

1990

Utah v. Hook : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 900139-CA
IN THE COURT OF APPEALS, STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff,	:	
vs.	:	
IRENE HOOK,	:	
Defendant.	:	COURT OF APPEALS
	:	CASE No.900139-CA
<hr/>		
HARRIS-DUDLEY PLUMBING COMPANY	:	
a Utah corporation,	:	
Third Party Judgment Creditor	:	
Respondent	:	
v.	:	
IRENE HOOK & ROBERT D. JOHNSON,	:	
Third Party Defendant Judgment Debtor	:	
Appellant.	:	

BRIEF OF APPELLANT ROBERT D. JOHNSON

Appeal to Reverse Trial Court's Judgment Denying Appellant's
Motion to Quash Respondent's Writ of Execution

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities Cited.	ii
Statement Of Jurisdiction	1
Nature of the Case	1
State of Issue on Appeal.	2
Statement of the Case	2
Summary of Argument	5
Argument I The Trial Court Committed Reversible Error In Denying Third Party Defendant Debtor- Johnson's Motion To Quash The Writ Of Execution	6
Argument II There Was Not Sufficient Evidence To Support The Court's Findings Of Fact And Conclusions Of Law That There Was A Fraudulent Conveyance Of The Boat And Trailer By Hook	11
Conclusion	15
Mailing Certificate	16

TABLE OF AUTHORITIES CITED

	Page
 CASES	
<u>Baccalero v. Bee</u> 126 p. 2d 1063	12
<u>Dahnken Inc. v. Wilmarth</u> 726 p. 2d 420	13
<u>Fort Collins Production Credit Ass'n v. Carrol Dairy</u> 553 p. 2d 95	8
<u>Harlene v. Campbell</u> 782 p. 2d 980	10
<u>Horton v. Horton</u> 695 p. 2d 102	10
<u>Jensen v. Eames</u> 30 Utah 2d 423, 519 p. 2d 263	12
<u>Kulic v. Albers, Inc.</u> 532 p. 2d 603	8
<u>Martins v. Metzger</u> 591 p. 2d 541	12
<u>Parks Enterprises, Inc. v. New Century Realty Inc.</u> 652 p. 2d 918	11
<u>Pelcher v. State Dept. Social Services</u> 663 p. 2d 450	9
<u>Reid v. Mutual of Omaha Ins. Co.</u> 776 p. 2d 896	10
<u>Sears Roebuck and Co. v. Walker</u> 621 p. 2d 938	9
<u>Smith v. Ut. Cent. Credit Union</u> 727 p. 2d 219	10

STATUTES CITED

Sec. 25-6-1 to 13 U.C.A. 1953, as amended	5, 13, 14
Sec. 76-3-201 (3) (a) (1) and (2)	14

TREATISES CITED

McCormick on Evidence, 286:2d Edition	13
Am Jur 2d p. 833	12

JURISDICTIONAL STATEMENT

The Court of Appeals of the State of Utah has jurisdiction over this appeal pursuant to §78-2a-3(2)(a) of the Utah Code 1953 as amended.

NATURE OF THE CASE

Robert D. Johnson, Third Party Defendant Judgment Debtor, hereinafter referred to as "Johnson", filed a "Motion to Quash Writ of Execution" and "Motion For Declarative Relief" on the 31st day of March, 1988. (TR pgs. 67-68).

The above motions were filed to stay the execution and sale of property, pursuant to a Writ of Execution served on Johnson March, 1988 by Harris Dudley Plumbing Co., Inc., a Utah Corporation, hereinafter known as "Harris" (TR Pg. 59). The Writ was an execution on property, to-wit: a boat and trailer in his possession. The property was alleged to belong to a third party on whom Harris believed he had a civil suit claim and judgment based on a restitution order in a criminal case. State of Utah v. Irene Hook, Cr. No. 87-172 (TR pgs. 2-55).

Judge Raymond S. Uno, after several hearings concerning the Motion to Quash; a subsequent issue of the legal ownership of the boat and trailer and if there were a

fraudulent conveyance of the property to Johnson ruled as follows: That Irene Hook is the owner of the boat and trailer, there was a fraudulent conveyance of the property to Johnson and Johnson's Motion to Quash is denied. (TR pg. 306-312).

Johnson hereby appeals the final Judgment and Order of Judge Uno, in its entirety, as such ruling was not substantiated by the facts in evidence and is clearly an erroneous ruling based on the facts and the law pertinent to these facts.

STATEMENT OF ISSUE ON APPEAL

1. Whether or not the trial court committed reversible error in denying Third Party Defendant Debtor - Johnson's Motion to Quash the Writ of Execution.

2. Whether or not there was sufficient evidence to warrant the Court's Findings of Fact and Conclusions of Law that there was any fraudulent conveyance of the boat and trailer.

STATEMENT OF THE CASE

This case arises originally from a criminal proceeding and proceeds to become a quasi civil and eventually a civil matter with fraud alleged. It is, because of the convoluted nature of this case that Johnson

feels that some background information would be helpful.

The criminal and original proceeding State of Utah v. Hook Cr. No. 87-172 began 1-06-87 (TR pg. 03-119). The criminal charges involved four counts of theft, second degree felonies, from the company of Harris-Dudley Plumbing and Heating Co. Inc. (TR pg 09-11). Ms. Hook, on April 6, 1987, before Judge Uno, pursuant to a plea bargain, entered a plea of guilty to one (1) count of theft, a second degree felony and all other charges were dismissed. Ms. Hook was fined, placed on probation for 18 months and referred to adult Parole and Probation Dept. (TR 16-19). Ms. Hook was ordered to pay restitution "...to be determined by a restitution hearing if necessary." (TR p 18) (emphasis added). The relevancy of this will be apparent. The A.P. & P. determined Ms. Hook pay \$10,000.00 restitution. She paid restitution on May, 1987. (TR 20-21). This is where the above does become pertinent to the civil nature of this case. On May 19, 1987 the Salt Lake County Attorney's Office informed the Court they wanted a hearing on the restitution as the A.P. & P. determination was not enough. (TR. P. 24,26).

A non-evidentiary hearing was held before Judge Uno on the 21st day of September, 1987. He determined and

signed an Order that Ms. Hook would now owe another \$399,000.00 restitution (TR P. 37-39). In this Order he also ordered that A.P. & P. collect the restitution.

It is by this second determination of restitution that Harris claims the right to proceed against Ms. Hook and ultimately Johnson. Harris, on March 17, 1988, started civil proceedings against Ms. Hook to collect the money by a motion in Supplementary Proceedings. (TR P. 47) This was the only civil pleading in the whole case. On March 25, 1988 Johnson was served with a Writ of Execution to execute and sell a boat and trailer that Harris alleged was owned by Ms. Hook and not Johnson. Upon receipt of this Johnson filed a Motion to Quash the Writ of Execution.

The matter was originally set for argument on April 4, 1988, the date before the execution sale (TR. P 68). Intervening events concerning the legality of the restitution and Harris' desire to take depositions, (12 in all), delayed the matter to June 14, 1988. Other evidentiary hearings were heard August 5, 1988 and September 19, 1989 before Judge Uno. (TR pg. 336, 337, 339).

The first issue of these hearings became whether or not Johnson owned the boat and trailer at the time of the execution. The second issue was whether or not there was a

fraudulent conveyance of the boat by Ms. Hook to Johnson.

The property in question on this appeal concerns a 24'2" fiberfoam boat and trailer owned by Johnson. The uncontradicted admissible facts presented in this case are basically that Johnson purchased this boat on February 26th or 27th, 1979 from Petersen Marine and subsequently sold a 2/3 interest to Ms. Irene Hook May 28, 1982. That on or about April 27, 1987 she transferred the boat and trailer back to him. (TR 63-64) (Exhibits A B & C TR. 65-66 Evidentiary Hearing dated June 14, 1988).

Judge Uno finally ruled that under Sec. 25-6-1- to 13) U.C.A. 1953 as amended, attached appendix I, Uniform Fraudulent Transfer Act, there was a fraudulent transfer of the boat to Johnson; therefore, he didn't legally own the boat and the Motion to Quash was denied. Mr. Johnson appeals this erroneous decision on the grounds there was insufficient admissible evidence on the record to support the judgment.

SUMMARY OF ARGUMENT

Johnson contends that the dearth of relevant and admissible testimony, both documentary and otherwise supports his argument that there is not sufficient evidence to support the Trial Court's findings. The only logical and

true conclusion would have been to grant the Motion to Quash and return the boat and trailer to Johnson.

This argument for reversal is supported by Johnson's affidavit, (TR. pg. 63-66), Hook's affidavit, (TR. pg 141-145) testimony at the hearings and their depositions. Johnson's evidence together with that of Irene Hooks can only lead to one proper conclusion and that is that Johnson owns the boat and it should be returned to him.

ARGUMENT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THIRD PARTY DEFENDANT DEBTOR - JOHNSON'S MOTION TO QUASH THE WRIT OF EXECUTION

The following pertinent facts are uncontradicted and undisputed. Johnson purchased the boat and trailer in question in February, 1979; that on May 28, 1982 he sold an interest in the fiberfoam boat and trailer to Irene Hook (TR 129). The next transaction occurred April 27, 1987, when Ms. Hook transferred the boat back to Johnson for release of a debt owed to Johnson by Ms. Hook. (TR 64,65 exhibit A) The consideration involved for the transfer was \$6,000.00 he loaned her parents, \$3,466.22 for payments and insurance Johnson paid for her Blazer vehicle, together with \$5,000.00 she still owed him on the boat. (TR P. 142 4) Ms. Hook's affidavit.

Documentation and evidence showing a valid transfer of the property are the statements, unrebutted by Harris, that Hook did sign the required documents for registration of the boat to Johnson in Wyoming and delivered the original bill of sale to Johnson. (TR. P. 142-143). At this time no titles on boats existed in the State of Utah.

Johnson contends that the only testimony Harris has placed on the issue of the Motion to Quash is an affidavit filed by Mr. John R. Dudley, President of the Company Harris-Dudley Plumbing Company (TR P. 116-118). His entire affidavit is not shown to be based on any legal, documentary or other evidence and further states conclusions of law that clearly are not admissible. The affidavit is self serving and does nothing to counter Johnson's legitimate claim to the property.

The testimony elicited from Johnson about his relationship with Ms. Hook was remote in time and totally irrelevant to the issues before the Court. None of it should have been allowed in evidence to be used in rendering a decision.

The evidence presented by Harris was not competent to establish ownership of the boat. The documentary evidence he introduced was a Utah Title of Registration

which only showed what was on the State's computer at the time. On the other hand, Johnson's documents showed a signed off title to the trailer and registration of ownership of the boat to him in Wyoming together with the bill of sale. Harris did not present any evidence on the Motion to Quash.

For Harris to prevail, the Trial Court had to find evidence that Ms. Hook owned the boat and that this was a valid civil judgment collection proceeding.

"Civil Rule authorizing non exempt property to satisfy a judgment may not be used where the property may be subject to valid claims of other creditors". (emphasis added)
Fort Collins Production Credit Ass'n v. Carrol Dairy, 553 P. 2d 95.

In Johnson's case evidence clearly and convincingly shows not only a valid claim on his part but legal ownership.

"In order for property to be property subject to execution, it must be owned by the party against whom judgment was entered". Kulic v. Albers, Inc. 532 P. 2d 603. Irene Hook did not own the boat upon which the execution was issued. The sole and only purpose of the hearing before Judge Uno was to determine whether or not the Motion to Quash a Writ of Execution on property owned by Johnson should have been granted. As a corollary some evidence was necessary to

establish Johnson's legitimate prior claim to the property. Johnson claims he has sustained his burden while Harris has not.

The function of the Court of Appeals as an appellate Court is to review the record and determine whether there is a reasonable basis therein for the ruling made by the Trial Court. Sears Roebuck and Co. v. Walker, 621 P. 2d 938. The Court of Appeals must determine whether Johnson is entitled to a Judgment of reversal as a matter of law. Johnson has established all the viable evidence showing his ownership and the legal and pragmatic rationale for all transactions. There is no reliable substantial evidence to the contrary by the opposing party, just innuendoes and hearsay, and some fear. (See Irene Hooks deposition pages 28, 34-36 et seq. 72-77, 110 & 111.) Johnson's un rebutted evidence alone stands for a finding of no reasonable basis whatsoever for the trial Court's ruling in this matter.

Harris's evidence on the other hand was irrelevant, hearsay, remote and did not focus on the issue and although in the record most was stricken as remote and hearsay. As the Court stated in Pelcher v. State Dept. Social Services, 663 P 2d 450.

"Matters not admitted into evidence before the trier of fact will not be considered on appeal".

Johnson contends this Court should completely disregard the testimony of James Crafts and Marcia A. Eldridge. Johnson is aware of the challenging standard set down by the courts in gaining a reversal on appeal of a Trial Court as stated in Reid v. Mutual of Omaha Ins. Co., 776 P 2d 896.

"To mount a successful challenge to the correctness of Trial Court's Finding of Fact, appellant must first marshal all evidence supporting finding and then demonstrate that all evidence is legally insufficient to support findings in viewing it in light most favorable to the Court below".

Johnson contends that in the preceding pages and argument this has been accomplished. Johnson ascribes to the theory espoused in Harlene v. Campbell, 782 P 2d 980. "that...findings of the Trial Court will be disturbed if there is no substantial record of evidence to support them". Again the record speaks emphatically for Johnson's right to have the lower court's decision reversed. The findings in this case should be disturbed as they are not based on substantial, competent and admissible evidence. See Smith v. Ut. Cent. Credit Union, 727 P 2d 219 Horton v. Horton,

695 P 2d 102. The Court should follow this tenant and reverse this case, based on Martins v. Metzger, 591 P 2d 541, where it said: ..." will disturb Trial Court's findings when...left with a definite and firm conviction on the entire record that a mistake has been made, even though there may be evidence to support the findings".

Harris failed in sustaining his evidentiary burden of proof of clear and convincing evidence. The record on appeal clearly preponderates against him and the Trial Court's findings should be reversed. See Parks Enterprises, Inc. v. New Century Realty Inc., 652 P 2d 918.

In the case before the Court there is absolutely no evidence to support the Court's findings. The only admitted evidence before the Court on this issue of boat ownership is that of Johnson and Hook. Their testimony clearly places the ownership with Johnson.

ARGUMENT II

THERE WAS NOT SUFFICIENT EVIDENCE
TO SUPPORT THE COURT'S FINDINGS OF
FACT AND CONCLUSIONS OF LAW THAT
THERE WAS A FRAUDULENT CONVEYANCE
OF THE BOAT AND TRAILER BY HOOK

The issue of fraudulent conveyance was not properly before the District Court and Johnson objected to the matter being heard. However, assuming that issue was

properly before the Court, there is no evidence to support the Court's findings. (Evidentiary Hearing held June 14, 1988, P. 25,26) It should be noted that if Mr. Dudley's affidavit, was in any way pertinent to the case it was fully and completely answered and rebutted by the affidavit of Ms. Hook. Harris has no evidence to justify any of his claim.

The Utah Supreme Court has held...."that once contested the burden is upon the one alleging the fraudulent conveyance to prove by clear and convincing evidence that the transfer was in fact fraudulent". (emphasis added) Jensen v. Eames, 30 Utah 2d 423, 519 p 2d 263; Baccalero v. Bee 126 p 2d 1063 Am Jur 2d See 166. p. 833

Johnson contends that nowhere in the volumes of pleadings and testimony has Harris introduced any reliable relevant evidence to portray any intent of Ms. Hook or Johnson to perpetrate any fraud. If we go through the most rudiment indicia of a fraudulent conveyance there is no evidence to support the Trial Court's judgment. The courts have usually looked at the following "badges of fraud" in considering the determination thereof and Harris's evidence didn't prove any of them.

There was (1) no indication of proof of concealment of the transfer and (2) no proof of insolvency of Ms. Hook. Although both parties were having financial

problems, for instance she had to mortgage her home for \$10,000.00 to pay the original restitution order and Johnson's business was faltering. Further, she received no cash money, stock, or any other real financial gain from the transfer, she received a release of a previous debt. (3) There was no evidence that the transfer was made in anticipation of any lawsuit. In fact she thought it was all over when she paid the fine and \$10,000.00 in restitution originally ordered. (4) There is no false statement as to the consideration received as it is documented by the parties all through out the hearing. See generally Dahnken Inc., v. Wilmarth, 726 P2d 420.

Even under Sec. 25-6-5 U.C.A. 1953, as amended Harris fails to meet the requirements needed for a fraudulent claim before or after transfer made.

(1) He didn't show it was made with actual intent, to hinder, delay or defraud any creditor and (2) without receiving a reasonable equivalent value in exchange for transfer (emphasis added)

Again, we see that under case law and the statute itself Harris has failed to meet his burden of proof. The principle is clearly espoused by E. Cleary, McCormick on Evidence, 286:2d Edition

"The burden of pleading and proof with regard to most facts have been and should be assigned to Plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."

Harris has failed to meet his burden of proof and persuasion.

Under §76-3-201 (3) (a) (1) and (2) U.C.A. 1953 as amended, "a civil penalty may be included in a sentence and a judgment for restitution can become a lien in a civil action, and be treated procedurally as all other civil cases". The way this statute is worded precludes any other interpretation than once the lien is there the party that wishes to take advantage of this remedy must follow the Utah Rules of Civil Procedure. Harris should have filed a Summons and Complaint and named Hook as the Defendant. Then the issue of fraudulent conveyance could have been properly addressed by the Court.

It should be noted, that the law to which the Findings of Fact and Conclusions of Law are cited as legal grounds, was not in effect at the time the alleged fraudulent transfer took place. This act applies when any transfer occurred after the effective date of the act. The effective date, pursuant to Utah Constitution, Article VI Sec. 25, for laws 1988, Chapter 59 which appear as §§25-6-1 to 25-6-13 was April 25, 1988. The Court will take notice

that all activities in this case took place in 1987 and prior thereto..

Testimony to be of any value must be admissible, it must be relevant, and to be relevant it must be used to establish a material proposition and fall within the exceptions of the hearsay rule. The evidence proffered by Harris does not meet that standard and the trial judge finally agreed. He disallowed the testimony of Mr. James Craft and Marcia Eldridge as hearsay. (Evidentiary Hearing dated September 19, 1989 P. 80-83).

CONCLUSION

This case, contrary to its voluminous nature, simply stated is, should the Motion to Quash the Writ of Execution have been granted? Appellant Johnson contends that it should certainly have been granted.

WHEREFORE, Appellant Johnson prays that this Court reverse the judgment and Order of the District Court by finding there was insufficient evidence to sustain a finding of a fraudulent transfer of the boat and trailer and therefore the Motion to Quash the Writ of Execution should have been granted and the boat returned to Johnson forthwith.

DATED this 14th day of May, 1990.

Matt Biljanic
MATT BILJANIC

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant to Macoy A.

McMurray, Attorney for Third Party Judgment Creditor, The Hermes Building, 455 East 500 South, Suite 300, Salt Lake City, Utah 84111, postage prepaid, this 14th day of

May, 1990.


MATT BILJANIC

COLLATERAL REFERENCES

Utah Law Review. — The Doctrine of Part Performance as Applied to Oral Land Contracts in Utah, 9 Utah L. Rev. 91.

Am. Jur. 2d. — 71 Am. Jur. 2d Specific Performance §§ 19, 20.

C.J.S. — 81 C.J.S. Specific Performance §§ 44, 45.

Key Numbers. — Specific Performance 39 et seq.

25-5-9. Agent may sign for principal.

Every instrument required by the provisions of this chapter to be subscribed by any party may be subscribed by the lawful agent of such party

History: R.S. 1898 & C.L. 1907, § 2478; C.L. 1917, § 5825; R.S. 1933 & C. 1943, 33-5-9.

NOTES TO DECISIONS

Authorization from only one joint tenant.

Husband could not bind wife, who was joint tenant, by contract to purchase the common property since she had not signed the contract

nor given written authority to agent to sign for her. *Williams v. Singleton*, 723 P.2d 421 (Utah 1986).

COLLATERAL REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d Statute of Frauds § 379 et seq.

Key Numbers. — Frauds, Statute of 116(1).

CHAPTER 6

UNIFORM FRAUDULENT TRANSFER ACT

Section		Section	
25-6-1.	Short title.	25-6-7.	Transfer — When made.
25-6-2.	Definitions.	25-6-8.	Remedies of creditors.
25-6-3.	Insolvency.	25-6-9.	Good faith transfer.
25-6-4.	Value — Transfer.	25-6-10.	Claim for relief — Time limits.
25-6-5.	Fraudulent transfer — Claim arising before or after transfer.	25-6-11.	Legal principles applicable to chapter.
25-6-6.	Fraudulent transfer — Claim arising before transfer.	25-6-12.	Construction of chapter.
		25-6-13.	Applicability of chapter.

25-6-1. Short title.

This chapter is known as the "Uniform Fraudulent Transfer Act."

History: C. 1953, 25A-1-1, enacted by L. 1988, ch. 59, § 1; recompiled as C. 1953, 25-6-1.

Comparable Provisions. — Other jurisdictions that have adopted the Uniform Fraudulent Transfer Act include: Arkansas, California, Florida, Hawaii, Idaho, Maine, Minnesota,

Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Washington, and West Virginia.

Compiler's Notes. — This chapter was enacted as §§ 25A-1-1 to 25A-1-13; it has been renumbered and all internal references corrected accordingly under instruction from the

76-3-104. Misdemeanors classified.

- (1) Misdemeanors are classified into three categories:
 - (a) Class A misdemeanors;
 - (b) Class B misdemeanors;
 - (c) Class C misdemeanors.
- (2) An offense designated a misdemeanor, either in this code or in another law, without specification as to punishment or category, is a class B misdemeanor.

History: C. 1953, 76-3-104, enacted by L. 1973, ch. 196, § 76-3-104.

NOTES TO DECISIONS

Cited in Cooper v. Utah, 684 F. Supp. 1060 (D. Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 30.

C.J.S. — 22 C.J.S. Criminal Law § 11.
Key Numbers. — Criminal Law ⇌ 27.

76-3-105. Infractions.

- (1) Infractions are not classified.
- (2) Any offense which is an infraction within this code is expressly designated and any offense defined outside this code which is not designated as a felony or misdemeanor and for which no penalty is specified is an infraction.

History: C. 1953, 76-3-105, enacted by L. 1973, ch. 196, § 76-3-105.

NOTES TO DECISIONS

Cited in Cooper v. Utah, 684 F. Supp. 1060 (D. Utah 1987).

PART 2**SENTENCING**

76-3-201. Sentences or combination of sentences allowed — Civil penalties — Restitution — Definitions — Aggravation or mitigation of crimes with mandatory sentences — Resentencing.

- (1) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentences or combination of them:
 - (a) to pay a fine;
 - (b) to removal from or disqualification of public or private office;

- (c) to probation unless otherwise specifically provided by law;
- (d) to imprisonment; or
- (e) to death.

(2) This chapter does not deprive a court of authority conferred by law to forfeit property, dissolve a corporation, suspend or cancel a license, or permit removal of a person from office, cite for contempt, or impose any other civil penalty. A civil penalty may be included in a sentence.

- (3) (a) (i) When a person is adjudged guilty of criminal activity which has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution up to double the amount of pecuniary damages to the victim or victims of the offense of which the defendant has pleaded guilty, is convicted, or to the victim of any other criminal conduct admitted by the defendant to the sentencing court unless the court in applying the criteria in Subsection (3)(b) finds that restitution is inappropriate. Whether the court determines that restitution is appropriate or inappropriate, the court shall make the reasons for the decision a part of the court record.

(ii) When a defendant has been extradited to this state under Chapter 30, Title 77, or has been transported at governmental expense from one county to another within the state for the purpose of resolving pending criminal charges, and is adjudged guilty of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition or transportation. In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (3)(b). If the court determines that restitution is appropriate or inappropriate, the court shall make the reasons for the decision a part of the court record. The court shall send a copy of its order of restitution to the Division of Finance.

(b) In determining whether or not to order restitution, or restitution which is complete, partial, or nominal, the court shall take into account:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

(c) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow him a full hearing on the issue.

(4) As used in Subsection (3):

(a) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(b) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes, but is not limited to, the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses such as earnings and medical expenses.

(c) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including insured damages.

(d) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities. "Victim" does not include any coparticipant in the defendant's criminal activities.

(5) (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.

(b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation, or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.

(c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

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

(e) The court in determining a just sentence shall be guided by sentencing rules regarding aggravation and mitigation promulgated by the Judicial Council.

(6) (a) If a defendant subject to Subsection (5) has been sentenced and committed to the Utah State Prison, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Board of Pardons, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he had not previously been sentenced, so long as the new sentence is no greater than the initial sentence nor less than the mandatory time prescribed by statute. The resentencing provided for in this section shall comply with the sentencing rules of the Judicial Council to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(b) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant as part of the sentence that if the defendant is released from prison, he may be on parole for a period of ten years.

(c) If during the commission of a crime described as child kidnaping, rape of a child, object rape of a child, sodomy upon a child, or sexual abuse of a child, the defendant causes substantial bodily injury to the child, and if the charge is set forth in the information or indictment and admitted by

the defendant, or found true by a judge or jury at trial, the defendant shall be sentenced to the aggravated mandatory term in state prison. This subsection supersedes any conflicting provision of law.

History: C. 1953, 76-3-201, enacted by L. 1973, ch. 196, § 76-3-201; 1979, ch. 69, § 1; 1981, ch. 59, § 1; 1983, ch. 85, § 1; 1983, ch. 88, § 3; 1984, ch. 18, § 1; 1986, ch. 156, § 1; 1987, ch. 107, § 1.

Amendment Notes. — The 1986 amendment redesignated former Subsections (6) to (10) as (a) to (e) of Subsection (5), revised an internal statutory reference in the first sentence of Subsection (3)(a), substituted "Subsection (5)" for "this section" and added "nor less than the mandatory time prescribed by statute" to the end of the first sentence of Subsection (5)(c), and made other, minor word or capitalization changes throughout the section

The 1987 amendment designated the contents of former Subsection (3)(a) as Subsection

(3)(a)(i), inserted Subsection (3)(a)(ii), redesignated the provisions of Subsection (5) as last amended by Laws 1986, ch. 156, § 1, added the last sentence to Subsection (6)(c), and made minor changes in phraseology and punctuation throughout the section

Cross-References. — Removal of officers, § 77-6-1 et seq

Restitution as condition of probation, § 77-18-1

Sentence, judgment and commitment, Rule 22, R Crim P

Special release from city or county jail, purposes, conditions and limitations, § 77-19-3-et seq

Uniform misdemeanor fine/bail schedule, Code of Judicial Administration, Appendix F

NOTES TO DECISIONS

ANALYSIS

Constitutionality
Arrest record
—Effect on sentence
Credit for pretrial detention
Discretion of court
Informal procedure
Probation
Restitution
—Right to challenge
Restitution to insurance company
Review
Statement of reasons for sentence
Cited

Constitutionality.

The minimum mandatory sentencing scheme set forth in Subsections 76-5-404 1(4), 76-3-201(5) to (10), 76-3-406(1), and 77-27-9(2) and this section is not unconstitutionally vague *State v Gerrish*, 746 P 2d 762 (Utah 1987)

Arrest record.

—Effect on sentence.

Defendant's view that the trial judge was unduly influenced by defendant's arrest record in imposing concurrent sentences of up to five years for two counts of aggravated assault was purely speculative, particularly in light of unanimous recommendations of the prosecutor and the Departments of Corrections and Adult Probation and Parole that defendant receive a prison sentence *State v McKenna*, 728 P 2d 984 (Utah 1986)

Credit for pretrial detention.

Defendant's request that the trial court order that credit be given for the period of time he spent in pretrial detention was outside the limits prescribed and therefore beyond the court's power, since the power to reduce or terminate sentences is exclusive with the Board of Pardons *State v Schreuder*, 712 P 2d 264 (Utah 1985)

Discretion of court.

Where the statute under which the defendant is convicted mandates imposition of one of three stated minimum terms, trial courts have discretion to weigh the circumstances in aggravation or mitigation of the presumptive term of middle severity in order to arrive at a just sentence *State v Lovell*, 758 P 2d 909 (Utah 1988)

Informal procedure.

This section contemplates a comparatively informal procedure *State v. Bell*, 754 P 2d 55 (Utah 1988)

Probation.

The probationary time period imposed by the court may be longer than the maximum time of imprisonment authorized for commission of the offense *State v Allmendinger*, 565 P 2d 1119 (Utah 1977)

Restitution.

—Right to challenge.

Defendant waived the right to challenge the order of restitution, where he lodged no objection to the imposition, amount or distribution of the restitution ordered, did not request a