender, but a prison inmate, already serving a term of five years to life. R154:7. In sum, nothing in defendant's character or history or in the circumstances of this case suggests that "it would [have been] unduly harsh" to record his conviction as a second degree felony offense. Utah Code Ann. § 76-3-402(1).

For these reasons, defendant has not shown that the trial court abused its discretion when it declined to reduce the degree of his conviction.

II.

DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT BASED ITS DENIAL OF HIS SECTION 402 MOTION ON UNRELIABLE INFORMATION; HE HAS NOT ESTABLISHED ERROR, LET ALONE PLAIN ERROR

Relevant law and background. "The due process clause in both the United States and Utah Constitutions requires that a sentencing judge act on reasonably reliable and relevant information in . . . fixing a sentence." *State v. Earle*, 2007 UT App 144U (citing *State v. Johnson*, 856 P.2d 1064, 1071 (Utah 1993) (internal quotation and additional citation omitted)). "Fundamental principles of procedural fairness in sentencing require that a defendant have the right to examine and challenge the accuracy and reliability of the factual information upon which [the] sentence is

based.” *State v. Mallow*, 2004 UT App 432U (citing *State v. Gomez*, 887 P.2d 853, 855 (Utah 1994) (internal quotation omitted)). “Procedural fairness is satisfied when a defendant is given the opportunity to review and challenge the information upon which the court base[s] its sentence.” *Id.* (citing *State v. Weeks*, 2000 UT App 273, ¶ 8, 12 P.3d 110).

In opposing the section 402 conviction, the prosecutor stated, “There was information that we had that [defendant] was trying to get this key to Troy [Kell] on death row. Whether that be true or not, obviously having a handcuff key is very serious.” R154:7-8.

Claim and analysis. Defendant claims, “To the extent the trial court relied on th[e] representation [about trying to get the key to Kell] in denying [his] request for a reduction in sentencing, that was improper under the plain-error doctrine.” Br. Appellant at 9. Defendant cannot prevail on this claim.

To establish plain error, defendant must show that (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) the error was harmful. *See State v. Lee*, 2006 UT 5, ¶ 26, 128 P.3d 1179. Here, defendant has not shown error, let alone obvious or harmful error.

Defendant has not shown that the statement about Troy Kell was unreliable. Defendant had an opportunity at sentencing to challenge this information or inquire as to its source, but did not. He did not show that the statement was unreliable.

Moreover, because he had an opportunity to refute the statement, he was not denied a right to procedural fairness. *See Mallow*, 2004 UT App 432U at *2; *Weeks*, 2000 UT App 273, ¶ 8.

Most significantly, defendant merely speculates that the trial court relied on the information about Kell when imposing sentence. In fact, the trial court never referenced the statement when imposing sentence. Moreover, defendant acknowledges the speculative nature of his claims: he argues merely that “[t]o the extent the trial court relied on the representation” and “[i]n the event the trial court relied” on that representation, the reliance was error. Br. Appellant at 9-10.

Moreover, the law presumes that a trial court has the ability to separate proper and improper matters when making its findings. *See, e.g., People v. Myatt*, 384 N.E.2d 85, 88 (Ill. App. 1978) (“[I]n a bench trial, where a prosecutor’s remarks are in error, the judge is presumed to have disregarded them.”); *People v. Nickel*, 788 N.Y.S.2d 274, 278 (N.Y. App. Div. 2005) (Because trial “judges are presumed capable of rendering dispassionate decisions [based] solely on appropriate legal criteria,” a prosecutor’s improper comments will seldom deprive a defendant of a fair trial where a judge, rather than a jury, serves as fact finder.).

Finally, even assuming that the prosecutor’s statement about Kell was erroneous and even assuming that the trial court considered it, defendant has not shown that the court’s error was “harmful,” i.e., that “absent the error, there is a

reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, [that the reviewing court's] confidence in the verdict is undermined." *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

The prosecutor explained that it was uncertain whether the information the State had received about Kell was true. *See* R154:7-8 ("Whether that be true or not). Under those circumstances, it is unlikely that the court considered the matter and, even if the court did, that it gave significant weight to it. Moreover, the allegedly unreliable information was not about defendant's conduct. It was not, for example, about whether he had committed an additional uncharged crime. Rather, it was about defendant's motivation, a peripheral matter. In any event, the factor driving the decision on the motion to reduce was not whether defendant planned to give the key to Kell or could potentially have done so, but whether defendant could potentially have passed the key to any other inmate or used it himself. Defendant has not shown that, absent the prosecutor's reference to Kell and absent any possible reliance on that remark, there was a "reasonable likelihood of a more favorable outcome," i.e., that the trial court would have granted the motion to reduce. *See Dunn*, 850 P.2d at 1208 (Utah 1993).

In sum, defendant has not established that the trial court plainly erred in denying his motion to reduce the degree of his conviction. He has not shown that


the court considered unreliable information or that, had it done so, any error would have been obvious or harmful.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted December 15, 2008.

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CERTIFICATE OF SERVICE

I certify that on December 15, 2008, two copies of the foregoing brief were

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A digital copy of the brief was also included: ☒ Yes ☐ No

Melina Fryer

ADDENDENDUM

76-3-402. Conviction of lower degree of offense -- Procedure and limitations.

(1) If at the time of sentencing the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, and after having given any victims present at the sentencing and the prosecuting attorney an opportunity to be heard, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute, the court may enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

(2) If the court suspends the execution of the sentence and places the defendant on probation, whether or not the defendant is committed to jail as a condition of probation, the court may enter a judgment of conviction for the next lower degree of offense:

- (a) after the defendant has been successfully discharged from probation;
- (b) upon motion and notice to the prosecuting attorney;
- (c) after reasonable effort has been made by the prosecuting attorney to provide notice to any victims;
- (d) after a hearing if requested by either party under Subsection (2)(c); and
- (e) if the court finds entering a judgment of conviction for the next lower degree of offense is in the interest of justice.

(3) (a) An offense may be reduced only one degree under this section, whether the reduction is entered under Subsection (1) or (2), unless the prosecutor specifically agrees in writing or on the court record that the offense may be reduced two degrees.

(b) In no case may an offense be reduced under this section by more than two degrees.

(4) This section does not preclude any person from obtaining or being granted an expungement of his record as provided by law.

(5) The court may not enter judgment for a conviction for a lower degree of offense if:

- (a) the reduction is specifically precluded by law; or
- (b) if any unpaid balance remains on court ordered restitution for the offense for which the reduction is sought.

(6) When the court enters judgment for a lower degree of offense under this section, the actual title of the offense for which the reduction is made may not be altered.

(7) (a) A person may not obtain a reduction under this section of a conviction that requires the person to register as a sex offender until the registration requirements under Section **77-27-21.5** have expired.

(b) A person required to register as a sex offender for the person's lifetime under Subsection **77-27-21.5(10)(c)** may not be granted a reduction of the conviction for the offense or offenses that require the person to register as a sex offender.

(8) As used in this section, "next lower degree of offense" includes an offense regarding which:

- (a) a statutory enhancement is charged in the information or indictment that would increase either the maximum or the minimum sentence; and
- (b) the court removes the statutory enhancement pursuant to this section.

Amended by Chapter 103, 2007 General Session

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