

2008

Utah v. Michael Dan Kerr : Brief of Appellee

Utah Court of Appeals

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Case No. 20080768-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/ Appellee,

vs.

Michael Dan Kerr,
Defendant/ Appellant.

Brief of Appellee

Appeal from convictions for aggravated assault and possession of a dangerous weapon by a restricted person, in the Second Judicial District Court of Utah, Weber County, the Honorable Parley R. Baldwin presiding.

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Utah Code Ann. § 76-5-103 (West 2004) (aggravated assault);
Utah Code Ann. § 76-10-503 (West 2004) (possession of a dangerous weapon
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Case No. 20080768-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Michael Dan Kerr,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (West 2004), and possession of a dangerous weapon by a restricted person, a third degree felony, in violation of Utah Code Ann. § 76-10-503(2)(b) (West 2004); from sentences enhanced on both counts pursuant to Utah Code Ann. § 76-3-203.8(2) (West 2004); and from an additional sentence for recidivism imposed pursuant to Utah Code Ann. § 76-3-203.8(4) (West 2004). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2008).

STATEMENT OF THE ISSUES

1. The trial court applied dangerous weapon sentencing enhancements to Defendant's sentences for aggravated assault and possession of a dangerous weapon by a restricted person. Did the legislature intend that the enhancements

apply to these offenses and do the enhancements therefore comport with double jeopardy provisions?

Standard of review. Whether the legislature intended that dangerous weapon enhancements apply to offenses involving dangerous weapons is a question of statutory interpretation, reviewed for correctness. *See State v. Smith*, 2005 UT 57, ¶ 6, 122 P.3d 615; *see also State v. Alfatlawi*, 2006 UT App 511, ¶¶ 40-41, 153 P.3d 804. Whether the enhanced sentences comport with double jeopardy is a legal question, also reviewed for correctness. *See State v. Northcutt*, 2006 UT App 269, ¶ 7, 139 P.3d 1066; *see also Alfatlawi*, 2006 UT App 511, ¶ 39.

2. Did the trial court plainly err in not sua sponte ruling that the additional five-to-ten year mandatory consecutive sentence for recidivism constituted cruel and unusual punishment under the Utah constitution?

To establish plain error, a defendant must show that “(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.” *State v. Alfatlawi*, 2006 UT App 511, ¶ 12, 153 P.3d 804.

3. Was counsel ineffective for not arguing that the additional five-to-ten-year mandatory consecutive sentence constituted cruel and unusual punishment under the United States and Utah constitutions?

“When an ineffective assistance of counsel claim ‘is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law.’” *Alfatlawi*,

2006 UT App 511, ¶ 11 (quoting *State v. Holbert*, 2002 UT App 426, ¶ 26, 61 P.3d 291 (additional citation and quotation marks omitted)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant constitutional provisions, statutes, and rules are included in the Addendum :

U.S. Const. amend V (double jeopardy);
U.S. Const. amend. VIII (cruel and unusual punishment);
Utah Const. art. I, § 12 (double jeopardy);
Utah Const. art. I, § 9 (cruel and unusual punishment; unnecessary rigor);
Utah Code Ann. § 76-5-103 (West 2004) (aggravated assault);
Utah Code Ann. § 76-10-503 (West 2004) (possession of a dangerous weapon by a restricted person);
Utah Code Ann. § 76-3-203.8 (West 2004) (enhancement for use of dangerous weapon).

STATEMENT OF THE CASE

The State charged Defendant with aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (West 2004), and possession of a dangerous weapon by a restricted person (“possession by a restricted person”), a third degree felony, in violation of Utah Code Ann. § 76-10-503(2)(b) (West 2004). *See* R7-8 (amended information). The State also charged Defendant with conduct subjecting him to a dangerous weapon enhancement, pursuant to Utah Code Ann. § 76-3-203.8 (West 2004). *See id.* The charges were based on a June 16, 2006 incident. *See* R9.

Defendant waived his right to a jury trial, and a bench trial was held. R127-29. The trial court found Defendant guilty of aggravated assault and found that a

“dangerous weapon was used in the commission of the aggravated assault.” R128; R194:110-11. The court further found Defendant guilty of possession by a restricted person and found that the dangerous weapon penalty enhancement was applicable. R128; R194:112. Finally, the court found that Defendant had been convicted of a prior felony for coercion with the use of a dangerous weapon in Clark County, Nevada, on September 2, 1998. *See* R194:110-111.

The court sentenced Defendant to enhanced concurrent prison terms of one to ten years on his convictions for aggravated assault and possession by a restricted person. R153. The Court also imposed an additional consecutive prison term of five to ten years based on Defendant’s having used a dangerous weapon in the offenses in this case after having been previously convicted and sentenced for the 1998 Nevada felony in which he used a dangerous weapon. *See id.*

Defendant timely appealed. R156.

STATEMENT OF FACTS

The offense

On June 16, 2006, a fight broke out between Defendant and another man in the men’s restroom of the Outlaw Saloon in Weber County. R194:7-9. Saloon security personnel Brandon Hartley and Brent McKissick broke up the fight and took the two men to separate locations outside the establishment. R194:12-13.

McKissick stayed with Defendant, whose face was purple and swollen, while they waited for the paramedics. R194:27. When Defendant tried to stand up, McKissick asked him to sit on the ground, relax, and wait until the paramedics arrived. *Id.* When sheriff's deputies began pulling into the parking lot, Defendant stood up and began walking away. R194:29. McKissick walked toward Defendant, again asking him to sit down. *Id.*

As McKissick drew close, Defendant "swung up with his left hand and hit [McKissick] in the cheek," stabbing him with a knife. R194:29-36. "Within seconds [McKissick's] mouth filled with blood ... and [he] observed [a] knife in [Defendant's] hand." R194:30. Defendant and McKissick wrestled with one another until McKissick got control of the situation. R194:31.

Hartley and a deputy sheriff came running. *Id.* The deputy sheriff pried the knife from Defendant's hand and handcuffed him. R194:32.

McKissick did not see the knife before Defendant stabbed him in the face. R194:33. He did not make any aggressive movements toward Defendant, did not threaten him, and did not brandish or even carry a weapon. *Id.*

The knife wound "went all the way through to the inside of the cheek about 2 inches." R194:35. McKissick also suffered a cut on his left arm, a small gash on his left side, and a small cut on his left thumb. *Id.*

Medical personnel later treated Defendant for the injuries he had suffered in the initial restroom fight. R194:81. They then transported Defendant to the hospital for an assessment, and a deputy sheriff followed them. R194:68-69. The deputy heard Defendant tell the medical staff at the hospital that he “‘got his ass kicked,’ and that the security guard ... was standing over him laughing so he stabbed him. He told the staff that he did not intend to stab him in the face, that he was trying to stab him in the hand to scare him.” R194:72.

SUMMARY OF ARGUMENT

1. The trial court properly imposed all sentence enhancements in this case. Where the legislature intends to provide for cumulative penalties, those penalties do not violate double jeopardy protections. This Court has already held that the legislature intended to provide for cumulative penalties when it enacted the statute governing enhancements for using dangerous weapons. Thus, the trial court did not violate double jeopardy provisions when it enhanced Defendant’s sentences for aggravated assault and possession of a dangerous weapon by a restricted person or when it imposed a consecutive cumulative sentence because Defendant committed these offenses after having been convicted and sentenced for an earlier felony involving the use of a dangerous weapon.

2. Defendant has not shown that the trial court plainly erred in not sua sponte holding that the additional consecutive five-to-ten-year prison term constituted

cruel and unusual punishment under the Utah constitution. Defendant has not shown that there was any settled appellate law that would have made any error obvious.

3. Defendant has not shown that his trial counsel was ineffective for not claiming that the additional consecutive five-to-ten-year prison term constituted cruel and unusual punishment under the United States and Utah constitutions. He has not shown why, on the basis of the law in effect at the time of trial, counsel should have made that claim.

ARGUMENT

I.

THE LEGISLATURE AUTHORIZED AND THE TRIAL COURT PROPERLY IMPOSED ENHANCED SENTENCES, WHERE DEFENDANT USED A WEAPON IN COMMITTING BOTH OFFENSES AND WHERE THE OFFENSES FOLLOWED ANOTHER FELONY CONVICTION INVOLVING USE OF A DANGEROUS WEAPON; NO DOUBLE JEOPARDY VIOLATION OCCURRED

Defendant claims that the trial court erred when it imposed dangerous weapon sentence enhancements to his sentences for aggravated assault and possession of a dangerous weapon by a restricted person. According to Defendant, “[t]here is no way to obtain convictions of Aggravated Assault and Possession of a Dangerous Weapon by a Restricted Person without the possession of a weapon.” Br. Appellant at 11. Thus, Defendant asserts, “the dangerous weapon penalty enhancement[s] must merge into the greater offenses of aggravated assault and possession of a dangerous weapon by a restricted person.” *Id.* Defendant asserts that failing to merge the enhancements violated his double jeopardy rights. *Id.* at 9.

Alternatively, Defendant argues, the weapons enhancement provisions should not even apply to the crime of possession of a dangerous weapon by a restricted person, because that crime requires only “possession” of a dangerous weapon and the enhancement statute requires “use” of a dangerous weapon. *Id.* at

18. He also relies on this alternate argument to support his claim that imposing the enhancements violated his double jeopardy rights. *Id.* at 19.

Neither of Defendant's claims has merit.

Relevant law. *Aggravated assault.* Defendant was charged with aggravated assault based on his use of a dangerous weapon, namely, a knife. *See* R7. A person commits aggravated assault if, in committing an assault, he uses a dangerous weapon. Utah Code Ann. § 76-5-103(1)(b).

Possession by a restricted person. A person is a "Category I restricted person" if he "has been convicted of any violent felony" as defined by statute. Utah Code Ann. § 76-10-503(1)(a)(i). "A Category I restricted person who intentionally or knowingly ... purchases, transfers, possesses, uses, or has under his custody or control ... any dangerous weapon other than a firearm is guilty of a third degree felony." Utah Code Ann. § 76-10-503(2). Thus, while this offense is commonly called "possession by a restricted person," a restricted person violates the statute not only if he possesses a dangerous weapon, but also if he purchases, transfers, uses, or has a dangerous weapon under his custody or control.

Dangerous weapon enhancement. The dangerous weapon enhancement statute, found at Utah Code Ann. § 76-3-203.8 (West 2004), provides for two kinds of enhancements. Subsection 2 provides that "[i]f the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or

furtherance of a felony, the court ... *shall* increase by one year the minimum term of the sentence” and “may increase by five years the maximum sentence.” Utah Code Ann. § 76-3-203.8(2) (emphasis added).

Subsection 4 provides that “[if] the trier of fact finds beyond a reasonable doubt that a person has been sentenced to a term of imprisonment for a felony in which a dangerous weapon was used” and “that person is subsequently convicted of another felony in which a dangerous weapon was used ... the court *shall*, in addition to any other sentence imposed including those in Subsection (2), impose an indeterminate prison term to be not less than five nor more than ten years to run consecutively and not concurrently.” Utah Code Ann. § 76-3-203.8(4) (emphasis added).

Double jeopardy and merger. The Fifth Amendment to the United States Constitution provides that no person “shall . . . be subject for the same offence to be

twice put in jeopardy of life or limb.” U.S. Const. amend. V.¹ “[T]he double jeopardy guarantee contained in these provisions protects a defendant from (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.” *State v. Low*, 2008 UT 58, ¶ 51, 192 P.3d 867 (quoting *State v. Rudolph*, 970 P.2d 1221, 1230 (Utah 1998)). The protection Defendant invokes here is that against “multiple punishments for the same offense.” *Id.*; see also Br. Appellant at 12.

“Merger is a judicially-crafted doctrine available to protect criminal defendants from being twice punished for committing a single act that may violate more than one criminal statute,” *State v. Diaz*, 2002 UT App 288, ¶ 17, 55 P.3d 1131. Thus, “[c]ourts apply the merger doctrine as one means of alleviating the concern of double jeopardy that a defendant should not be punished twice for the same crime.” *State v. Lopez*, 2004 UT App 410, ¶ 8, 103 P.3d 153.

¹ Article I, section 12 of the Utah constitution also provides that no person “shall . . . be twice put in jeopardy for the same offense.” Utah Const. art. I, § 12. Defendant briefly references the double jeopardy provision of the Utah constitution. Br. Appellant at 14. But if he is intending to rely on the state constitutional provision, he has not adequately briefed that claim. He has not offered any “unique state constitutional analysis” in his brief to this Court, instead only offering “cursory references to the state constitution within arguments otherwise dedicated to a federal constitutional claim.” *State v. Worwood*, 2007 UT 47, ¶¶ 18-19, 164 P.3d 397. Therefore, his state constitutional claim is not properly before this Court.

The merger doctrine is now codified at Utah Code Ann. § 76-1-402 (West 2004). See *State v. Perez-Avila*, 2006 UT App 71, ¶ 10, 131 P.3d 864 ; *State v. Lee*, 2006 UT 5, ¶ 32, 128 P.3d 1179. Section 76-1-402 provides that, “[a] defendant . . . may not be convicted of both the offense charged and [an] included offense.” Utah Code Ann. § 76-1-402(3). Under this section, “an offense qualifies as a lesser included offense when the offense ‘is established by proof of the same or less than all the facts required to establish the commission of the offense charged.’ ” *Perez-Avila*, 2006 UT App 71, ¶ 10 (quoting Utah Code Ann. § 76-1-402(3)(a)). In other words, “[i]f the greater offense “cannot be committed without necessarily having committed the lesser, then the lesser offense merges into the greater crime.”” *State v. Smith*, 2003 UT App 179, ¶ 12, 72 P.3d 692 (quoting *State v. Yanez*, 2002 UT App 50, ¶ 21, 42 P.3d 1248).²

The merger doctrine does not apply, however, “where the legislature intended a statute to be an enhancement statute.” *State v. Smith*, 2005 UT 57, ¶ 9, 122 P.3d 615. As the United States Supreme Court has explained, “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no

² A second form of merger, not relevant here, is set forth in *State v. Finlayson*, 2000 UT 10, 994 P.2d 1243.

more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). “Where [the legislature] intended ... to impose multiple punishments, imposition of such sentences does not violate the Constitution.” *Id.* at 368 (citations and internal quotations omitted) (emphasis in *Hunter*).

Finally, in *State v. Alfatlawi*, this Court considered whether the legislature intended to provide for multiple punishments when it enacted Utah’s dangerous weapons enhancement statute. *Alfatlawi*, 2006 UT App 511, ¶ 37. This Court held that the plain and unambiguous language of section 76-3-203.8 and its mandatory imposition of increased sentences showed that the legislature intended the statute to impose cumulative punishments. *Id.* at ¶¶ 40-41 (noting that both the plain language of the statute and its legislative history demonstrated “a legislative intent to authorize cumulative punishment for a single act,” i.e., to impose an enhancement). *Id.* at ¶ 41. “As a result,” the Court concluded, “the dangerous weapon enhancement statute complies with the requirements of *Hunter* and does not violate the Fifth Amendment.” *Id.* at ¶ 40. The Court “likewise determine[d] that [a] dangerous weapon enhancement does not violate the Utah Constitution’s prohibition against double jeopardy.” *Id.* at ¶ 42 (citing Utah Const. art. I, § 12).

Proceedings below. The trial court, acting as trier of fact in a bench trial, found Defendant guilty of aggravated assault based on his use of a dangerous

weapon during the commission of an assault. R194:104. The court also found Defendant guilty of possession by a restricted person based on his use of a dangerous weapon during the assault. R194:112. And the court found that Defendant had a prior conviction for a violent felony – his 1998 Nevada conviction for coercion with a dangerous weapon. R194:111.

Based on these findings, the trial court ordered that Defendant's sentences for aggravated assault and possession of a dangerous weapon be enhanced under subsection (2) of the dangerous weapons enhancement statute. R195:4. *See* Utah Code Ann. § 76-3-203.8(2) (providing that "[i]f the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of a felony, the court ... shall increase by one year the minimum term of the sentence" and "may increase by five years the maximum sentence"). Thus, instead of imposing sentences of zero to five years, the trial court imposed sentences of one to ten years on those convictions. R195:4.

The court then ordered that Defendant also serve a consecutive five-to-ten-year prison term for recidivism under subsection (4) of the dangerous weapons enhancement statute. *Id.* *See* Utah Code Ann. § 76-3-203.8(4) (providing that "[i]f the trier of fact finds beyond a reasonable doubt that a person has been sentenced to a term of imprisonment for a felony in which a dangerous weapon was used ... and that person is subsequently convicted of another felony in which a dangerous

weapon was used ... the court shall, in addition to any other sentence imposed including those in Subsection (2), impose an indeterminate prison term to be not less than five nor more than ten years to run consecutively”). The court did not specify whether this mandatory sentence was based on Defendant’s aggravated assault charge, his possession-by-a-restricted-person charge, or both. *See id.*

A. Because the legislature intended that the dangerous weapon statute provide for enhanced penalties, merger does not apply and imposition of cumulative punishments does not violate double jeopardy protections.

Defendant claims that “the dangerous weapon penalty enhancement must merge into the greater offenses of aggravated assault and possession of a dangerous weapon by a restricted person.” Br. Appellant at 11. According to Defendant, merger is required because the only element necessary to support the enhancements in this case was possession/use of a dangerous weapon and possession/use of a dangerous weapon is already an element of the underlying aggravated assault and possession-by-a-restricted-person offenses. *See id.*

Defendant’s claim fails because, as the Utah Supreme Court has held, the merger doctrine does not apply “where the legislature intended a statute to be an enhancement statute.” *State v. Smith*, 2005 UT 57, ¶ 9, 122 P.3d 615. And, as this Court has already held, both the plain language of the dangerous weapons enhancement statute and its legislative history demonstrate “a legislative intent to authorize cumulative punishment for a single act,” i.e., to impose an enhancement.

Alfatlawi, 2006 UT App 511, ¶ 41. Moreover, there can be no double jeopardy violation, because, “[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

Given this case law, Defendant cannot prevail on his double jeopardy and merger challenges to the trial court’s application of the dangerous weapons enhancement statute.

- B. The possession-by-a-restricted-person statute criminalizes the use, as well as the possession, of dangerous weapons.**
Defendant, a restricted person, violated the section by *using*, as well as by possessing, a dangerous weapon, and was therefore properly subject to enhancements for having *used* a dangerous weapon in the commission of that felony.

Alternatively, Defendant claims that his possession-by-a-restricted-person offense could not support dangerous weapons sentencing enhancements. According to Defendant, the enhancement statute does not “permit an enhancement for a weapon possession when the possession is the sole element of the underlying crime.” Br. Appellant at 18. Moreover, Defendant asserts, the enhancement statute applies only “when a weapon is used in the commission or furtherance of a felony,” and possession of a weapon by a restricted person does not constitute “use[] in the commission or furtherance of a felony.” *Id.* This argument misapprehends the statutory elements of possession by a restricted person.

The enhancement was proper because Defendant's conviction was for *use* of a dangerous weapon by a restricted person. Under statutory law, a "Category I restricted person who intentionally or knowingly ... purchases, transfers, possesses, uses, or has under his custody or control ... any dangerous weapon other than a firearm is guilty of a third degree felony." Utah Code Ann. § 76-10-503(2)(b). Defendant was charged and convicted under Utah Code Ann. § 76-10-503(2)(b) as a Category I restricted person for intentionally or knowingly purchasing, transferring, possessing, *using*, or having a knife under his control. R7 (information). Thus, he was charged not only with possessing, but also with *using* the knife.

Moreover, the evidence supporting Defendant's conviction on that charge showed that Defendant not only possessed the knife, but that he also used it. Thus, his conviction for possession by a restricted person was not merely a conviction for possession of a dangerous weapon but for *use* of that weapon. Mere possession of the knife as a restricted person might have sufficed to make the offense enhanceable under the dangerous weapon possession statute. But his *use* of the knife as a restricted person definitely did. Subsection 2 of the enhancement statute requires a one-year increase of the minimum sentence and permits a five-year increase in the maximum sentence "[i]f the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of a felony." Utah Code Ann. § 76-3-203.8(2). Defendant used his knife in commission of the felony of

possession or *use* by a restricted person when he stabbed McKissick. Thus, the increased sentence for weapons possession by a restricted person was proper.

Finally, Defendant's use of the knife also supports his conviction and sentence for recidivism. Subsection 4 of the enhancement statute requires that the trial court impose an additional five-to-ten-year consecutive sentence "[i]f the trier of fact finds beyond a reasonable doubt that a person has been sentenced to term of imprisonment for a felony in which a dangerous weapon was used in the commission of or furtherance of the felony and that person is subsequently convicted of another felony in which a dangerous weapon was used in the commission of the felony." Utah Code Ann. § 76-3-203.8(4).

The trial court, acting as trier-of-fact, found that Defendant had been convicted and sentenced for a 1998 Nevada felony in which he used a dangerous weapon. R194:111. As explained, the trial court also found that Defendant had used a dangerous weapon in committing both the aggravated assault and the possession-by-a-restricted-person offenses. *See* R194:112. Hence, the trial court properly found Defendant subject to the enhancement for recidivism.

But the trial court imposed only one sentence under the subsection 4 enhancement provision. R195:4. And, while Defendant challenges imposition of the subsection 4 enhancement on the basis of his possession-by-a-restricted-person charge, he has not challenged the imposition of the enhancement on the basis of his

aggravated assault charge. Thus, an alternative unchallenged basis survives to support imposition of this enhanced term, and this Court need not address Defendant's claim that enhancement of his possession-by-a-restricted-person offense under subsection 4 was improper. *See State v. Baker*, 963 P.2d 801, 810 (Utah App. 1998) (when a defendant challenges only some of the bases for a trial court's decision, the appellate court "need not address whether the trial court erred in considering [them]," because the other bases survive to support the trial court's decision).

In sum, the trial court committed no error in its application of the dangerous weapons enhancements to Defendant's case. Thus, Defendant's claims challenging that application fail.

II.

THE TRIAL COURT DID NOT PLAINLY ERR IN NOT SUA SPONTE RULING THAT THE ADDITIONAL FIVE-TO-TEN-YEAR CONSECUTIVE TERM CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT UNDER ARTICLE 1, SECTION 9, OF THE UTAH CONSTITUTION

Defendant claims that the trial court plainly erred in not sua sponte ruling that his consecutive five-to-ten-year prison term constituted cruel and unusual punishment in violation of the Utah constitution. *See Br. Appellant at 19-27.* Defendant cannot prevail on this claim because he has not demonstrated that error, if any, should have been obvious.

To establish plain error a defendant must show that “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome.” *State v. Lee*, 2006 UT 5, ¶ 26, 128 P.2d 1179 (citation and internal quotation omitted). An error is obvious only if “the law governing the error was clear at the time the alleged error was made.” *State v. Dean*, 2004 UT 63, ¶ 16, 95 P.3d 276. “Utah courts have repeatedly held that a trial court’s error is not plain where there is no settled appellate law to guide the trial court.” *State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997) (citing *State v. Eldredge*, 773 P.2d 29, 35-36 (Utah 1989); *State v. Braun*, 778 P.2d 1336, 1341-42 (Utah App. 1990)).

Here, Defendant’s plain error claim fails as a matter of law because he cannot show obvious error. No possible error in imposing the additional five-to-ten-year consecutive prison term could have been obvious to the trial court, because there is

no settled appellate law stating that such a term for that offense is unconstitutional.

Defendant cites no such authority, and the State is aware of none.³

In sum, Defendant's plain error claim fails because Defendant has not shown that error, if any, was obvious.

³ Defendant relies on language in the plurality opinion written by then-Justice Durham in *State v. Gardner*, 947 P.2d 631 (Utah 1997), to support his claim that the dangerous weapon enhancement violates the Utah constitution. *Gardner* addressed the constitutionality of a Utah statute that made assault by a prisoner a capital offense in certain circumstances. *See id.* at 632. *Gardner* does not support Defendant's claim. First, the majority reached no holding under the Utah constitution. *See id.* at 653-58 (J. Zimmerman, concurring in part and concurring in the result; JJ. Russon and Howe, dissenting). Only two justices adopted the portion of the opinion addressing the Utah constitution. *See id.* at 653. The three-justice majority agreed only that the statute violated the Eighth Amendment. *See id.* Second, the issue in that case was the propriety of the death penalty, not the propriety of any sentence for a certain number of years. *See id.* at 632.

Defendant cites no other authority for his claim. While he references several United States Supreme Court cases — *Ewing v. California*, 538 U.S. 11 (2003); *Solem v. Helm*, 463 U.S. 277 (1983); *Coker v. Georgia*, 433 U.S. 584 (1977); and *Furman v. Georgia*, 408 U.S. 238 (1972), those cases address the Eighth Amendment of the United States Constitution, not article 1 of the Utah constitution. Moreover, those cases, unlike the instant case, all involved sentences for death or for a term up to life, not sentences for a term of years.

Defendant also cites several state cases — *State v. Rivera*, 2003 UT App 169U; *State v. Stromberg*, 783 P.2d 54 (Utah App. 1989); and *State v. South*, 932 P.2d 622 (Utah App. 1977). But none of these cases address the constitutionality of the dangerous weapon enhancement statute or otherwise support Defendant's claim.

III.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT ARGUING THAT THE ADDITIONAL FIVE-TO-TEN-YEAR CONSECUTIVE TERM CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES AND UTAH CONSTITUTIONS

Defendant also claims that his trial counsel was ineffective for not arguing that the additional five-to-ten-year consecutive term for recidivism constituted cruel and unusual punishment under the United States or Utah constitutions. *See* Br. Appellant at 27-32. Defendant cannot prevail on this claim because he has not shown that counsel's performance was deficient or prejudicial.

"An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162. To establish ineffective assistance of counsel, Defendant must demonstrate both that "counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment," and that "counsel's deficient performance was prejudicial — i.e., that it affected the outcome of the case." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

In proving the first prong of *Strickland* — that counsel's representation fell below an objective standard of reasonableness — Defendant must demonstrate "why, on the basis of the law in effect at the time of trial, his or her trial counsel's performance was deficient." *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993) (citations omitted). Defendant may not predicate a claim of ineffective assistance of counsel

on a novel question of law. See *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993) (“The Sixth Amendment does not require counsel to forecast changes or advances in the law”); cf. *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) (Sixth Amendment does not require appellate counsel to raise every nonfrivolous issue).

Here, as explained under Point II., above, there is no controlling appellate law proscribing enhancement of Defendant’s sentences under the dangerous weapons enhancement statute. There is no controlling appellate law holding that the enhancement, or any similar enhancement, constitutes cruel and unusual punishment under the United States or Utah constitutions. Thus, counsel’s not arguing, on the basis of the law in effect at the time of trial, that the enhancement constituted cruel and unusual punishment under either constitution was neither deficient nor prejudicial.

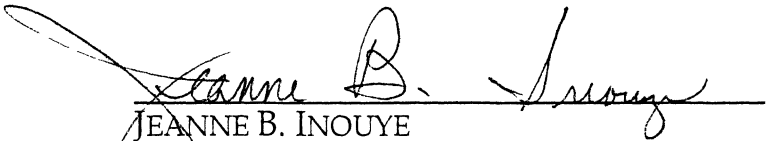
Because Defendant has not shown that counsel’s performance was deficient or that he suffered any prejudice, he cannot prevail on his ineffective assistance claim.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted September 14, 2009.

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CERTIFICATE OF SERVICE

I certify that on September 14, 2009, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

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Weber County Public Defender Association
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A digital copy of the brief was also included: ☒ Yes ☐ No

Melissa Freyer

Addendum

United States Constitution, Amendments V and VIII

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

No History for Constitution

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Last revised: Thursday, May 28, 2009

Article I, Section 9. [Excessive bail and fines -- Cruel punishments.]

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

No History for Constitution

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Last revised: Thursday, May 28, 2009



UT ST § 76-5-103
U.C.A. 1953 § 76-5-103

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WEST'S UTAH CODE ANNOTATED
TITLE 76. UTAH CRIMINAL CODE
CHAPTER 5. OFFENSES AGAINST THE PERSON
PART 1. ASSAULT AND RELATED OFFENSES
§ 76-5-103. **Aggravated assault**

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

Laws 1973, c. 196, § 76-5-103; Laws 1974, c. 32, § 10; Laws 1989, c. 170, § 2;
Laws 1995, c. 291, § 5, eff. May 1, 1995.

<General Materials (GM) - References, Annotations, or Tables>

CROSS REFERENCES

Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.

Body armor, increase of sentence if worn in violent felony, see § 76-3-203.7.

Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq.

Enhanced penalty, certain offenses committed by prisoner, see § 76-3-203.6.

Fines upon conviction of misdemeanor or felony, see § 76-3-301.

Force in defense of person, forcible felony defined, see § 76-2-402.

Habitual violent offenders, definition and penalties, see § 76-3-203.5.

Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302.



WEST'S UTAH CODE ANNOTATED

TITLE 76. UTAH CRIMINAL CODE

CHAPTER 10. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, WELFARE, AND MORALS

PART 5. WEAPONS

§ 76-10-503. Restrictions on possession, purchase, transfer, and ownership of dangerous weapons by certain persons

(1) For purposes of this section:

(a) A Category I restricted person is a person who:

(i) has been convicted of any violent felony as defined in Section 76-3-203.5;

(ii) is on probation or parole for any felony;

(iii) is on parole from a secure facility as defined in Section 62A-7-101; or

(iv) within the last ten years has been adjudicated delinquent for an offense which if committed by an adult would have been a violent felony as defined in Section 76-3-203.5.

(b) A Category II restricted person is a person who:

(i) has been convicted of or is under indictment for any felony;

(ii) within the last seven years has been adjudicated delinquent for an offense which if committed by an adult would have been a felony;

(iii) is an unlawful user of a controlled substance as defined in Section 58-37-2;

(iv) is in possession of a dangerous weapon and is knowingly and intentionally in unlawful possession of a Schedule I or II controlled substance as defined in Section 58-37-2;

(v) has been found not guilty by reason of insanity for a felony offense;

(vi) has been found mentally incompetent to stand trial for a felony offense;

(vii) has been adjudicated as mentally defective as provided in the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), [FN1] or has been committed to a mental institution;

(viii) is an alien who is illegally or unlawfully in the United States;

(ix) has been dishonorably discharged from the armed forces; or

(x) has renounced his citizenship after having been a citizen of the United States.

(2) A Category I restricted person who intentionally or knowingly agrees, consents, offers, or arranges to purchase, transfer, possess, use, or have under his custody or control, or who intentionally or knowingly purchases, transfers, possesses, uses, or has under his custody or control:

(a) any firearm is guilty of a second degree felony; or

(b) any dangerous weapon other than a firearm is guilty of a third degree felony.

(3) A Category II restricted person who purchases, transfers, possesses, uses, or has under his custody or control:

(a) any firearm is guilty of a third degree felony; or

(b) any dangerous weapon other than a firearm is guilty of a class A misdemeanor.

(4) A person may be subject to the restrictions of both categories at the same time.

(5) If a higher penalty than is prescribed in this section is provided in another section for one who purchases, transfers, possesses, uses, or has under this custody or control any dangerous weapon, the penalties of that section control.

(6) It is an affirmative defense to a charge based on the definition in Subsection (1)(b)(iv) that the person was:

(a) in possession of a controlled substance pursuant to a lawful order of a practitioner for use of a member of the person's household or for administration to an animal owned by the person or a member of the person's household; or

(b) otherwise authorized by law to possess the substance.

Laws 2000, c. 303, § 5, eff. May 1, 2000; Laws 2000, c. 90, § 1, eff. May 1, 2000;
Laws 2003, c. 203, § 2, eff. May 5, 2003; Laws 2003, c. 235, § 1, eff. May 5,
2003.

[FN1] See 18 U.S.C.A. § 921 et seq.

<General Materials (GM) - References, Annotations, or Tables>



UT ST § 76-3-203.8
U.C.A. 1953 § 76-3-203.8

Page 1

WEST'S UTAH CODE ANNOTATED
TITLE 76. UTAH CRIMINAL CODE
CHAPTER 3. PUNISHMENTS
PART 2. SENTENCING

§ 76-3-203.8. Increase of sentence if dangerous weapon used

(1) As used in this section, "dangerous weapon" has the same definition as in Section 76-1-601.

(2) If the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of a felony, the court:

(a)(i) shall increase by one year the minimum term of the sentence applicable by law; and

(ii) if the minimum term applicable by law is zero, shall set the minimum term as one year; and

(b) may increase by five years the maximum sentence applicable by law in the case of a felony of the second or third degree.

(3) A defendant who is a party to a felony offense shall be sentenced to the increases in punishment provided in Subsection (2) if the trier of fact finds beyond a reasonable doubt that:

(a) a dangerous weapon was used in the commission or furtherance of the felony; and

(b) the defendant knew that the dangerous weapon was present.

(4) If the trier of fact finds beyond a reasonable doubt that a person has been sentenced to a term of imprisonment for a felony in which a dangerous weapon was used in the commission of or furtherance of the felony and that person is subsequently convicted of another felony in which a dangerous weapon was used in the commission of or furtherance of the felony, the court shall, in addition to any other sentence imposed including those in Subsection (2), impose an indeterminate prison term to be not less than five nor more than ten years to run consecutively and not concurrently.

Laws 2003, c. 148, § 4, eff. May 5, 2003; Laws 2004, c. 276, § 2, eff. May 3, 2004.

HISTORICAL AND STATUTORY NOTES