

2008

Utah v. David Orosco Garcia : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: 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.

Ryan D. Tenney; assistant attorney general; Mark Shurtleff; attorney general; Matthew G. Nielsen; Salt Lake County Attorney's Office; counsel for appellee.

Margaret P. Lindsay; counsel for appellant.

Recommended Citation

Brief of Appellee, *Utah v. Garcia*, No. 20080703 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/1109

This Brief of Appellee 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. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Case No. 20080703-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/ Appellee,
vs.
David Orosco Garcia,
Defendant/ Appellant.

Brief of Appellee

Appeal from sentencing on convictions for three counts of unlawful possession of a controlled substance, two counts of unlawful distribution of a controlled substance, one count of unlawful possession of drug paraphernalia, one count of providing a false identity to a peace officer, and one count of possessing a dangerous weapon as a restricted person, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Vernice Trease presiding.

MARGARET P. LINDSAY
775 West Center Street
P.O. Box 1058
Spanish Fork, UT 84660

Counsel for Appellant

RYAN D. TENNEY (9866)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

MATTHEW G. NIELSEN
Salt Lake County Attorney's Office

Counsel for Appellee

Oral Argument Not Requested

FILED
UTAH APPELLATE COURTS

JUL 09 2009

Case No. 20080703-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/ Appellee,
vs.
David Orosco Garcia,
Defendant/ Appellant.

Brief of Appellee

Appeal from sentencing on convictions for three counts of unlawful possession of a controlled substance, two counts of unlawful distribution of a controlled substance, one count of unlawful possession of drug paraphernalia, one count of providing a false identity to a peace officer, and one count of possessing a dangerous weapon as a restricted person, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Vernice Trease presiding.

MARGARET P. LINDSAY
775 West Center Street
P.O. Box 1058
Spanish Fork, UT 84660

Counsel for Appellant

RYAN D. TENNEY (9866)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

MATTHEW G. NIELSEN
Salt Lake County Attorney's Office

Counsel for Appellee

Oral Argument Not Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTORY STATEMENT	1
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.....	3
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT	6
ARGUMENT	6
I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED DEFENDANT TO PRISON	6
CONCLUSION.....	11

TABLE OF AUTHORITIES

STATE CASES

<i>State v. Gomez</i> , 887 P.2d 853 (Utah 1994).....	3
<i>State v. Montoya</i> , 929 P.2d 356 (Utah App. 1996)	7, 11
<i>State v. Patience</i> , 944 P.2d 381 (Utah App. 1997)	2
<i>State v. Rhodes</i> , 818 P.2d 1048 (Utah App. 1991)	7
<i>State v. Thorkelson</i> , 2004 UT App 9, 84 P.3d 854.....	7

STATE STATUTES

Utah Code Annotated § 77-18-1 (West 2004)	3
Utah Code Annotated § 78A-4-103 (West 2008).....	2

Case No. 20080703-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

David Orosco Garcia,
Defendant/Appellant.

Brief of Appellee

INTRODUCTORY STATEMENT

This is an appeal from a consolidated sentencing hearing regarding three separate cases. The case numbers are 061904623, 071901643, and 071903426. For convenience, the State will refer to the cases as -4623, -1643, and -3426. The State will cite to the records as R. 4623 at __; R. 1643 at __; and R. 3426 at __.

The sentencing transcript for the three cases is included in the record for case -1643, and it is paginated as R. 1643 at 95: __. For convenience the State will cite to it as Sent. Tr. at __.

STATEMENT OF JURISDICTION

Defendant appeals from convictions for unlawful possession of a controlled substance (cocaine), a third degree felony, one count of unlawful possession of a controlled substance (marijuana), a class B misdemeanor, one count of unlawful

possession of drug paraphernalia, a class B misdemeanor, one count of providing a false identity to a peace officer, a class C misdemeanor, one count of unlawful distribution of a controlled substance (methamphetamine), a second degree felony, one count of unlawful distribution of a controlled substance (marijuana), a third degree felony, one count of possessing a dangerous weapon as a restricted person, a third degree felony, and one count of unlawful possession of a controlled substance (heroin), a third degree felony. R. 4623 at 149-50; R. 1643 at 54-61, 63-64; R. 3426 at 48-56.

This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion when it sentenced Defendant to prison, rather than probation, where Defendant was convicted of multiple felonies, and where Defendant also has a lengthy criminal history, extensive gang ties, and a pronounced substance abuse problem?

Standard of Review. “The trial court has substantial discretion in conducting sentencing hearings and imposing a sentence, and we will in general overturn the trial court’s sentencing decisions only if we find an abuse of discretion.” *State v. Patience*, 944 P.2d 381, 389 (Utah App. 1997) (quotations and citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

This case is not governed by any determinative constitutional provisions, statutes, or rules.

STATEMENT OF THE CASE¹

Case -4623

Defendant was charged with one count of unlawful possession of a controlled substance (cocaine), a third degree felony, one count of unlawful possession of a controlled substance (heroin), a third degree felony, one count of unlawful possession of a controlled substance (marijuana), a class B misdemeanor, one count of unlawful possession of drug paraphernalia, a class B misdemeanor, and one count of providing a false identity to a peace officer, a class C misdemeanor. R. 4623 at 2-4.

¹ During the hearing below, Defendant objected to three specific allegations from the PSI. R. 95: 4. On agreement from the State, the trial court accepted those objections and made the requested corrections. R. 95: 5. The State accordingly does not cite to the stricken allegations.

The remaining allegations, however, are accepted as true for purposes of this appeal. “If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.” Utah Code Ann. § 77-18-1(6)(b) (West 2004). Utah courts accordingly accept the factual assertions made in a PSI when the defendant fails to specifically contest those assertions at sentencing. *See, e.g., State v. Gomez*, 887 P.2d 853, 855 (Utah 1994).

After trial, a jury acquitted Defendant on the heroin charge, but convicted him on all other charges. R. 4623 at 149-50.

Case -1643

Defendant was charged with one count of unlawful distribution of a controlled substance (methamphetamine), a second degree felony, one count of unlawful distribution of a controlled substance (heroin), a second degree felony, and unlawful distribution of a controlled substance (marijuana), a third degree felony. R. 1643 at 1-2.

Defendant subsequently pleaded guilty to one count of unlawful distribution of a controlled substance (methamphetamine), a second degree felony, and one count of unlawful distribution of a controlled substance (marijuana), a third degree felony. R. 1643 at 54-61, 63-64.

Case -3426

Defendant was charged with one count of possession of a dangerous weapon by a restricted person, a third degree felony, one count of unlawful possession of a controlled substance (heroin), a third degree felony, one count of failing to stop at the command of a law enforcement officer, a class A misdemeanor, one count of vehicle burglary, a class A misdemeanor, one count of unlawful possession of another's identification documents, a class A misdemeanor, one count of carrying a

concealed dangerous weapon, a class A misdemeanor, and one count of providing a false identity to a peace officer, a class C misdemeanor. R. 3426 at 1-3.

Defendant subsequently pleaded guilty to one count of possessing a dangerous weapon as a restricted person, a third degree felony, and one count of unlawful possession of a controlled substance (heroin), a third degree felony. R. 3426 at 48-56.

Sentencing

On June 20, 2008, the court held a consolidated sentencing hearing on these three cases. R. 4623 at 171-72; R. 1643 at 72-74; R. 3426 at 65-66. During sentencing, Defendant asked the court to sentence him to probation, rather than prison. Sent. Tr. at 8-9. Defense counsel acknowledged that this request was not “realistic,” and instead asked the court to send Defendant to some sort of in-patient therapy program. Sent. Tr. at 7. The State asked the court to sentence Defendant to prison, “based upon his record” of drug offenses and dishonesty with law enforcement. Sent. Tr. 7-8.

Following argument, the court sentenced Defendant to concurrent prison terms, with credit for time served. Sent. Tr. 10-11.

SUMMARY OF ARGUMENT

Defendant argues that the trial court abused its discretion when it sentenced him to prison, rather than probation.

A trial court's decision to sentence a defendant to prison is only reversed when the decision was inherently unfair or excessive. In this case, Defendant was convicted of multiple felonies, has a lengthy criminal history, has extensive gang ties, and has a pronounced substance abuse problem. Under these circumstances, it was not inherently unfair to sentence him to prison.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED DEFENDANT TO PRISON

Defendant argues that the trial court abused its discretion by sentencing him to prison. Aplt. Br. 5-8. In support of his argument, Defendant (1) points to weaknesses in some of the aggravating factors that were discussed below, and (2) highlights some mitigating factors that allegedly supported his request for probation. Aplt. Br. 5-8.

As Defendant acknowledges, however, "there is no statutory obligation in this case that the trial court weigh the mitigating and the aggravating factors in imposing sentence." Aplt. Br. 6. Instead, "the [trial] 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.” *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991). Thus, the “granting or withholding of probation involves considering intangibles of character, personality and attitude,” and an appellate court only reverses such a decision when it is “clear that the actions of the judge were so *inherently unfair* as to constitute an abuse of discretion.” *Id.* at 1049, 1051 (emphasis added) (quotations and citation omitted).

With respect to sentencing decisions, an “[a]buse of discretion may be manifest if the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence.” *State v. Montoya*, 929 P.2d 356, 358 (Utah App. 1996) (quotations and citation omitted). It is therefore settled that a court only abuses its discretion when “no reasonable [person] would take the view adopted by the trial court.” *Id.*; accord *State v. Thorkelson*, 2004 UT App 9, ¶ 12, 84 P.3d 854.

In this case, regardless of whether Defendant’s particular contentions are correct, there was nothing “inherently unfair” about the court’s decision to sentence him to prison. *Rhodes*, 818 P.2d at 1051.

As noted by defense counsel below, Defendant’s request for probation was not “realistic,” due to Defendant’s “mini crime spree.” Sent. Tr. at 6-7. Between

these three cases, Defendant was convicted of unlawful possession of a controlled substance (cocaine), a third degree felony, one count of unlawful possession of a controlled substance (marijuana), a class B misdemeanor, one count of unlawful possession of drug paraphernalia, a class B misdemeanor, one count of providing a false identity to a peace officer, a class C misdemeanor, one count of unlawful distribution of a controlled substance (methamphetamine), a second degree felony, one count of unlawful distribution of a controlled substance (marijuana), a third degree felony, one count of possessing a dangerous weapon as a restricted person, a third degree felony, and one count of unlawful possession of a controlled substance (heroin), a third degree felony. R. 4623 at 149-50; R. 1643 at 54-61, 63-64; R. 3426 at 48-56.

As detailed in the PSI, Defendant's mini crime spree was not an isolated event. Rather, this was emblematic of a lifelong pattern of criminal activity. As a juvenile, Defendant was charged in 40 separate criminal incidents; in the nine years that Defendant has been an adult, Defendant has been charged in 22 different criminal incidents. PSI at 5-9.

Defendant has also demonstrated an inability to comply with the rules of incarceration or probation. From 2000-2008, Defendant was charged with 31 different jail infractions, stemming from 14 different incidents. PSI: 4-5. During that

time, Defendant's probation was also revoked due to his failure to comply with his probation terms. PSI at 10.

Defendant is also a known gang member. The Salt Lake Metropolitan Gang Database lists Defendant as an associate of the QVO street gang, and an AP&P investigation found that Defendant "was frequently associating with a known gang member and convicted murder[er], Angel Martinez." PSI at 9. AP&P thus concluded that Defendant has been "heavily involved in gangs and drug trafficking." PSI at 9.

Moreover, Defendant has not been truthful with law enforcement. For example, he told AP&P that he was last associated with QVO gang members in 2000, but the Salt Lake Metropolitan Gang Project found that Defendant was associated with the gang at least as late as 2005, thus "contradict[ing] his claim." PSI at 9. AP&P also found that Defendant uses 12 different aliases, along with two different social security numbers. PSI at 12. At sentencing, the prosecutor explained that Defendant used one of these aliases in these underlying crimes, thus leading to his conviction for providing a false identity to a police officer. Sent. Tr. 8; *see also* R. 4623 at 149-50.

In addition, Defendant has a pronounced substance abuse problem. During various extended periods, Defendant has regularly used alcohol (1/5 of cognac every weekend and a 12 pack of beer every night on weekends), marijuana (one joint per day), cocaine (\$40 worth per week), crack (once per month), heroin (daily), mushrooms (every 2 weeks for a 6 month period), LSD (every 2 weeks for a 6 month period), and Lortab (daily). PSI at 12. He has also experimented with chemical fumes, methamphetamine, ecstasy, and Percoset. PSI at 12. In fact, Defendant “was known as ‘Toke 1’ by his fellow gang members because of his notoriety for smoking marijuana.” PSI at 12.

Defendant’s substance addictions are particularly significant in this case due to the nature of the charged offenses. Specifically, all three of these cases resulted in felony convictions for drug offenses. R. 4623 at 171-72; R. 1643 at 72-74; R. 3426 at 65-66. Moreover, although Defendant asked the sentencing court to give him leniency based on his alleged desire to receive drug treatment, he admitted that he had made no efforts to obtain any treatment during the two and one-half months that he was out of custody while awaiting sentencing. Sent. Tr. 8-9.

As summed up by AP&P, Defendant’s “first ever criminal offense was a felony he committed as a juvenile. Since that time[,] he has been involved in the QVO gang, sold drugs, was arrested on multiple occasions, has multiple criminal

convictions, failed at probation, became a fugitive, [and] received major write ups while in jail.” PSI at 2. Defendant’s extensive criminal record therefore “reveals he is a predator and a serious threat to society.” PSI at 2.

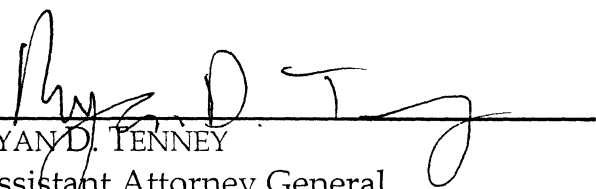
Given the multiple felonies involved in this sentencing, Defendant’s prodigious criminal history, Defendant’s repeated failures to comply with jailhouse rules once incarcerated, Defendant’s longstanding gang ties, and Defendant’s unchecked substance abuse problem, Defendant has not shown that “no reasonable [person]” would have sentenced him to prison. *Montoya*, 929 P.2d at 358 (quotations and citation omitted).

CONCLUSION

For the foregoing reasons, the Court should affirm Defendant’s sentence.

Respectfully submitted July 9, 2009.

MARK L. SHURTLEFF
Utah Attorney General


RYAN D. TENNEY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on July 9, 2009, two copies of the foregoing brief were ~~X~~ mailed

☐ hand-delivered to:

Margaret P. Lindsay
775 West Center Street
P.O. Box 1058
Spanish Fork, UT 84660

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

Melisa Fryer