

1999

## Utah v. Jackson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	
Plaintiff and Appellee,	)	
	)	Appellate Case No. 990565-CA
v.	)	
	)	Priority No. 2
LAWRENCE MARSHALL JACKSON,	)	
	)	
Defendant and Appellant.	)	

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REPLY OF THE APPELLANT

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Appeal from the Judgment and Order of Commitment  
Eighth District Court  
Uintah County, State of Utah  
Honorable John R. Anderson, Judge

---

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Vernal, Utah 84078

Oral Argument Requested

**FILED**

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COURT OF APPEALS

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**Appellee's Statement of the Facts Challenged**

Appellee's lengthy and emotionally charged statement of the facts, Br. Appellee 4-8, should not obscure the issues that Jackson has presented on appeal. Jackson never has contested the fact that he pleaded guilty to one count of rape of a child. He never has sought reversal of his ensuing conviction. Instead, he has argued that in the sentencing phase of his case the trial court made two errors and trial counsel rendered

constitutionally deficient performance. The two errors complained of are that the trial court committed plain error by failing to make detailed factual findings on the record supporting imposition of the upper term of fifteen years to life imprisonment, as Utah Code Ann. § 76-3-201 requires, and it abused its discretion by failing to conduct specific inquiry and appoint substitute counsel at sentencing despite written and verbal complaints and an express request for new counsel. The ineffective assistance complained of is that counsel failed to bring § 76-3-201 to the court's attention and ensure compliance with the statute. Jackson is entitled to dispassionate review of these issues, independent of the particulars of the offense of rape of a child.

Further, appellee's references to Jackson's diagnostic report, mental health evaluation, and presentence investigation report, insofar as they may justify imposition of the upper minimum mandatory term, are misplaced. If in fact they contain observations, impressions, or recommendations supporting the sentence that Jackson received, it was incumbent upon the trial court to make them explicit at sentencing and explain how they influenced the decision ultimately reached. The court failed to do this, and appellee should not try now, even implicitly. The required findings of fact may not be inferred from the reports. They may not be incorporated by reference. They must independently and clearly be made part of the record at the time of sentencing. *See State v. Beltran-Felix*, 922 P.2d 30, 37 (Utah Ct.App. 1996); *see also State v. Anderson*, 797 P.2d 1114, 1117 (Utah Ct.App. 1990).

### **Insufficiency of Findings in Support of Sentence**

Jackson agrees with appellee, Br. Appellee 8-10, that his claim of insufficient findings in support of sentence should be reviewed under the plain error doctrine and that Utah Code Ann. § 76-3-201 is controlling. According to § 76-3-201,

(6)(a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.

...

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.

Utah Code Ann. § 76-3-201 (1999).

Jackson, however, does dispute appellee's claim, Br. Appellee 10-11, that Utah case law supports the proposition that trial courts need not make specific findings or make use of sentencing guidelines when choosing among alternative minimum mandatory



sentences.<sup>1</sup> Cases that appellee cites are inapposite and contrary to appellee's position.

•In *State v. Wright*, 893 P.2d 1113, 1120-22 (Utah Ct.App. 1995), defendant challenged imposition of the middle not upper term. The case therefore is distinguishable. In any event, the trial court reviewed, on the record, aggravating and mitigating evidence, even though not required to do so statutorily.

•In *State v. Gibbons*, 779 P.2d 1133, 1136-37 (Utah 1989), defendant challenged imposition of the middle not upper term. The case is distinguishable. Also, the trial court reviewed, on the record, aggravating and mitigating evidence, even though not required to do so statutorily.

•In *State v. Bell*, 754 P.2d 55, 57-60 (Utah 1988), defendant challenged imposition of middle not upper terms. The case is distinguishable. And, again, the trial court reviewed, on the record, aggravating and mitigating evidence, even though not required to do so statutorily.

•In *State v. Smith*, 909 P.2d 236, 244-45 (Utah 1995), the issue was not the application of sentencing guidelines but whether the trial court abused its discretion in imposing upper terms. There was no abuse because the court identified, on the record, numerous aggravating circumstances.

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<sup>1</sup>Contrary to appellee's claim, Jackson never has asserted that when sentencing defendants under § 76-3-201 trial courts must consider only those mitigating and aggravating circumstances in the sentencing guidelines or that they must discuss mechanically, one by one, all the circumstances identified. Appellee's arguments in this regard are specious.

•In *State v. Russell*, 791 P.2d 188, 191-93 (Utah 1990), the trial court properly imposed upper terms because it identified, on the record, sufficient aggravating circumstances.

•In *State v. Simmons*, 2000 UT App 190, ¶¶ 18-21, 5 P.3d 1228, the trial court did not abuse its discretion in imposing the upper term because it identified, on the record, five aggravating circumstances and only one mitigating circumstance.

Remarkably, in summarizing these cases, appellee claims that there is no requirement that trial courts actively must make use of the sentencing guidelines in imposing sentences under § 76-3-201. If in fact this is true, appellee would appear to invite the Court of Appeals to interpret the statute and determine to what extent, if any, the guidelines should play a part in courts' decision-making. Jackson himself believes that the language contained in subsection (6)(e) is both plain and controlling: "In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission." The language here is not permissive; it does not say that trial courts "may" or "may not" use the guidelines. The language is not hortatory; it does not say that courts "should" use the guidelines. Rather, the language is mandatory; it says, unequivocally, that courts "shall" use them.

Appellee implicitly recognizes this statutory construction when averring, Br. Appellee 11-12, that the trial court actually considered the guidelines' factors in

reaching its sentencing decision in Jackson's case. The court, however, did no such thing. Alternatively, assuming for the sake of argument that the court used the guidelines, it still did not make use of them in a manner justifying imposition of the upper term.

As appellee concedes, the trial court did not expressly refer to the sentencing guidelines prior to imposing sentence. Indeed the court never acknowledged the existence of the guidelines by name, the purpose of the guidelines in sentencing proceedings generally, or the application of any of the identified aggravating and mitigating circumstances in this specific case. Arguably, any overlap between the court's remarks at sentencing and the contents of the guidelines is insignificant and the product of chance rather than design. In the alternative, comments that the court made about Jackson, even when bootstrapped to the language of the guidelines, do not explain why it was appropriate for him to have been sentenced to the upper term. Two mitigating circumstances are not present: existence of developmental disabilities and appropriateness for rehabilitative treatment. One mitigating circumstance is present: no significant criminal history for a period of ten years. But where are there aggravating circumstances? The court identified none. The court labeled Jackson "a pedophile," as appellee emphasizes, but that is not an aggravating circumstance in this case. Rape of a child is, by definition, an act of pedophilia. Separate and distinct aggravating circumstances are required for the court to impose the upper term. *See State v. Russell*,

791 P.2d 188, 192 (Utah 1990); *see also State v. Egbert*, 748 P.2d 558, 560 (Utah 1987). Further, despite appellee's claim, the court's "reason" for its sentencing decision, that "it was necessary to protect society and punish defendant," is really no reason at all or perhaps more properly speaking not a legally sufficient reason, in this case, to impose the upper term. Courts protect society and punish defendants every day, in all types of cases, ranging from minor traffic offenses to murder. The general rationale of protection and punishment does not provide a proper basis for the particular sentence, among three possible sentences, that Jackson received.

Bottom line, the trial committed plain error by failing to make detailed factual findings on the record supporting imposition of the upper term of fifteen years to life imprisonment, as Utah Code Ann. § 76-3-201 requires.

### **Ineffective Assistance of Counsel at Sentencing**

Appellee asserts, Br. Appellee 13-14, that assigned counsel did not render constitutionally deficient performance by failing to bring the requirements of § 76-3-201 to the trial court's attention because the court in fact made findings sufficient to support its sentencing decision. As discussed above, however, the court did not make detailed factual findings on the record supporting imposition of the upper term.

Jackson continues to believe that reasonable professional assistance, at sentencing, encompasses ensuring compliance with § 76-3-201 when the statute is applicable. Such assistance is especially critical when, as here, the trial court neglected to carry out the

statutorily required scrutiny and analysis and the prosecutor said and did nothing to assist the court in this regard. In these circumstances, it is trial counsel who is defendant's lifeline and last hope and bears special responsibility for guaranteeing fair hearing, due process, adequacy of the record, and confidence in the proceedings upon appellate review.

### **Failure to Conduct Specific Inquiry and Appoint Substitute Counsel**

Appellee claims, Br. Appellee 16, that the trial court's inquiry into Jackson's complaints against assigned counsel was sufficient to conclude that there was no need to appoint substitute counsel. This assertion is not supported by a fair and objective reading of the transcript of the sentencing hearing. *See* Br. Appellant, Addendum B. The court's inquiry lasted but a minute or two. *Id.* at 3-5. The court allowed Jackson, then his counsel, to speak, but it did not ask either even one question based on what was said. Further, the reason articulated by the court for deciding not to appoint substitute counsel--"Well, not hearing from counsel in terms of a failure to be able to work you. I'm going to keep her on the case at this point and deny your motion."--bears no connection to the proper legal standard to be used in such circumstances. It is not counsel's perceived unhappiness or difficulty working with a defendant that determines whether substitute counsel is legally required. Instead, it is the nature of the relationship between counsel and a defendant that is determinative, in particular whether there has been a complete breakdown in communication or an irreconcilable conflict. *State v.*

*Lovell*, 1999 UT 40, ¶31, 984 P.2d 382, *cert. denied*, 528 U.S. 1083 (2000).

Jackson does not suggest that, when confronted with complaints about assigned counsel, a trial court must go through a checklist and ask a defendant and counsel certain questions in a certain order. Some questioning, however, is almost always indicated. Here, despite Jackson's letter to the court, as well as his comments at the beginning of the sentencing hearing, the court asked no specific questions in response to the complaints made. Arguably, the court might have inquired into the basis for Jackson's belief that counsel was "not interested in protecting my interest," the opportunity that Jackson and counsel did or did not have to prepare for the hearing, and whether in fact counsel was ready to go forward with the issue at hand at that time, namely the appropriate sentence to be imposed upon Jackson under § 76-3-201. There is every indication that had such questioning occurred the court would have found evidence of a complete breakdown of communication, to the point where Jackson was not receiving adequate representation.

This argument is not purely speculative but is supported by what actually occurred at sentencing. Most significantly, assigned counsel never brought the requirements of § 76-2-301 to the court's attention. But she also never used the statute, with its attendant guidelines, to present mitigating evidence and challenge putative aggravating evidence. True, she was not totally passive. As appellee points out, Br. Appellee 17, counsel brought up the matter of Jackson's request for substitute counsel,

explained why she had been unable to communicate with him before the hearing, and expanded on his complaints about the way in which he was treated during diagnostic and presentence evaluation. These matters, however, were essentially irrelevant to the proceedings, which were being held for the purpose of deciding which sentence, among alternative minimum mandatory sentences, Jackson should receive. Contrary to appellee's claim, counsel was not properly focused on and did not vigorously represent Jackson's interests at sentencing. This case is clearly distinguishable from *Lovell, supra*, and *State v. Pursifell*, 746 P.2d 270 (Utah Ct.App. 1987), where there was adequate representation.

Jackson's instincts about the adequacy of assigned counsel at sentencing proved to be correct. If the trial court had conducted specific inquiry, as required, it likely would have discovered sufficient grounds to appoint substitute counsel. And if there had been substitute counsel, Jackson likely would have been represented by counsel who, at the very least, recognized the import of § 76-3-201, made sure that the court complied with the statute, and zealously used it to advocate for Jackson and safeguard his numerous interests at the time of sentencing.

### **Relief Sought**

This Court should hold that (1) the trial court committed plain error by failing to make detailed factual findings on the record supporting imposition of the upper term of fifteen years to life imprisonment, as Utah Code Ann. § 76-3-201 requires; (2) trial

counsel was ineffective because she failed to bring the requirements of § 76-3-201 to the court's attention and ensure compliance with the statute; and (3) the court abused its discretion by failing to conduct specific inquiry and appoint substitute counsel at sentencing. Consequently, the Court should vacate Jackson's sentence and remand the case to the trial court for another sentencing hearing to be conducted *de novo* with newly appointed defense counsel.

### **Oral Argument and Published Opinion Requested**

Jackson, through appellate counsel, requests oral argument before the Court. Further, Jackson requests a published opinion. The issues that he has raised on appeal involve the interpretation of Utah Code Ann. § 76-3-201 and the roles and responsibilities of all parties in ensuring that the statute is applied properly. A published opinion will help promote the fair and effective administration of justice in future sentencing hearings where, as here, trial courts must choose from alternative minimum mandatory terms and clearly state the reasons for their choice on the record and both prosecutors and defense counsel actively must be part of this process.

DATED this 10 day of January, 2001.



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WESLEY M. BADEN  
Attorney for Defendant and Appellant



### **Certificate of Mailing**

On this 10 day of January, 2001 I mailed via first-class mail the original and eight copies of this reply of the appellant to:

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