

1999

Utah v. Lance Michael Weeks : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



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.

Linda M. Jones; Scott C. Williams; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

Karen A. Klucznik; Assistant Attorney General; Jan Graham; Attorney General; Simarjit Singh Gill; Kent Morgan; Attorneys for Appellee.

Recommended Citation

Reply Brief, *Utah v. Lance Michael Weeks*, No. 990979 (Utah Court of Appeals, 1999).
https://digitalcommons.law.byu.edu/byu_ca2/2422

This Reply Brief 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.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

LANCE MICHAEL WEEKS,

Defendant/Appellant.

:
:
:
:
:
:
:
:
:
:
:
:

Case No. 990979-CA

Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for attempted illegal possession of a controlled substance, a class A misdemeanor offense in violation of Utah Code Ann. § 58-37-8 (Supp. 1998), in Case No. 991902830; attempted receipt or transfer of a stolen motor vehicle, a third degree felony offense in violation of Utah Code Ann. § 41-1a-1316(2) (1998), in Case No. 991903049; and failing to respond to an officer's signal to stop, a third degree felony offense in violation of Utah Code Ann. § 41-6-13.5 (1998), in Case No. 991903239, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

LINDA M. JONES (5497)
SCOTT C. WILLIAMS (6687)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

JAN GRAHAM (1231)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Plaintiff/Appellee

FILED
Utah Court of Appeals

JUL 11 2000

Julia D'Alessandro
Clerk of the Court

STATE OF UTAH.

v.

Defendant/Appellant.

Priority No. 2

Appeal from a judgment of conviction for attempted illegal possession of a controlled substance, a class A misdemeanor offense in violation of Utah Code Ann. § 58-37-8 (Supp. 1998), in Case No. 991902830; attempted receipt or transfer of a stolen motor vehicle, a third degree felony offense in violation of Utah Code Ann. § 41-1a-1316(2) (1998), in Case No. 991903049; and failing to respond to an officer's signal to stop, a third degree felony offense in violation of Utah Code Ann. § 41-6-13.5 (1998), in Case No. 991903239, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

Salt Lake City, Utah 84114-0854

Attorney for Plaintiff/Appellee

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	
<u>THE STATE DOES NOT DISPUTE THAT THE TRIAL JUDGE FAILED TO COMPLY WITH SECTION 76-3-201.</u>	2
A. <u>THE STATE DOES NOT DISPUTE THAT THE TRIAL COURT FAILED TO PROVIDE A “FULL HEARING” ON THE ISSUE OF RESTITUTION; RATHER, THE STATE CLAIMS WEEKS DID NOT TIMELY OBJECT TO THE MATTER.</u>	2
1. <u>This Court Does Not Need to Consider the State’s “Waiver” Argument Since the Trial Court Considered Weeks’ Request for a “Full Hearing” on the Merits.</u>	5
2. <u>The Statute Does Not Provide that if Defendant Fails to Object to the Restitution Amount at the Time of Sentencing, He Has Waived the Matter.</u>	6
3. <u>The Cases Relied Upon by the State Do Not Support the Determination that a Defendant, Who Fails to Object “at the Time of Sentencing,” Has Waived His Right to a “Full Hearing.”</u>	13
B. <u>WEEK’S CLAIM CONCERNING THE FACTORS SET FORTH AT SECTION 76-3-201(8)(c) IS GOVERNED BY MONSON AND ROBERTSON.</u>	16
1. <u>The Statutory Law and Case Law Provide that the Trial Court Must Make <i>Explicit</i> Findings in the Record With Regard to the Statutory Factors in Ordering Restitution.</u>	16

	<u>Page</u>
2. <u>The Analysis Set Forth in <i>Monson and Robertson/</i></u> <u><i>Labrum</i> Supports Review of This Issue Under the</u> <u>Plain-Error Doctrine.</u>	21
CONCLUSION	23

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Monson v. Carver</u> , 928 P.2d 1017 (Utah 1996)	8, 13, 14, 15, 16, 17, 18, 21, 22, 23
<u>State v. Belgard</u> , 830 P.2d 264 (Utah 1992)	6
<u>State v. Casarez</u> , 656 P.2d 1005 (Utah 1982)	8, 11
<u>State v. Gomez</u> , 887 P.2d 853 (Utah 1994)	8
<u>State v. Haga</u> , 954 P.2d 1284 (Utah App. 1998)	13
<u>State v. Helm</u> , 563 P.2d 794 (Utah 1977)	10, 11
<u>State v. Howell</u> , 707 P.2d 115 (Utah 1985)	8, 11
<u>State v. Johnson</u> , 821 P.2d 1150 (Utah 1991)	5, 6
<u>State v. Johnson</u> , 856 P.2d 1064 (Utah 1993)	8, 12
<u>State v. Labrum</u> , 925 P.2d 937 (Utah 1996)	21, 22, 23
<u>State v. Lee Lim</u> , 7 P.2d 825 (Utah 1932)	13
<u>State v. Lipsky</u> , 608 P.2d 1241 (Utah 1980)	8, 11
<u>State v. Matsamas</u> , 808 P.2d 1048 (Utah 1991)	6
<u>State v. Patience</u> , 944 P.2d 381 (Utah App. 1997)	8, 11
<u>State v. Robertson</u> , 932 P.2d 1219 (Utah 1997)	18, 19, 20, 21, 22, 23

	<u>Page</u>
<u>State v. Seale</u> , 853 P.2d 862 (Utah 1993)	6
<u>State v. Snyder</u> , 747 P.2d 417 (Utah 1987)	13, 15
<u>State v. Starnes</u> , 841 P.2d 712 (Utah App. 1992)	7

STATUTES AND RULES

Utah Code Ann. § 76-3-201 (Supp. 1998)	1, 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23
Utah Code Ann. § 77-35-1 (1953 as amended)	10
Utah R. Crim. P. 22(e) (2000)	12
Utah R. Prof. Cond. 3.1 (2000)	8

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

LANCE MICHAEL WEEKS,

Defendant/Appellant.

:
:
:
:
:
:
:
:
:
:
:

Case No. 990979-CA
Priority No. 2

On appeal, Defendant Lance Michael Weeks (“Weeks”) is challenging the trial court’s order of restitution in the amount of \$9,104.35 on the grounds that the order is not based in reliable information, and/or the trial court refused to provide Weeks with a “full hearing” on the matter pursuant to Utah Code Ann. § 76-3-201(4)(e) (Supp. 1998). (Brief of Appellant at 2.) Specifically, the trial court relied on double-hearsay statements in the presentence investigation report to calculate and order the restitution amount. Weeks objected to the amount and requested a “full hearing” on the matter in order to examine the basis for the award. The trial court denied Weeks’ request.

In response to the challenges on appeal, the state acknowledges that in connection with Weeks’ request for a “full hearing” on the issue of restitution, the trial court conducted a hearing, but took “no evidence” on the matter. (State’s Brief of Appellee (“S.B.”) at 9.) The state also does not dispute that the trial court based the restitution award on unreliable information.

However, in urging affirmance on appeal, the state argues that Weeks’ objection

and request for a “full hearing” was untimely. According to the state, a defendant must make such an objection “at the time of sentencing” or the matter is waived. (S.B. at 11-12.) The state relies on Section 76-3-201 and Utah case law to support its position.

As more fully set forth herein, Weeks timely objected and requested a “full hearing” under the statute in connection with the restitution order. In addition, the trial court considered the merits of the matter in denying the request for a “full hearing.” Since the trial court addressed the merits of the request, the issue is properly before this Court. Inasmuch as the state does not dispute that the trial court failed to provide Weeks with a “full hearing,” Weeks respectfully urges this Court to reverse and remand the case for further proceedings.

ARGUMENT

THE STATE DOES NOT DISPUTE THAT THE TRIAL JUDGE FAILED TO COMPLY WITH SECTION 76-3-201.

A. THE STATE DOES NOT DISPUTE THAT THE TRIAL COURT FAILED TO PROVIDE A “FULL HEARING” ON THE ISSUE OF RESTITUTION; RATHER, THE STATE CLAIMS WEEKS DID NOT TIMELY OBJECT TO THE MATTER.

As set forth in the opening Brief of Appellant, during sentencing the trial judge in this case ordered Weeks to pay restitution in the amount of \$9,104.35. The amount was based on double-hearsay statements presented to the trial judge in a presentence investigation report. (See Brief of Appellant at 14; see also Presentence Investigation Report at 8-10; R. 60:4-5.)

Weeks objected to the order of restitution and requested a “full hearing” pursuant

to Utah Code Ann. § 76-3-201(4)(e). (Case No. 2830:37; Case No. 3049:41; Case No. 3239:39; and R. 60.) Thereafter, at a hearing, Weeks challenged the reliability of the information allegedly supporting the restitution award, and he requested the opportunity to examine the information purportedly supporting the alleged damages in order that he may assess its accuracy. (R. 60:5-7.) The trial judge denied Weeks' requests and ruled that the restitution award was fair and reasonable. (R. 60:7.)

The state does not dispute that the trial judge failed to provide Weeks with a "full hearing" on the matter, or that the award of restitution was based on double-hearsay statements. Indeed, the state acknowledges that a defendant's due process rights and statutory rights are protected so long as "defendant has the opportunity to examine and challenge the information on which his sentence is based." (S.B. at 10.) In this case, the trial court denied Weeks such an opportunity, thereby violating his due process and statutory rights.

While the state does not take issue with the merits of Weeks' claims, the state challenges the procedural posture of the matter. Specifically, the state asserts that Weeks' statutory and due process rights were not violated in this case where Weeks "neither requested a restitution hearing nor challenged the factual basis of the trial court's restitution order at the time of sentencing." (S.B. at 11.) According to the state, "any defendant who wishes to challenge a trial court's restitution order must make his objection known at the time he is sentenced in order to preserve his right to a full hearing

on the issue.” (S.B. at 11.) The state asserts this Court should decline to reach the merits of Weeks’ issue on appeal on the basis that Weeks “waived his right to a restitution hearing” when he filed an objection and requested the hearing 11 days after sentencing. (S.B. at 11.)

The state’s argument is unpersuasive for at least three reasons: First, the trial judge in this matter considered the merits of Weeks’ request for a “full hearing” and denied the request on the grounds that the restitution award was fair and reasonable. Under those circumstances this Court will not find waiver, but will consider the merits of the issue on appeal. Second, Section 76-3-201 does not provide that a defendant who fails to object to the imposition of or amount in restitution “at the time of sentencing” has waived his right to a “full hearing.” In the event this Court interprets the statute in such a manner, the interpretation may present an unworkable approach to sentencing proceedings that conflicts with due process considerations. Third, the state has cited to case law purportedly supporting its interpretation of Section 76-3-201(4)(e) that failure to request a full hearing “at the time of sentencing” constitutes waiver. Those cases do not support that position. They support the fundamental proposition that an appellate court will not review an issue on appeal where the lower court was not given the opportunity first to consider and correct the error. That is not an issue in this case.

Inasmuch as the state has not disputed the merits of Weeks’ claim on appeal, he urges this Court to remand the matter for a “full hearing” on the restitution issue.

1. This Court Does Not Need to Consider the State's "Waiver" Argument Since the Trial Court Considered Weeks' Request for a "Full Hearing" on the Merits.

On September 10, 1999, the trial judge entered an order of restitution in the underlying cases. (See Envelope containing "Documents From Case No. 991902297," page 2; Case No. 2830:33-36; Case No. 3239:37-38; Case No. 3049:39-40.) Thereafter, on September 21, Weeks objected to the order and requested a "full hearing." (R. Case No. 2830:37; Case No. 3239:39; Case No. 3049:41.)

On October 18, the trial judge held a hearing (R. 60). In disposing of Weeks' objection and request, the trial judge "did not rely on waiver, but addressed the merits of the issue." State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991). That is, the judge considered argument from counsel, described his calculation for the restitution amount, acknowledged relying on statements in the presentence investigation report in making his determination, and refused to allow Weeks the opportunity to consider or examine the factual basis for the restitution award. (R. 60.) The judge also ruled that the amount in restitution was "fair and reasonable." (R. 60.)

Where the trial judge has addressed the issues fully and has not relied on waiver, "we consider the issue on appeal" -- even if trial counsel arguably failed to properly preserve the issue. Johnson, 821 P.2d at 1161.

One of the primary reasons for imposing waiver rules like rule 103(a)(1) is to assure that the trial court has the first opportunity to address a claim that it erred. If the trial court already has had that opportunity, the justification for rigid waiver requirements is weakened considerably.

Id.

In the underlying cases in this matter, the trial court gave no indication that it had considered rejecting, or would reject, Weeks' objections and request for a full hearing on the grounds that the motion was untimely or that Weeks waived such a request. (See R. 60 generally.) Thus, the problem with the state's waiver argument is that whatever the alleged requirements of Section 76-3-201(4)(e), the trial judge chose not to treat Weeks' alleged failure to raise the issue "at the time of sentencing" as a waiver. "Instead, he proceeded to consider the claim. Therefore, the objection was preserved for appeal. The judge effectively waived the requirements of [the rule.]" State v. Matsamas, 808 P.2d 1048, 1053 (Utah 1991); State v. Belgard, 830 P.2d 264, 266 (Utah 1992); State v. Seale, 853 P.2d 862, 870 (Utah 1993) (court's consideration of the merits of the matter -- rather than finding waiver -- ensures defendant's right to have the merits of the issue reviewed on appeal). Contrary to the state's assertion, this Court may consider the merits of the issue on appeal and reverse the matter for a "full hearing" in accordance with Section 76-3-201(4)(e).

2. The Statute Does Not Provide that if Defendant Fails to Object to the Restitution Amount at the Time of Sentencing, He Has Waived the Matter.

According to the state, if defendant fails to object to the restitution order "at the time of sentencing," he waives his right to a "full hearing." (S.B. at 11.) In support of that position, the state relies on Section 76-3-201(4)(e), which provides the following: "If a defendant objects to the imposition, amount, or distribution of the restitution, the court

shall at the time of sentencing allow the defendant a full hearing on the issue.” Utah Code Ann. § 76-3-201(4)(e) (Supp. 1998). The state seems to argue that the phrase “at the time of sentencing” relates to the timing of defendant’s objection. Yet, it does not. Indeed, the provision is silent with respect to when defendant must object, and it in no way suggests that a failure to object “at the time of sentencing” constitutes waiver.

The phrase “at the time of sentencing” seems to relate to the trial court. That is, Section 76-3-201(4)(e) requires the trial court to provide a “full hearing” once defendant objects to the imposition or amount in restitution. While the statute may be construed to require the trial court to provide a “full hearing” on the matter “at the time of sentencing,” such a requirement would be impractical and problematic.

Consider the manner in which trial courts proceed with sentencing, and the requirements of a “full hearing.”

On the one hand, a “full hearing” contemplates fairness, and that a defendant will have the opportunity to present evidence in the form of documents, and/or testimony from witnesses, and to examine and challenge the accuracy of the factual information upon which sentencing determinations are made. See State v. Starnes, 841 P.2d 712 (Utah App. 1992) (“full hearing” contemplates opportunity for defendant to present evidence as well as examine state evidence). The “full hearing” accommodates due process at sentencing, where criminal proceedings must be conducted to ensure that the decision-making process is based upon accurate and reliable information. State v.

Gomez, 887 P.2d 853, 854-55 (Utah 1994); State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) (cites omitted); State v. Howell, 707 P.2d 115, 118 (Utah 1985) (Article 1, Section 7 of Utah Constitution requires sentencing judge to act on reliable, relevant information in exercising discretion in sentencing); State v. Lipsky, 608 P.2d 1241, 1248-49 (Utah 1980); see also State v. Casarez, 656 P.2d 1005, 1008 (Utah 1982) (court must interpret statutory provisions to be consistent with constitutional safeguards); State v. Patience, 944 P.2d 381, 389 (Utah App. 1997). It contemplates that defendant will have the opportunity to investigate his objections to the restitution order.

On the other hand, in accordance with the practice in this state, restitution is imposed at the time of sentencing. (See Envelope containing “Documents From Case No. 991902297,” page 2; R. Case No. 3239:37-38; Case No. 2830:33-36; Case No. 3049:39:40.) Thus, an objection to the imposition of or amount in restitution may become an issue only after sentencing. That is, a defendant cannot be expected to object to restitution unless and until it is imposed against him. Once it is imposed at sentencing, it is reasonable to allow counsel the opportunity to investigate the matter to determine whether the amount is objectionable. See Utah R. Prof. Cond. 3.1 (2000) (a lawyer shall not bring or defend a proceeding or assert or controvert an issue unless there is a basis that is not frivolous); see also Monson v. Carver, 928 P.2d 1017, 1028 n. 9 (Utah 1996) (in determining the amount in restitution, the Board of Pardons and Parole would hold a hearing after providing appropriate notice to defendant and access to investigative

materials for presentation of evidence).

Thus, if this Court were to construe the statute to provide a defendant with a “full hearing” on restitution only “at the time of sentencing,” such an interpretation would be unreasonable, burdensome, and excessive. It would require the parties and court to anticipate a full evidentiary hearing at every sentencing, without knowing in advance how the trial court intended to calculate restitution, the basis for the order, or the amount the trial court intended to impose. Defendant would not have the ability to investigate the matter and to assess the evidentiary issues to be addressed. Rather, in anticipation of every possible challenge to what may be ordered, the defendant and state would have to arrange the attendance of witnesses and victims even before it is known whether the trial judge intended to impose restitution and in what amount.

Such an interpretation would disrupt and congest the system as well as impose an undue burden on victims and other third-party witnesses. In the event the trial court determined not to impose restitution, or imposed it in an amount that was not objectionable, the disruption would prove to be a waste of time for those who came prepared to testify on the chance that a “full hearing” would be necessary to the matter. That is not a reasonable interpretation of Section 76-3-201(4)(e).

Rather, a more reasoned interpretation of the provision would require this Court to consider the language of the Section 76-3-201(4)(e) in light of its purpose. That is, the phrase “at the time of sentencing” relates to the timing of the trial court’s notice

concerning the “full hearing.” The provision ensures that the trial court will provide notice “at the time of sentencing” that a full hearing will be allowed. The phrase provides an assurance to defendant of no undue or unreasonable delay in allowing the “full hearing.” Thus, when a defendant objects to restitution, the trial court shall provide notice to the defendant at the time of sentence that it will hold the “full hearing” on the issue. Under that interpretation, the phrase “at the time of sentencing” emphasizes the importance of the matter to the trial court in scheduling it without undue delay.

Such an interpretation would identify the importance of that phrase and the fact that it is directed to the trial court. If the defendant objected postorder, after an investigation into the matter, the trial court would not be required to provide notice of the full hearing “at the time of sentencing,” but would be required to provide notice of the “full hearing” on the matter within a reasonable time of defendant’s objection.

That interpretation of Section 76-3-201(4)(e) would be consistent with treatment of other sentencing statutes. In State v. Helm, 563 P.2d 794 (Utah 1977), the Utah Supreme Court considered Utah Code Ann. § 77-35-1 (1953 as amended). The statute provided that after a guilty verdict, “the court *must* appoint a time for pronouncing judgment, which *must* be at least two days and not more than ten days after the verdict.” Id. at 797 (quoting § 77-35-1) (emphasis added). The defendant in Helm argued that the trial court’s failure to pronounce sentence within the time mandated by the statute deprived the trial court of jurisdiction over the matter. Id. at 797. The supreme court disagreed and construed the language of the statute as follows:

[This] statute should be viewed in harmony with the general rule of statutory construction: that it should be interpreted and applied in light of its purpose. That purpose was that there should be no undue or [unreasonable] delay in the pronouncement of the sentence, particularly that there should be no imposition of hardship on the defendant or prejudicial effect upon his rights. Consistent with what has been said, we think the view which is sound and which comports with the requirements of justice is that the limits so prescribed in the statute are not mandatory and jurisdictional, but are directory; and that where the sentence is imposed within a reasonable time so that there is no abuse of the court's power nor adverse effects upon the defendant, he should not be entitled to go free, but should be entitled to have the correct sentence imposed upon him, with due consideration given to any time he may have served because of the delay.

Id. at 797 (footnote omitted).

In this matter, Section 76-3-201(4)(e) should not be construed as a bar against the defendant in objecting to the order of restitution so long as defendant's objection is made within a reasonable time. Indeed, the statute does not specify that a defendant has waived his right to such a full hearing "by failing to request it at the time of sentencing." (S.B. at 11.) Further, while nothing in the record suggests that Weeks' objection to restitution 11 days after sentencing had any adverse effect on the court, the state, or the victims, the failure to provide the "full hearing" adversely affected Weeks' due process rights. See State v. Casarez, 656 P.2d 1005, 1008 (Utah 1982) (court must interpret statutory provisions to avoid potential constitutional conflicts); State v. Howell, 707 P.2d 115, 118 (Utah 1985) (Article 1, Section 7 of Utah Constitution requires sentencing judge to act on reliable, relevant information in exercising discretion in sentencing); Lipsky, 608 P.2d at 1248-49; see also Casarez, 656 P.2d at 1007; State v. Patience, 944 P.2d 381, 389 (Utah App. 1997).

The provision should be construed to mean that when a defendant requests a “full hearing,” there should be no undue or unreasonable delay in the process; there should be no imposition of hardship on the defendant or victims, or prejudicial effect upon defendant’s rights. The provision is not mandatory but directory in terms of the timing, and where a request for a “full hearing” is made within a reasonable time of the imposition of restitution, defendant shall be entitled to such a hearing within a reasonable time with due consideration given to the need to investigate the matter and to present and examine evidence.

Finally, to the extent this Court determines that Weeks’ request was untimely under Section 76-3-201(4)(e), this Court may disregard the form of the request for its substance to find that the rules of criminal procedure accommodate the request for a “full hearing” where a defendant may request at any time that a trial court correct an illegal sentence. See Utah R. Crim. P. 22(e) (2000).

In this case, an illegal sentence was issued where the trial court imposed restitution based on double-hearsay statements. (See Brief of Appellant at 8-20.) Such statements “cannot stand alone as the basis for sentencing.” Johnson, 856 P.2d at 1071. Also, Weeks was not allowed to examine the information purportedly supporting the restitution amount. Such information should have been made available to Weeks in connection with an evidentiary hearing on the matter where he would have the opportunity to consider the basis for the award and challenge the accuracy of the amount. That is consistent with the requests made in this case.

Since a motion to correct an illegal sentence may be made at any time, see State v. Lee Lim, 7 P.2d 825, 826 (Utah 1932) (a district court may reassume jurisdiction to correct sentence), it may serve as an appropriate method for requesting the hearing in this matter.

For the reasons set forth herein, Section 76-3-201(4)(e) should not be construed as a rule of limitations against defendant, and should not serve to bar objections brought within a reasonable period of time.

3. The Cases Relied Upon by the State Do Not Support the Determination that a Defendant, Who Fails to Object “at the Time of Sentencing,” Has Waived his Right to a “Full Hearing.”

The state has cited to Monson v. Carver, 928 P.2d 1017, 1029 (Utah 1996), and State v. Snyder, 747 P.2d 417, 421 (Utah 1987), for the proposition that a defendant must make his objection to restitution “at the time he is sentenced in order to preserve his right to a full hearing on the issue.” (S.B. at 11.)¹ Those cases do not stand for that proposition.

Indeed, consideration of Monson supports the determination that defendant may be allowed a “full hearing” on the issue of restitution even where defendant failed to make such a request to the tribunal that issued the restitution order.

In that case, the Board of Pardons and Parole held a hearing in November 1992

¹ The state also has relied on State v. Haga, 954 P.2d 1284, 1289 (Utah App. 1998). That case supports the determination that a defendant who requests a “full hearing” is entitled to such.

concerning Monson's parole. Thereafter, the Board issued a formal order granting a parole date and imposing parole conditions, which in part required Monson to "pay restitution in an amount to be determined." Monson, 928 P.2d at 1021. Monson did not object to the order and he did not request that the Board hold a hearing on the matter. Monson, 928 P.2d at 1029. Rather, in January 1993, Monson filed a pro se petition with the district court, and in November 1993, with the assistance of counsel, Monson filed an amended petition for extraordinary relief alleging among other things that the Board failed to comply with Utah statutory law in ordering restitution. Id. at 1021, 1029. Monson relied on Section 76-3-201, and claimed that the Board failed to consider mandatory statutory factors in ordering restitution, and it denied him a "full hearing" on the matter as permitted by § 76-3-201(4)(e). See Monson, 928 P.2d at 1028-29.

The supreme court agreed with Monson on the first point: "The record in this case does not demonstrate that the Board considered the statutory factors because it does not contain any explanation of the reasons the Board ordered Monson to pay restitution." Id. at 1028. The supreme court remanded the case to the trial court with orders that the Board must give an explanation of its restitution order taking into account the statutory factors. "In so doing, the Board will no doubt determine the amount of restitution to be ordered." Id.

In considering Monson's second point, the supreme court ruled there was no error in failing to provide a "full hearing" since Monson never made an objection to the Board or requested the hearing. Rather, Monson filed a petition with the trial court. Id. at

1029. The supreme court's ruling in that regard was consistent with the fundamental principle that an appellate court will not find error if defendant has failed to allow the trial court the opportunity to address the matter in the first instance.

In making that determination, the supreme court did not indicate that Monson had lost all rights to a "full hearing" on the matter for failing to object in connection with the Board proceedings. Rather, in order to accommodate the statute and Monson's due process rights, the court stated that Monson would be entitled to a "full hearing" when the Board specified an amount in restitution. Id. Thus, it seems Monson would be allowed the "full hearing," where the restitution issue was remanded on the first point and it was expected that the Board would determine the amount of restitution. Id. at 1028-29.

In Monson, defendant failed to request a "full hearing" with the Board, as he should have. Yet, that did not deprive Monson of the right to such a hearing. In addition, the supreme court did not construe Section 76-3-201(4)(e) to bar Monson's right to a "full hearing" based on his failure to object in connection with the Board proceedings. This Court likewise should not construe the statute in such a manner.

Next, in Snyder, 747 P.2d at 421, after the trial court ordered defendant to pay restitution, defendant failed to lodge any objection to the imposition, amount, or distribution of the restitution ordered. Id. Thus, in accordance with fundamental legal principles, the Utah Supreme Court determined that defendant waived his right to challenge the order of restitution. Id. The court did not consider the timing of the

objection in the trial court for purposes of a “full hearing.”

In this case, Weeks made a request for a “full hearing” within a reasonable time of the trial court’s order on restitution. The trial court failed to allow a “full hearing.” The appropriate remedy here is to remand the case and to order the trial court to give Weeks a “full hearing” on the matter. See Monson, 928 P.2d at 1028-29.

B. WEEKS’ CLAIM CONCERNING THE FACTORS SET FORTH AT SECTION 76-3-201(8)(c) IS GOVERNED BY MONSON AND ROBERTSON.

In response to Weeks’ claim that the trial judge failed to take into consideration the factors set forth at Section 76-3-201(8)(c) (Brief of Appellant at 17-20), the state again asserts that Weeks failed to timely object to the trial court’s order and/or Weeks waived the issue on appeal. In addition, the state asserts that the trial court complied with the statute in issuing the restitution order. The state disregards relevant case law on the matter in making its assertions, as set forth below.

1. The Statutory Law and Case Law Provide that the Trial Court Must Make Explicit Findings in the Record with Regard to the Statutory Factors in Ordering Restitution.

As set forth in the opening Brief of Appellant, Section 76-3-201(8)(c) provides that the court must consider the following factors in determining restitution: (1) The defendant’s financial resources and the burden that restitution will impose on defendant’s other obligations; (2) The defendant’s ability to pay restitution; (3) The rehabilitative effect on the defendant of restitution payments; and (4) Other circumstances which make restitution inappropriate. Utah Code Ann. § 76-3-201(8)(c) (Supp. 1998). Also, “[if] the

court determines that restitution is appropriate or inappropriate under this subsection, the court shall make the reasons for the decision a part of the court record.” Utah Code Ann. § 76-3-201(4)(d)(i) (Supp 1998).

Utah case law supports the determination that explicit consideration of the above factors is mandatory, and must be set forth in the record.

As set forth above (point A.3., *supra*), in Monson v. Carver, the Board of Pardons and Parole issued an order fixing defendant’s parole date and imposing conditions on parole. The Board ordered Monson to pay restitution in an amount to be determined. Monson, 928 P.2d at 1021. Monson did not object to the Board’s ruling. Monson, 928 P.2d at 1029. Rather, he filed a petition for extraordinary relief with the trial court and alleged that the Board “failed to comply with certain procedural requirements when it ordered restitution.” Id. at 1021. The trial court rejected Monson’s claims.

On appeal, the Utah Supreme Court considered provisions set forth at § 76-3-201, which require the trial court to take into account the four specific factors in assessing restitution, and recognized that according to the statute, if restitution is ordered the trial court “shall make the reasons for the decision a part of the court record.” Monson, 928 P.2d at 1028.² The supreme court reversed and remanded the case in order that the Board

²The statutory provisions at § 76-3-201 have been renumbered. In prior Utah case law, the four statutory factors appeared at Section 76-3-201(4)(c), and the provision requiring the trial court to “make the reasons for the [restitution] decision a part of the court record” appeared at Section 76-3-201(4)(d). In 1999, when Weeks was sentenced, the four statutory factors appeared at Section 76-3-201(8)(c). That subsection is incorporated by reference into subsection (4), which requires the trial court to determine

could “comply with the statute by giving Monson an explanation of its decision which demonstrates that it has taken into account the appropriate statutory factors.” Id. at 1028-29.

In State v. Robertson, 932 P.2d 1219, 1233-34 (Utah 1997), the Utah Supreme Court again considered the statutory requirements imposed on the trial court in assessing restitution. Id. In that case, the trial court ordered defendant to pay restitution for costs incurred in connection with extradition. Defendant appealed the order on the basis that the trial court failed to consider “his financial history and impecunious status” as required under Section 76-3-201(4)(c). See note 2, supra. The supreme court reiterated that according to the statute, “before ordering restitution, the court must take into account the financial resources of defendant. Utah Code Ann. §§ 76-3-201(4)(c)(i), 77-32a-3. Moreover, when the court determines whether restitution of extradition costs is appropriate, ‘the court shall make the reasons for the decision a part of the court record.’ *Id.* § 76-3-201(4)(d)(i).” Id. at 1234 (footnote omitted).

The supreme court found that the trial court in that matter failed to make the appropriate findings in connection with the restitution of extradition costs. The court declined to infer such findings from the record:

Although the trial judge did not specifically state that he considered Robertson’s financial condition in ordering restitution, as a general rule, “this court upholds

restitution “as provided in Subsection (8).” Utah Code Ann. § 76-3-201(4)(c) (Supp. 1998). Also, according to subsection (4)(d), the trial court “shall make the reasons for the decision a part of the court record.” Utah Code Ann. § 76-3-201(4)(d) (Supp. 1998).

the trial court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings.” *Ramirez*, 817 P.2d at 788 n.6 (Utah 1991). As we discussed above, ***there are limited instances in which this assumption should not be made***: when an ambiguity of the facts makes the assumption unreasonable, *id.* at 788, ***if the statute explicitly provides that written findings must be made***, *Labrum*, 925 P.2d at 939-40, or when a prior case states that findings on a particular issue must be made to impress upon the trial court the importance of the issue so as to ensure that we can properly perform our appellate review function, *see Nelson*, 725 P.2d at 1356 n. 3. [***Imposing***] ***of restitution of extradition costs falls under the Labrum exception.***

Id. at 1234 (bold emphasis added).

According to Robertson and pursuant to Subsections 76-3-201(8)(c) and (4)(d), in considering the four factors relevant to imposition of restitution “the trial court must take the additional step of explicitly noting on the record the reasons for the decision it reached, reflecting the detailed factors listed in the statute.” Robertson, 932 P.2d at 1234.

In Weeks’ case, the state admits that in connection with ordering restitution, the trial court did not “specifically address[] its reasons for restitution.” (S.B. at 18); see Robertson, 932 P.2d at 1234 (where trial court “did not discuss on the record the reasons for ordering restitution of extradition costs” the matter would be vacated and remanded for further proceedings). Indeed, the order of restitution here appears almost as an afterthought, where the trial judge simply stated, “And I will further order that you pay restitution in the amount of \$9,104.35, that you pay a recoupment fee for the use of your publicly provided lawyer of \$250, and I will recommend while you’re there that you receive substance abuse therapy.” (R. 70:Tab 2:10.)

Nevertheless, the state asserts the following statement made by the judge reflects

consideration of the factors: “There’s no mystery about the fact that I’m going to obviously commit you to prison, which is probably where you need to be, at least until you get your head on straight. You’ve taken now since you were 14 to develop this style of living, it’s going to take you a while to undevelop it.” (R. 70:Tab 2:9.) Those statements relate to the fact that the judge intended to send Weeks to prison for the crimes.

The state also suggests that the “additional step of explicitly noting on the record the reasons for the [restitution] decision,” Robertson, 932 P.2d at 1234, may be inferred from the fact that the presentence investigation report contained information relating to Weeks’ dismal job history. (S.B. 19-20.) The report reflects that as a juvenile, Weeks held five separate jobs for short periods of time that paid from 25 cents per delivery to \$5.50 an hour. With respect to each job, Weeks was employed for a few months and then was fired or quit. Also, Weeks was “kicked out” of his parents’ home at age 13, he believed the “highest grade he actually completed was the eighth,” he was ordered to pay restitution in several other cases, and he presently had no income or assets. (Presentence Investigation Report, dated 5-30-99, at 9-11, 13-17.)

It is not clear whether, or to what extent, the trial court took into account Weeks’ lack of financial resources, his inability to pay, or the other court-ordered financial obligations set forth in the presentence investigation report, in ordering restitution in the amount of \$9,104.35. The trial court’s failure to comply with the statutory requirements and case law compels reversal of this matter and remand for further proceedings.

2. The Analysis Set Forth in *Monson* and *Robertson/Labrum* Supports Review of This Issue Under the Plain-Error Doctrine.

The state claims that in the lower court, Weeks did not properly preserve his claim that the court failed to comply with Subsections 76-3-201(8)(c) and (4)(d) in ordering restitution. (S.B. at 15-16.) Yet, Weeks objected to the imposition of restitution pursuant to § 76-3-201. (Case No. 2830:37; Case No. 3049:41; Case No. 3239:39; and R. 60.) Weeks requested a restitution hearing on the matter, which should have been provided to accommodate consideration of the factors set forth in § 76-3-201(8)(c). The issue was properly preserved for purposes of appeal.

The error was plain and obvious. In the alternative, Weeks asserts that this Court may review the trial court's failure to consider the statutory factors under the plain-error doctrine. (Brief of Appellant at 19 n. 5.) The state disputes application of that doctrine on the basis that the error was not obvious: "Here, neither statute nor case law requires the trial court to make specific findings on defendant's financial condition before ordering restitution." (S.B. at 17.) The state is incorrect. The statute mandates that the trial court "make the reasons for the [restitution] decision a part of the record" at the time that it orders restitution. Utah Code Ann. § 76-3-201(4)(d).

Likewise, Utah case law in effect at the time of sentencing in this case provided that "the trial court must take the additional step of explicitly noting on the record the reasons for the [restitution] decision it reached, reflecting the detailed factors listed in the statute," Robertson, 932 P.2d at 1234, including (1) the defendant's financial resources

and the burden that restitution will impose on defendant's other obligations; (2) defendant's ability to pay restitution; (3) the rehabilitative effect on the defendant of restitution payments; and (4) other circumstances which make restitution inappropriate. Utah Code Ann. § 76-3-201(8)(c) (Supp. 1998).

Furthermore, in Monson, although defendant did not object when the Board failed to consider the four statutory factors, the Utah Supreme Court reviewed the issue on the merits and reversed the matter for further proceedings. Monson, 928 P.2d at 1028-29. The supreme court found that "[the] record in this case does not demonstrate that the Board considered the statutory factors because it does not contain any explanation of the reasons the Board ordered Monson to pay restitution." Monson, 928 P.2d at 1028. The record in Weeks' case likewise is silent on the matter.

Finally, the supreme court's discussion of the issue in Robertson relies on State v. Labrum, 925 P.2d 937 (Utah 1996), for support. In Labrum, the Utah Supreme Court ruled that where a statute requires a trial court to make specific findings on the record in connection with a ruling, the trial court's failure to comply with the plain language of the statute constitutes plain and obvious error. Id. at 940-41.³ In Robertson, the supreme court recognized that the language of the Utah restitution statute is plain: the trial court must explicitly note on the record its reasons for ordering restitution, taking into consideration the four statutory factors. Robertson, 932 P.2d at 1234. Thus, where the

³ Weeks does not claim that the trial court was required to make *written* findings.

requirement is explicit in the statute, Robertson and Labrum support application of the plain-error analysis to find that the trial court obviously erred in failing to comply with the statute. See Labrum, 925 P.2d at 940-41; Robertson, 932 P.2d at 1234.


The error was prejudicial. The state does not dispute that Weeks suffered prejudice under the plain-error doctrine. Indeed, because the trial court failed to take the factors into consideration in ordering restitution in the amount of \$9,104.35, there is no assurance that imposition of restitution was appropriate in this case.

In accordance with Robertson and Monson, “the appropriate remedy” is to order the trial court to comply with the statutory provisions of Section 76-3-201, “by giving [defendant] an explanation of its decision which demonstrates that it has taken into account the appropriate statutory factors.” Monson, 928 P.2d at 1028. Weeks respectfully requests that this Court reverse and remand the matter for further proceedings consistent with the statutory mandates of Section 76-3-201(8)(c) and (4)(d).

CONCLUSION

In this case, Weeks was entitled to a “full hearing” on the issue of restitution, and to a review of the information underlying the alleged restitution amount. In addition, Weeks was entitled to have the trial court consider the factors set forth in § 76-3-201(8)(c) in assessing restitution. Weeks respectfully requests that this Court reverse the restitution award since it is based on unreliable information, or in the alternative, vacate the order and remand the case for a “full hearing” and/or appropriate findings.

SUBMITTED this 11th day of July, 2000.


LINDA M. JONES
SCOTT WILLIAMS
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 11th day of July, 2000.


LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this ___ day of _____, 2000.
