2010

State of Utah v. Ronald Dean Udy : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
RONALD DEAN UDY,	:	Case No. 20100726-CA
Defendant/Appellant.	:	Appellant is incarcerated.

REPLY BRIEF

Appeal from an amended Sentence, Judgment, Commitment entered on August 3, 2010, the Honorable William W. Barrett, Judge, Third District Court, Salt Lake County, State of Utah, presiding.

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INTRODUCTION

First, this Court should reverse because the trial court violated double jeopardy by entering an increased sentence at the August review hearing. Ronald Dean Udy had a legitimate expectation of finality in the oral sentencing decision imposed at the May sentencing hearing because the trial court did not expressly reserve the option to change that oral sentencing decision at the August review hearing. Neither the trial court's informal remark at the end of the May sentencing hearing nor the unsigned May 3 order undermined Udy's legitimate expectation of finality. This issue is preserved or can be reached under rule 22(e) of the Utah Rules of Criminal Procedure.

Second, this Court should reverse because the trial court violated Udy's right to allocution and due process when it denied Udy and his counsel the opportunity to speak at the time of sentencing. Udy's opportunity to speak at the May sentencing hearing did not protect his right to speak when he was resentenced at the August review hearing. This

issue is preserved or can be reached through the plain error doctrine or rule 22(e). Udy does not address the remainder of the State's arguments because those arguments are adequately addressed in the opening brief.

ARGUMENT

I. THE TRIAL COURT VIOLATED DOUBLE JEOPARDY BY ENTERING AN INCREASED SENTENCE AFTER UDY GAINED A LEGITIMATE EXPECTATION OF FINALITY IN THE ORAL SENTENCING DECISION IMPOSED AT THE MAY HEARING

First, Udy had a legitimate expectation of finality in the trial court's original sentence because jeopardy attached to the oral sentencing decision imposed by the court at the May sentencing hearing and the court did not explicitly reserve the option to change that oral sentencing decision. See infra Part I.A. Second, this Court should reach the merits of the double jeopardy argument because it is preserved, and the State's claim to the contrary is inadequately briefed. Alternatively, this Court should reach the merits because the State does not contest that rule 22(e) applies. Instead, it assumes that rule 22(e) applies and proceeds to the merits of the issue. See infra Part I.B.

A. Udy Had a Legitimate Expectation of Finality in the Original Sentence Because Jeopardy Attached to the Oral Sentencing Decision Imposed at the May Sentencing Hearing and the Trial Court Did Not Explicitly Reserve the Option to Change That Oral Sentencing Decision.

The State asserts that the trial court "explicitly stayed imposition of the sentence at the May hearing" until the August review hearing. Appellee Br. at 13. It claims that its assertion is "clearly demonstrate[d]" by the record. Id. at 20-21. And it insists that "the trial court did everything it reasonably could to prevent [the] May sentence from becoming the final judgment." Id. at 17.

To support its assertion, the State presents this summary of the proceedings: At the May sentencing hearing, the court "announced a prison sentence," but then "immediately 'stay[ed] the imposition of that sentence.'" Appellee Br. at 13 (citing R.287:51). The court stayed the imposition of sentence at Udy's "own request" in order to allow Udy "to make one final effort to pay restitution before deciding the question of incarceration." Id. at 20 (citing R.287:49-50). "The trial court never stated that jail would commence after the August hearing depending on whether [Udy] had paid restitution." Id. at 21 (citing R.287:53). Rather, the court "told [Udy] that the sentence proposed at the May hearing depended entirely on [Udy's] subsequent behavior and that the sentence would be finally decided in August." Id. at 17 (citing R.287:51-53). The court "told [Udy] he might be sent to prison should he not pay restitution by August." Id. (citing R.287:53). When the court spoke about probation, it "referred to future probation after serving some commitment." Id. at 18 (citing R.287:51). At the August hearing, defense counsel stated "that he understood that whether or not" Udy was sentenced to prison that day "depended on whether [Udy] had paid restitution by that date." Id. (citing R.288:2).

The record does not support the State's recitation of the proceedings. The State cites the May sentencing hearing transcript and the August review hearing transcript to supports its assertions. Excerpts from those transcripts are attached to the opening brief at Addenda D and E for the Court's review. Those pages show that:

1. The trial court did not postpone the imposition of sentence until the August review hearing. When the court said at the May sentencing hearing that it would "stay the imposition of that sentence," it was stating that the prison terms would be stayed in favor

of a jail term and probation. R.287:51 ("I'm going to give [Udy] 1 to 15 on the two second degree felonies; zero to 5 on the third; stay the imposition of that sentence. I'm going to make him do a year in jail. And then after the year in jail, he'll be on 36 months probation."); see R.288:4 (court explaining that it "suspended" the prison terms at the May sentencing hearing). The court's decision was consistent with common practice and Utah law. See Utah Code §77-18-1(2)(a) (Supp. 2010) (allowing court to, "after imposing sentence, suspend the execution of the sentence and place the defendant on probation"); id. at §77-18-1(8)(a)(v) (allowing court to "require that the defendant . . . serve a period of time, not to exceed one year, in a county jail" "as a condition of probation").

2. Udy did not ask the trial court to postpone the sentence so that he could make a final effort to pay restitution before being sentenced. To the contrary, defense counsel told the court that Udy was "ready to go forward" with sentencing that day. R.287:51.

3. The trial court did not tell Udy that the sentence imposed at the May hearing depended on Udy's behavior or that the sentence would not be finally decided until August. On the contrary, the court said, "I'm ready to sentence [Udy]." R.287:51. It then sentenced Udy to prison, but stayed the prison terms and ordered Udy to serve "a year in jail" and "36 months probation." R.287:51. Regarding the August review hearing, the court told Udy that if "[y]ou have these people paid off because this money has come in in the 60 day time frame, I'll reconsider the jail sentence and I may cut it down." R.287:51. But "if you don't, you're going to do the year regardless." R.287:51.

4. The trial court did not tell Udy that he might be sent to prison if he did not pay restitution by August. Appellee Br. at 17. Nor did the trial court loosely refer to "some

commitment" to be served before probation. See id. at 18. Rather, the court told Udy that he would serve a "year in jail" and "36 months probation." R.287:51. The court then told Udy that it would "reconsider the jail sentence" and possibly "cut it down" if Udy paid the restitution by the August review hearing. R.287:51.

5. Defense counsel did not say at the August review hearing that he understood that whether Udy was sentenced to prison that day depended on whether Udy had paid the restitution. To the contrary, defense counsel said that his "understanding [was] that the prison was suspended" and that Udy "was sentenced to one year in the Salt Lake County Jail." R.288:4. Defense counsel also said that his understanding was that if Udy had paid the restitution by the August review hearing "there would be a discount" in the jail sentence, "but not that there would be additional--." R.288:4-5. Defense counsel could not complete his statement, however, because the trial court interrupted him. R.288:5; see Appellant Br. at 32-40; infra Part II.A (discussing why trial court's interruptions deprived Udy of his rights to allocution and due process).

In reality, the State's argument rests on an informal comment made by the trial judge at the end of the May sentencing hearing and the unsigned May 3 order. Neither of these facts, however, undermined Udy's legitimate expectation of finality in the sentence.

First, the court's informal remark at the end of the May sentencing hearing did not undermine Udy's legitimate expectation of finality because the court did not expressly reserve sentencing until the August review hearing. After the court imposed sentence at the May hearing, the court and counsel discussed the logistics of the restitution payment. R.287:51-53. As that discussion ended, the State commented that the check would have

to clear before the restitution money could be delivered to the creditors. R.287:53. In response, the court said, "Well, I know that. The check's got to clear. We're going to be realistic here. But if that makes everybody feel good, and I know some of you—we had a mixed group here, I think, but I'm going to give him that time frame and if the money's not there, he's at least going to go to jail, and he may go to prison." R.287:53.

It is evident from the record that none of the parties perceived the court's comment as anything more than an offhand remark. Defense counsel responded to the remark by saying, "Thank you, Your Honor," and continuing the discussion about restitution. R.287:53. And the State remained silent. R.287:53. If the State perceived the remark as a revocation of the already-imposed sentence, it should have requested clarification and asked whether the court intended to postpone sentencing until the August review hearing. R.287:53; see United States v. Husein, 478 F.3d 318, 339-40 (6th Cir. 2007) (noting government could have "asked the court to" delay sentencing, but it "never" did and "[i]ts afterthought on appeal simply comes too late"). That the State did not ask for clarification is evidence that it, like Udy, understood the comment as an offhand remark and felt satisfied with the sentence imposed by the trial court. R.287:45 (prosecutor stating that the State was not seeking prison time in Udy's case).

Thus, as explained in the opening brief, to the extent that the trial court's informal remark carried any weight at all, it did not eliminate Udy's legitimate expectation in the finality of the sentence. See Appellant Br. at 27-28; State v. Horrocks, 2001 UT App 4, ¶25, 17 P.3d 1145 (double jeopardy allows a trial court to "change an oral sentencing decision when it has *specifically reserved* that option pending receipt of further

information relevant to sentencing" (emphasis added)). Rather, the remark should be interpreted consistently with the sentence: Udy could receive a reduced jail term if he paid the restitution by the August review hearing; otherwise, he would serve a year in jail and thirty-six months of probation, and he could be sent to prison if he violated his probation. See Appellant Br. at 27-28.

Second, the lack of a signature on the May 3 order does not undermine Udy's expectation of finality because Udy's expectation of finality arose from the trial court's oral sentencing decision. The State claims that the court must have rescinded the sentence it imposed at the May sentencing hearing because it did not sign the May 3 Sentence, Judgment, Commitment order. See Appellee Br. at 14, 17. But it is the oral sentencing decision, not the final signed order, to which jeopardy attaches.

The State concedes that Horrocks provides "the proper framework for analyzing when jeopardy attaches to judgments." Appellee Br. at 15 n.2. Horrocks says that "a final signed order" is not required for jeopardy to attach. Horrocks, 2001 UT App 4, ¶23. Rather, jeopardy attaches to "an oral sentencing decision" unless the court "expressly decline[s] to impose a final sentence until it has had the opportunity to review sentencing information." Id. at ¶¶23-24.[1] In this case, as explained above and in the opening brief,

[1] Although State v. Todd, 2006 UT 7, 128 P.3d 1199, does not address double jeopardy, it too recognizes the importance of "the oral announcement of the sentence" in determining a defendant's understanding of the sentence. Todd, 2006 UT 7, ¶8. That case holds that "the oral announcement of the sentence" triggers "the ten-day window for filing a motion for new trial" because "the defendant is much more likely to be immediately aware of the precise date of the oral announcement of the sentence." Id. Thus, Todd held that "the date of the oral announcement of the sentence to the defendant is the date of imposition of sentence *for all purposes*." Id. (emphasis added).

the court did not expressly decline to impose sentence until the August review hearing. To the contrary, it imposed sentence at the May sentencing hearing and set the August review hearing for the purpose of reducing the jail sentence if Udy successfully paid the restitution. See Appellant Br. at 23-29. Thus, jeopardy attached because Udy developed a legitimate expectation of finality in the sentence, and the court was prohibited from increasing that sentence at the review hearing. See Husein, 478 F.3d at 338.

B. This Court Can Review Udy's Double Jeopardy Claim Because the State Inadequately Briefed Its Claim that the Issue Is Not Preserved and/or Because Udy's Sentence Is Illegal and Was Imposed in an Illegal Manner.

This Court should reach the merits of the double jeopardy argument because it is properly preserved (or the failure to properly preserve it constituted ineffective assistance of counsel, see Appellant Br. at 30 n.2) and because it is an illegal sentence that may be corrected at any time under rule 22(e) of the Utah Rules of Criminal Procedure.

The State claims that Udy did not preserve the double jeopardy claim below. See Appellee Br. at 11. The State, however, does not support its argument with any analysis or citations to case law or the record. See id. Thus, this Court should disregard the State's preservation argument because it is inadequately briefed. See Utah R. App. P. 24(a)(9), (b), (k) (appellee brief must contain "citations to the authorities, statutes, and parts of the record relied on"; briefs that "are not in compliance may be disregarded or stricken, on motion or sua sponte by the court"); State v. Thomas, 961 P.2d 299, 305 (Utah 1998) (holding issue is inadequately briefed "when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court").

Moreover, the State's summarily raised preservation argument overlooks pages four through five of the August review hearing transcript, where defense counsel questioned the trial court's authority to amend the sentence at the August review hearing. R.288:4-5. It also overlooks defense counsel's Motion to Correct Sentence under rule 22(e) of the Utah Rules of Criminal Procedure. See R.235-60.

Perhaps, the State intends to argue that the issue is not preserved because defense counsel never used the phrase "double jeopardy" when preserving the issue for appeal. As explained in the opening brief, however, defense counsel's argument was sufficient to preserve the double jeopardy issue because it followed the traditional double jeopardy analysis and it satisfied both policies of the preservation rule. See Appellant Br. at 29-30.

Even if an issue is raised "indirectly," it is properly preserved so long as it is "'raised to a level of consciousness such that the trial judge can consider it.'" State v. Brown, 856 P.2d 358, 361 (Utah Ct. App. 1993) (citation omitted). Thus, in State v. Garcia, 2007 UT App 228, 164 P.3d 1264, this Court held that the State's argument relying on the "Franks doctrine" was preserved even though "the State did not formally cite the Franks case below," because it "argued the underlying premise of the Franks doctrine" and this Court had "no doubt the trial court was on notice of the State's legal argument." Garcia, 2007 UT App 228, ¶10; see, e.g., State v. Bujan, 2006 Utah App 322, ¶¶21-22, 142 P.3d 581 (holding "counsel's objections, in conjunction with the court's reliance on rule 801, were sufficient to preserve the issue for appeal" because "both of the policies articulated in Holgate" were satisfied and "the trial court clearly understood that counsel's objection pertained to rule 801"), aff'd, 2008 UT 47; see State v. Valenzuela,

2001 UT App 332, ¶25 n.4, 37 P.3d 260 (addressing the identity issue even though it was not specifically preserved because defendant preserved the probable cause issue and the identity issue was included in the probable cause issue); Nielsen v. Pioneer Valley Hosp., 830 P.2d 270, 272 (Utah 1992) (stating that although "[defendant's] objections were not textbook examples of specificity," they nonetheless "adequately directed the trial judge's attention to the claimed error" such that "they were sufficient").

In sum, the "preservation requirement is self-imposed and is therefore one of prudence rather than jurisdiction." Patterson v. Patterson, 2011 UT 68, ¶13, --- P.3d ---. Given the State's failure to explain why it believes the issue is not preserved, therefore, this Court should "exercise" its "wide discretion" to address the issue on appeal. Id.

Besides, as explained in the opening brief, there is no need for this Court to determine whether the issue is adequately preserved because this Court may reach the issue under rule 22(e). See Appellant Br. at 30-31. In the response brief, the State says that it will not "conced[e]" that rule 22(e) applies, but it provides no argument as to why rule 22(e) would not apply. See Appellee Br. at 11. Instead, it "assum[es] . . . that rule 22(e) provides a remedy for violations of double jeopardy at sentencing" and proceeds to the merits of the issue. Id. Thus, despite the State's summary claim that the double jeopardy argument is not preserved and its summary assertion that it does not concede the applicability of rule 22(e), this Court should reach the merits of the claim because it is preserved and because the State essentially concedes that rule 22(e) applies.

II. THE TRIAL COURT VIOLATED UDY'S RIGHTS TO ALLOCUTION AND DUE PROCESS WHEN IT DENIED UDY AND HIS COUNSEL THE OPPORTUNITY TO SPEAK AT THE TIME OF SENTENCING

First, Udy's rights to allocution and due process were violated because Udy and defense counsel were denied the opportunity to speak at the time of sentencing. See infra Part II.A. Second, this Court should reach the merits of the issue because the issue is preserved and the State inadequately briefed its argument to the contrary, Udy has shown that the error was prejudicial under the plain error doctrine, and Udy's sentence is an illegal sentence that may be corrected at any time under rule 22(e). See infra Part II.B.

A. Udy's Rights to Allocution and Due Process Were Violated Because Udy and Defense Counsel Were Denied the Opportunity to Speak At the Time of Sentencing.

The State claims that Udy's rights to allocution and due process were not violated at the August review hearing because they were protected at the May sentencing hearing. See Appellee Br. at 23-28. The State's argument follows the same reasoning it employed in its double jeopardy argument—the August review hearing "was merely a continuation and conclusion of the sentencing hearing that began in May." Id. at 24. As explained in Part I, this argument fails because it is not supported by the record. See supra Part I.A.

The record shows that the May hearing was a complete sentencing hearing at which Udy's rights to allocution and due process were protected and the trial court imposed a legal sentence. See Appellant Br. at 35. As explained by the trial court, the August hearing was a review hearing: The court sentenced Udy to jail time and probation, but agreed to hold a "review" hearing in August in order to consider reducing the "jail sentence" if Udy had "paid off" the restitution by then. R.287:51. When Udy and

his counsel appeared at the August hearing, however, it became apparent that this was not the review hearing promised by the trial court, but a new sentencing hearing. The court announced: "I initially said that I was going to give him a year in jail," but "I've revisited this in my head." R.288:3-4. The court then imposed a new, much harsher, sentence: "He's going to prison to be taken forthwith, 1 to 15, zero to 5 concurrent." R.288:3.

Udy does not complain that he was denied "the unlimited right to continue allocuting for as long as [he] wish[ed]." Appellee Br. at 28. Rather, he asserts that his right to allocution was violated because he and his attorney were not allowed to speak at the time of sentencing. Appellant Br. at 32-38. The right to allocution demands that the defendant and his counsel be given the opportunity to speak "[a]t the time of sentence." Utah Code §77-18-1(7); see Utah R. Crim. P. 22(a) ("Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment . . ."); State v. Milligan, 2011 UT App 390, ¶16, 265 P.3d 132 (remanding for resentencing because trial court denied the right to allocution by amending an illegal sentence without granting defendant the opportunity to argue for concurrent sentences at the time the illegal sentence was corrected).

The right to speak at the time of sentence was critical in this case because the trial court's sentencing decision at the August review hearing was discretionary, and the denial of allocution at that hearing led the court to impose a harsher sentence based on speculation. The court did not allow Udy to explain why he had not received the art project commission yet. R.288:1-2. Instead, it concluded that Udy "lied to me" about the commission and "he's going to pay the price." R.288:4; see R.288:5 ("[H]e lied to me.

And I think I have a right to pull the plug on that because of his conduct."); R.288:5 ("And he has an obligation to this Court to tell me the truth and he didn't. So he's going to prison."). Further, the trial court accepted as true the State's speculation that the commission would never materialize because Udy "is probably being scammed and he's taken some of . . . this latest money that he's received from people, sent it on to this bigger fish that's scamming him." R.288:3. Thus, this Court should vacate the August 3 sentencing order and impose the original May 3 sentencing order because the trial court violated Udy's rights to allocution and due process at the August review hearing.

B. This Court Can Review This Issue on Appeal Because the Issue is Preserved and the State's Argument to the Contrary Is Inadequately Briefed, the Trial Court's Error Was Plain, and Udy's Sentence Is Illegal and May Be Corrected at Any Time Under Rule 22(e).

This Court should reach the merits of the allocution issue because it is properly preserved and the State's argument to the contrary is inadequately briefed, because the trial court's error was plain, or because Udy's sentence is an illegal one that may be corrected at any time under rule 22(e).

The allocution issue is properly preserved. The State claims that Udy did not preserve the allocution claim below, but the State does not support its argument with any analysis or citations to case law or the record. See Appellee Br. at 11. Thus, this Court should disregard the State's preservation argument because it is inadequately briefed. See Utah R. App. P. 24(a)(9), (b), (k); Thomas, 961 P.2d at 305.

Besides, the State's summarily raised preservation argument overlooks pages one through five of the August review hearing transcript where defense counsel preserved the

issue by repeatedly attempting to speak on Udy's behalf, but was prevented from doing so by the trial court. See R.288:1-5. As explained in the opening brief, defense counsel's repeated attempts to speak preserved the issue for appeal because they satisfied both purposes of the preservation rule. See Appellant Br. at 38-39; see Patterson, 2011 UT 68, ¶15 ("in assessing application of our preservation rule, we find it useful to examine its underlying policies"). This issue can be decided from the record; it does not "'depend[] on controverted factual questions whose relevance thereto was not made to appear at trial.'" Id. (citations omitted). Thus, this Court should "exercise" its "wide discretion" to address the issue on appeal. Id. at ¶13.

Alternatively, this Court may reach the issue under the plain error doctrine. The State's brief does not address the obviousness of the error. See Appellee Br. at 23. Thus, the opening brief is adequate to explain obviousness. See Appellant Br. at 39. Moreover, the State's brief misstates the prejudice standard. The State argues that the prejudice standard requires Udy to show "that he would have provided the sentencing court with evidence or argument that *would have resulted* in a more favorable outcome." Appellee Br. at 23 (emphasis added); see id. at 30 (claiming Udy "must show that the trial court *likely would have* entered a more lenient sentence" (emphasis added)). The State also argues that the prejudice standard requires Udy to "demonstrate that the court would have been compelled to believe [his] argument or evidence." Id.; see id. at 27-28 (arguing Udy was not prejudiced because his statements "would not have been believable").

In reality, the prejudice standard only requires Udy to show that the error was "'harmful,'" meaning that "'absent the error, there [was] a *reasonable likelihood* of a

more favorable outcome.'" State v. Garcia, 2001 UT App 19, ¶6, 18 P.3d 1123 (emphasis added) (citations omitted). This standard does not require the defendant to prove that the trial court "would have been compelled to believe" his statements at sentencing. Appellee Br. at 27-28. It only requires him to show that the trial court "could have been swayed" by his statements. State v. Hales, 2007 UT 14, ¶92, 152 P.3d 321; see Milligan, 2011 UT App 390, ¶16 (reversing right to allocution error in amended sentence because "we think it is possible that [defendant] could have convinced the court to order that the amended sentence be served concurrently with his other sentences"). Udy has met this standard. See Appellant Br. at 39-40.

Udy had documentation to show that the art project commission was imminent, and he was prepared to explain the "significance" of that documentation to the court. See R.288:1-2. Defense counsel represented that he had maintained "contact with a number of Mr. Udy's creditors" and that the majority of those creditors believed Udy's assertion that the commission was imminent. R.288:1-2. There is a reasonable likelihood that Udy's explanation could have swayed the trial court too, if the court had honored Udy's right to allocution. See Hales, 2007 UT 14, ¶92. But the court did not give Udy the chance to speak. Instead, it silenced Udy and defense counsel and imposed the new sentence based on speculation. See Appellant Br. at 32-38. Given that the State was not seeking prison time in Udy's case, see R.287:45, and that the court sentenced Udy to probation when it permitted Udy to speak at the May sentencing hearing, there is a reasonable likelihood that the outcome of the August review hearing would have been more favorable to Udy had his rights to allocution and due process not been violated. See Appellant Br. at 39-40.

This court may also reach the issue under rule 22(e). The State claims in a footnote that rule 22(e) should not apply to the allocution issue because the issue is an "ordinary or 'run of the mill' error[]." Appellee Br. at 23 n.4 (quoting State v. Candedo, 2010 UT 32, ¶9 n.2, 232 P.3d 1008). This argument fails because Utah case law states that rule 22(e) encompasses sentences imposed in violation of due process, express statutory provisions, and/or rule 22(a) of the Utah Rules of Criminal Procedure.

First, "the definition of illegal sentence under rule 22(e) is sufficiently broad to include constitutional violations that threaten the validity of the sentence." Candedo, 2010 UT 32, ¶¶11, 14; see, e.g., State v. Garner, 2008 UT App 32, ¶¶18, 20-25, 177 P.3d 637 (reviewing "[d]efendant's claim that Utah's indeterminate sentencing scheme violates his Sixth Amendment rights" under rule 22(e)). Thus, when presented with a due process claim that threatens the validity of the sentence, Utah appellate courts have addressed the merits of the issue under rule 22(e). See, e.g., Candedo, 2010 UT 32, ¶14 (reviewing substantive due process claim under rule 22(e)); State v. Telford, 2002 UT 51, ¶¶2-4, 48 P.3d 228 (invoking rule 22(e) to reach argument that indeterminate sentencing violates Utah's due process clause).

Second, the definition of illegal sentence is sufficiently broad to include sentences that fail "to comply with express statutory provisions." Candedo, 2010 UT 32, ¶13; see, e.g., State v. Yazzie, 2009 UT 14, ¶¶11-13, 203 P.3d 984 (invoking rule 22(e) to reach argument that sentence was illegal "because it did not comply with the statutory requirement to determine concurrent or consecutive sentencing at the time of final judgment"). Utah Code section 77-18-1(7) is an express statutory provision: "At the time

of sentence, the court shall receive any testimony, evidence, or information the defendant . . . desires to present concerning the appropriate sentence." Utah Code §77-18-1(7).

Third, "a sentence imposed in violation of rule 22(a) of the Utah Rules of Criminal Procedure may be considered a 'sentence imposed in an illegal manner' under rule 22(e)." State v. Samora, 2004 UT 79, ¶13, 99 P.3d 858 (citation omitted). Rule 22(a) includes the right to allocution: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed." Utah R. Crim. P. 22(a).

In this case, as explained in the opening brief, the Court may reach the merits of the allocution issue under rule 22(e) because the sentence was imposed in violation of the right to allocution, as delineated in rule 22(a) and Utah Code §77-18-1(7), and the right to due process. See Appellant Br. at 40. It was also imposed in an illegal manner because it was imposed in violation of the rights to allocution and to due process. See id. Thus, this Court should vacate the August sentence and impose the original May sentence.

CONCLUSION

Udy respectfully requests that this Court vacate the amended sentence dated August 3, 2010, and impose the original sentence dated May 3, 2010.

SUBMITTED this 19 day of January, 2012.

Lori Seppi

LORI J. SEPPI
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 19 day of January, 2012.

Lori Seppi

DELIVERED this ___ day of January, 2012.