

2009

State of Utah v. Timothy Michael Howard : State's Reply Brief

Utah Court of Appeals

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Case No. 20090911-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellant,

vs.

Timothy Michael Howard,
Defendant/Appellee.

State's Reply Brief

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The State responds as follows to the arguments raised in Defendant's brief.

**THE SENTENCE WAS ILLEGAL BECAUSE IT FELL OUTSIDE THE
AUTHORIZED STATUTORY RANGE**

Defendant argues that the State did not preserve its challenge to the illegal sentence below. Br. Aple. 3-4. He contends that preservation was necessary because the sentence was not, in fact, illegal. *Id.* at 3-5. The State's argument was preserved. But even it were not, the sentence was illegal and, therefore, may be corrected at anytime, whether or not preserved.

A. The challenge to the illegal sentence was preserved.

Defendant states that the prosecutor "mentioned" during the sentencing hearing that he was recommending that Defendant's sentence include "the 90 day jail term as laid out by the statute." Br. Aple. 3. The prosecutor, however, expressly stated to the trial court that the 90-day jail term was mandatory under the statute.

Defendant's counsel below first acknowledged the 90-day statutory requirement, but asked the court not to impose it.¹ See T:56, 7-9. In his response, the prosecutor reminded the trial court that "there [is] the mandatory 90 day jail sentence for the sex offender registration violation." T:16.

Defendant nevertheless contends—without citing any authority—that the prosecutor "invited" any error in the sentence by not objecting to it after the trial court imposed it. Br. Aple. 3-4. Defendant misapprehends both the preservation rules and the invited error doctrine.

"One of the purposes in requiring objections is to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate." *VanDyke v. Mountain Coin Machine Distrib., Inc.*, 758 P.2d 962, 964 (Utah App. 1988). Thus, the objection "must be specific enough to put the trial court on notice of every error which is complained of on appeal." *Id.* at 964-65.

¹ Defense counsel referenced the requirement by stating that "all the arguments that Mr. Cramer just made about the 90 days is very appropriate in this case, it is a situation, it's a little bit different." T:5. Counsel was referring to an argument that Mr. Cramer, Defendant's appellate counsel, had just made in a sentencing hearing in *State v. Dana*, Case No. 20090910-CA, that the mandatory 90-day jail term was unconstitutional. The State has also appealed the trial court's refusal to impose the required statutory term in that case. By motion filed today, the State is asking the Court to consolidate this appeal with *Dana* and with *State v. Williams*, Case No. 20090908-CA—another State's appeal raising the same issue—for purposes of decision and argument, if held.

The prosecutor put the trial court on timely and specific notice of any potential error when he informed the trial court, before sentence was imposed, that the statute mandated a minimum 90-day incarceration period. T:4. Once the prosecutor did so, the primary purpose of the preservation rule was fulfilled. The prosecutor was not required to repeat that information after the trial court, having been expressly alerted to the mandatory sentence, chose to ignore it.

Moreover, contrary to Defendant's argument, merely "[f]ailing to object" is not "typically considered as invited error." Br. Aple. 3. Rather, the invited error doctrine applies only when a party leads a trial court into error by "'affirmatively represent[ing] to the [trial] court that he or she had no objection to the [proceedings].'" *Pratt v. Nelson*, 2007 UT 41, ¶ 16, 164 P.3d 366 (quoting *State v. Winfield*, 2006 UT 4, ¶ 14, 128 P.3d 1171). Here, as Defendant concedes, the prosecutor did not affirmatively represent that the trial court could or should impose something less than the statutorily-mandated jail term. Rather, the prosecutor affirmatively informed the court of its obligation to impose the mandated jail term. Thus, the prosecutor did not invite any error.

B. The sentence was illegal because it did not comply with statutory requirements.

But whether or not the issue was preserved, this Court may address a claim of an illegal sentence for the first time on appeal. *State v. Brooks*, 908 P.2d 856, 859-60 (Utah 1995); *see also State v. Babbell*, 770 P.2d 987, 993-94 (Utah 1989) (“*Babbell I*”) (addressing State’s claim of illegal sentence raised for first time at oral argument on appeal). This is true even when the prosecutor agrees to the illegal sentence in the trial court. *See State v. Babbell*, 813 P.2d 86, 86 (Utah 1991) (“*Babbell II*”) (approving reversal of illegal sentence, even though error resulted from both prosecutor and defense counsel misinforming trial court of applicable sentence).

Defendant acknowledges that an illegal sentence may be corrected at any time under rule 22(e), Utah Rules of Criminal Procedure, but contends that the sentence here was not illegal. Br. Aple. 4. Defendant argues that to be illegal, a sentence must be “patently” or “manifestly” illegal. Br. Aple. 4 (citing *State v. Garner*, 2008 UT App 32, ¶ 17, 177 P.3d 637). Defendant argues that to be “patently” or “manifestly” illegal, the sentence must be “beyond the authorized statutory range.” *Id.* Defendant reasons that because the sentence here was “below” the statutory minimum, instead of “beyond” the statutory maximum, his sentence was not “patently” or “manifestly” illegal. *Id.*

Defendant cites no authority to support his logic. Nor could he. The Utah Supreme Court has expressly recognized that a sentence less than that mandated by statute is an illegal sentence because it does “not comply with the requirements of” the statute. *Babbel*, 813 P.2d at 87 n.1. Babbel was convicted of crimes that, at the time, carried minimum-mandatory prison terms. *Id.* at 86. The trial court nevertheless imposed indeterminate prison terms because “both the defense attorney and the prosecutor indicated to the judge that a minimum mandatory term was inapplicable.” *Id.* at 86. On appeal, the State asserted for the first time “at oral argument that Babbel’s sentences were unlawful.” *Id.* After affirming Babbel’s convictions, the Utah Supreme Court “vacated his sentences and remanded for resentencing because of the clear error in the original sentences.” *Id.*

On remand, Babbel received more severe minimum-mandatory sentences. *Id.* at 86-87. Babbel appealed, arguing that the harsher sentences violated double jeopardy and Utah statutory law. *Id.* at 87. In rejecting Babbel’s second appeal, the Utah Supreme Court explained that the initial “sentences were illegal because they did not comply with the requirements of [the applicable statutes].” *Id.* at 87 n.1.

Likewise, Defendant’s sentence here does not “comply with the requirements of” the applicable statute. His sentence, therefore, was illegal and must be corrected.

Although not clear, Defendant seems to suggest that the State may prevail only if it shows that “the trial court had no jurisdiction to impose the sentence it imposed.” Br. Aple. 4-5. Defendant asserts that “in order to get relief under rule 22(e),” the State must show that his sentence was “unconstitutional.” Br. Aple. 5.

Babbel II, however, clearly holds that a sentence is illegal under rule 22(e) when it does not comply with *statutory* requirements. *Babbel II*, 813 P.2d at 88. There is no requirement that the sentence also be unconstitutional. *See id.* Moreover, the issue here is not whether the trial court had “jurisdiction” to impose the illegal sentence. Rather, the issue is whether statute authorized the sentence imposed. *See id.* As the Utah Supreme Court explained, while “an unlawful sentence [is] void,” the jurisdiction of the trial court “continue[s] until a valid sentence [is] imposed.” *Id.* Indeed, the trial court “has this power at any time, whether before or after an appeal, and even if there is no appeal.” *Id.*

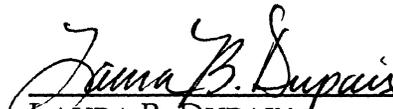
In sum, the sentence in this case was illegal because it did not comply with the statutorily-mandated jail time. The sentence, therefore, must be vacated and the case remanded for the trial court to impose a legal sentence.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand for imposition of a legal sentence.

Respectfully submitted August ~~26~~¹⁹, 2010.

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CERTIFICATE OF SERVICE

I certify that on August 24, 2010, two copies of the foregoing brief were

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