

1989

William Babbel v. State of Utah : Brief of Appellant

Utah Supreme Court

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Paul Van Dam; Attorney General; Attorney for Respondent.

William Babbel; Pro Se.

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UTAH SUPREME COURT.

BRIEF

890165

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM BABEL,	:	
Appellant,	:	Case No. 890165
v.	:	
THE STATE OF UTAH,	:	
Respondents.	:	

BRIEF OF APPELLANT

APPEAL FROM SENTENCE ENTERED IN THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT
LAKE COUNTY, STATE OF UTAH, THE HONORABLE
SCOTT DANIELS, JUDGE, PRESIDING.

WILLIAM BABEL
Pro Se
P.O. Box 250
Draper, Utah 84020

PAUL VAN DAM
Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorney for Respondent

FILED

MAY 23 1989

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Utah

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WILLIAM BABBEL
Pro Se
P.O.Box 250
Draper,Utah 84020

PAUL VAN DAM
Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorney for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM BABEL,
Appellant, :
v. : Case No. 890165
THE STATE OF UTAH, :
Respondents. :
:

BRIEF OF THE APPELLANT

This appeal is from the sentence imposed in the Third Judicial District Court on the 24th day of March 1989. Jurisdiction lies in this Court under Utah Code Ann. 78-2-2 (3) (i) (1987) (Supp. 1988) because the conviction which caused the sentence and incarceration which appellant complains was for a first degree felony.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether sentence imposed is legal
2. Whether sentence imposed violates double jeopardy clause.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

For the purpose of this brief, appellant relies on the following provisions.

1. Utah Constitution I 12
2. United States Constitution Amendment Five (1971)

3. Utah Code Ann. 77-1-6 (2) (a)
4. Utah Code Ann. 76-3-201 (5) (c)
5. Utah Code Ann. 76-3-405
6. Utah Code Ann. 77-35-22 (E)

STATEMENT OF THE CASE

Appellant was convicted of three first degree felonies on 28 October, 1985. Appellant was sentenced to three terms of 5 years to life in the Utah State Prison. However, the trial court failed to impose a minimum mandatory term as required by law. On direct review this Court vacated appellants sentence and remanded appellant to trial court for resentencing.

On 24 March, 1989 appellant was resentenced to three terms of 10 years to life, with a minimum/ mandatory term of ten years. The new sentence imposed increased appellants minimum term by at least 15 months.

STATEMENT OF FACT

On 3 March, 1989, the Utah Supreme Court upheld appellants conviction, vacated his sentence and remanded the case for resentencing. The trial court resentenced appellant to more time than he originally had.

SUMMARY OF ARGUMENT

Appellant directly appeals his sentence from the Third Judicial District Court because such sentence is barred

by the Utah Code Ann. 76-3-405, 76-3-201 (5)(c), 77-1-6 (2) (c). The Constitution of the State of Utah I-12, and the Fifth Amendment of the U.S. Constitution.

ARGUMENT

POINT I

Appellant was originally sentenced to three terms of five years to life. No minimum mandatory terms were imposed. This sentence was vacated by this court on direct appeal (see Utah v. Babbel (sic)21033 filed 3 March 1989) and remanded for resentencing. The original minimum term set by the Board of Pardons was 105 Months. (See exhibit A) However the minimum term was increased to 120 months when the appellant was resentenced. He should have been sentenced to three terms of five to life with a minimum mandatory term or 5 years, to run concurrently. With time enhancements imposed by the Board of Pardons, this sentence would have been the same as the original sentence. (See exhibit B, time matrix) The Utah Code Ann. in 76-3-405 specifically states;

The court shall not impose a new sentence for the same offense....

Which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

76-3-405 is specifically applicable in the instant case;

76-3-405 Limitation on sentence
where conviction or prior sentence
set aside.

Where.... a sentence has been set
aside on direct review...

This sentence was set aside on direct review by this court on 3 March, 1989, 76-3-405 was applicable when the appellant was resentenced. The trial court erred when it sentenced the appellant to three terms of ten years to life with a minimum/mandatory term of 10 years. 76-3-405 expressly forbids the imposition of a greater or more severe sentence. This is also in evidence in 76-3-201 (5) (c) As there were no minimum / mandatory terms imposed, the only sentence that would have been the same or less, would have been three terms of 5 years to life to run concurrent. As the sentence was set aside on Direct Review the trial court was bound by Utah Code Ann. 76-3-405 (1973)

In United States v. Lopez, 706 F 2d, 108 (2nd Cir 1983) the court created a "Bright Line Rule" which allowed courts to correct an illegal sentence only if it does not acutally prejudice the defendant. In the instant case the appellant was very definately prejudiced by the new sentence imposed by the court. First appellant had 15 months added to his sentence. His custody status dropped from a level 4 to level 1. Appellant was houses at the Tron County/ Utah

State Corrections Facility before the resentencing. He is now being housed in Maximum Security at the Draper site. Appellant has lost such privileges as work, school, therapy phone, visits and outside recreation due to the drop in his custody level.

Appellant should not be forced to serve a longer term due to the error committed initially by the trial court. In the case of United States v. Alverson, the court held:

When resentencing due to trial error, new sentence may not exceed original term because jeopardy terminated when defendant no longer in courts custody
666 F 2d 341,350 N8 (9th Cir 1982)

See also; United States v. Busic, 639 F 2d 949,950 (3rd Cir) and United States v. Jones, when in the stated;

The opinion of the court is double jeopardy clause forbids resentencing defendant after misunderstanding of certain factual matters and after defendant has begun serving sentence, in absence of statute explicitly providing for modification
722 F 2d 632 638-39 (11th Cir 1983)

As there is a statute that applies to the correction of an illegal sentence (see U.C.A. 77-35-22 (e)) there is also a statute that limits what that new sentence will be.
76-3-405 The trial court erred by sentencing appellant to three terms of 10 years to Life.'

POINT II

DOES THE NEW SENTENCE VIOLATE
THE DOUBLE JEOPARDY CLAUSE

The Utah Code in 77-1-6 (2) states that a defendant will not be twice put in jeopardy for the same offence. By waiting 3½ years to increase the appellants sentence, and waiting until after he began serving the original sentence, appellant was twice put in jeopardy for the same offence.

Justice Rhenquist wrote for the court;

United States v. Difrancesco, 449 U.S. (1980)

Double Jeopardy Clause bars imposition of greater sentence once defendant begun serving first sentence

see also; United States V. Benz, 282 U.S. 304, 307 (1931)

Double Jeopardy forbids the imposition of a greater or more severe sentence once the defendant has begun serving the first sentence

by imposing a longer term of 10 years instead of 5 years the court has lengthened appellants minimum term by 15 months thereby creating a Double Jeopardy violation.

CONCLUSION

Based on the forgoing, and any further information which may be brought out on oral argument, the Appellant asks this court to vacate this sentence, remand the case to the trial court and order the appellant to be sentenced to three terms of 5 years to life to run concurrent with a minimum mandatory term of 5 years.

RESPECTFULLY submitted this 18 day of MAY 1989.

William Babbel
WILLIAM BABEL
PRO SE

CERTIFICATE OF MAILING

I hereby certify that I mailed 4
true and correct copies of the foregoing Appellants
Brief to the Utah Attorney General, Paul Van Dam
236 State Capitol, Salt Lake City, Utah, 84114,
postage pre-paid on the 18 day of MAY 1989.

William Babbel
WILLIAM BABBEL



MEMBERS

JL W. BOYDEN
IRIA J PALACIOS
LY L WEBSTER

THE STATE OF UTAH

BOARD OF PARDONS
6100 SOUTH 300 EAST
SALT LAKE CITY, UTAH 84107
(801) 261-2825

PAUL W. SHEFFIELD
Administrator

April 5, 1989

William Babbel, USP#17564
P.O. Box 250
Draper, Utah 84020

Dear Mr. Babbel,

The Board is in receipt of your recent letter dated March 25, 1989. In your letter you expressed concerns regarding your re-sentenceing etc. At the time of your original hearing, held in November of 1986, your guidelines (minimum time to be served) were calculated at 105 months (8 years 9 months). The guidelines for your minimum mandatory 10-life sentences are just that, a minimum of 10 years.

In your letter you also expressed a desire to come before the Board again due to the fact that your previous commitment was vacated and the minimum madatory imposed. We will honor that request. You will be scheduled to come before the Board of Pardons during the month of July 1989. You will be notified approximately 2 weeks prior to your scheduled date to give you further information about hearings and the time yours will take place.

Sincerely,

PAUL W. SHEFFIELD, Administrator

CA
2966c

A

TIME CALCULATION ON
ORIGINAL SENTENCE

5 YEARS

2½ YEARS CONSECUTIVE ENHANCEMENT

1¼ YEAR CONCURRENT ENHANCEMENT

105 MONTHS MINIMUM

12 TERM TO BE SERVED.

117 PLUS 1 YEAR IN A COMMUNITY CORRECTIONS
9yrs 9 months CENTER, REQUIRED BY
THE DEPARTMENT

TIME CALCULATION ON
NEW SENTENCE

10 YEARS MINIMUM? MANDATORY

$1\frac{1}{4}$ YEAR CONCURRENT ENHANCEMENT

$1\frac{1}{4}$ YEAR CONCURRENT ENHANCEMENT

$12\frac{1}{2}$ YEARS

$13\frac{1}{2}$ PLUS ONE YEAR COMMUNITY CORRECTIONS CENTER

THIS NEW SENTENCE REPRESENTS A 4 YEAR AND 3 MONTH INCREASE
IN TIME.

THE SENTENCE THAT SHOULD HAVE BEEN GIVIN IS THREE FIVE
YEAR TO LIFE TERMS TO RUN CONCURRENT. WITH ENHANCEMENTS SET
BY B.O.P. THAT SENTENCE WOULD BE THE SAME AS THE ORIGINAL
SENTENCE.

5 YEARS

15 MONTHS ENHANCEMENT

15 MONTHS ENHANCEMENT

12 MONTHS COMMUNITY CORRECTIONS CENTER

8½ YEARS

AS THIS COURT VACATED THE ORIGINAL SENTENCE AS ILLEGAL, IT
SHOULD VACATE THIS SENTENCE PURSUANT TO 76-3-405 AND ORDER
APPELLANT TO BE SENTENCED TO 3, 5 YEAR TO LIFE TERMS TO
RUN CONCURRENT.

THE SENTENCES ARE TO BE CONSECUTIVE. USE THE CONSECUTIVE ENCHANCEMENTS
PORTION OF THE "TIME MATRIX" FOR ALL CONSECUTIVE SENTENCES EXCEPT THE
MOST SERIOUS" CONVICTION.

NAME _____ USP# _____ OBSCIS# _____ DATE _____

CRIMINAL HISTORY ASSESSMENT**PRIOR FELONY CONVICTION**
(SEPARATE CRIMINAL INCIDENTS)

0 NONE
 2 ONE
 4 TWO
 6 THREE
 8 MORE THAN THREE

CRIMINAL HISTORY CATE

POOR 16 - 28

FAIR 12 - 15

MODERATE 8 - 11

GOOD 4 - 7

EXCELLENT 0 - 3

PRIOR MISD. CONVICTIONS
(SEPARATE CRIMINAL INCIDENTS)
(INCLUDES DUI & RECKLESS)
(EXCLUDES OTHER TRAFFIC)

0 NONE
 1 ONE
 2 TWO TO FOUR
 3 FIVE TO SEVEN
 4 MORE THAN SEVEN

PRIOR JUVENILE REFERRALS
(FINDINGS OF DELINQUENT FOR
INCIDENTS THAT WOULD HAVE BEEN
FELONIES IF COMMITTED BY AN ADULT)
[3 NON-STATUS MISD. = 1 FELONY]

0 NONE
 1 ONE
 2 TWO TO FOUR
 3 MORE THAN FOUR
 4 SECURE PLACEMENT

PLEASE CIRCLE THE
CORRECT CATEGORY**SUPERVISION HISTORY**

(ADULT OR JUVENILE)

0 NO PRIOR SUPERVISION
 1 PRIOR SUPERVISION
 2 PRIOR RESIDENTIAL PLACEMENT
 3 PRIOR REVOCATION
 4 CURRENT SUPERVISION OR PRE-TRIAL RELEASE

SUPERVISION RISK
(ADULT OR JUVENILE)

0 NO ESCAPES OR ABSCONDINGS
 1 FAILURE TO REPORT (ACTIVE OFF) OR OUTSTANDING WARRANTS
 2 ABSCONDED FROM SUPERVISION
 3 ABSCONDED FROM RESIDENTIAL PROG. OR EXTRADITION FAILURE
 4 ESCAPED FROM CONFINEMENT

WEAPONS ENHANCEMENT
(ACTIVE OFFENSE)

0 NONE
 2 OTHER
 3 KNIFE
 4 FIREARM OR EXPLOSIVE

** NOTE: 2nd FIREARMS CONVICTION
 REQUIRES A MANDATORY 5 - 10 YEAR
 CONSECUTIVE SENTENCE **

TOTAL PLACEMENT SCORE: _____

GENERAL DISPOSITION MATRIX

		CRIME SEVERITY										
		CAPITAL		1ST DEGREE		PERSON CRIMES			OTHER CRIMES		MISDEMEANOR	
			MUR II	OTHER	HOMICIDE	2ND DEG	3RD DEG	2ND DEG	3RD DEG	A	B	
CRIMINAL HISTORY	POOR											JAIL
	FAIR			PRISON								
	MODERATE											
	GOOD				ALTERNATE				PROBATION			
	EXCELLENT											

DRUG DISTRIBUTION OF OR INTENT TO DIST. OVER \$500 & RESIDENTIAL BURGLARY SHOULD BE "PERSON" CRIMES

**AGGRAVATING AND MITIGATING CIRCUMSTANCES ASSOCIATED WITH
MANDATORY SENTENCES REQUIRED BY H.B. 209**

House Bill 209 passed by the 1983 Utah Legislature established "mandatory minimum sentences" for those convicted of certain crimes. Probation is only a possibility in these cases if the victim is over 5 years of age and there is a familial relationship between the offender and the victim and if 12 specified mitigating conditions can be established. The 12 required conditions are found in Utah Code Annotated §76-5-406.5. If these conditions do not exist, the offender must be sentenced to the Utah State Prison.

The length of the mandatory minimum sentence is either 10 years or 6 years, depending on the specific crime of conviction (see Form 1). If aggravating circumstances exist, then the mandatory minimum sentence is increased to 15 and 9 years respectively. Similarly, if mitigating circumstances exist, the mandatory minimum sentence is reduced to 5 and 3 years respectively. The responsibility to weigh aggravating and mitigating circumstances in each case rests with the individual judge.

The presentence investigator should circle the number associated with any aggravating or mitigating circumstance that merits consideration by the judge. The page number from the presentence investigation report where any such circumstance is discussed should be noted in the blank next to that circumstance.

Aggravating Circumstances

NOTE: The following aggravating circumstances should only be considered if they are not inherent in the definition of the crime of conviction.

PSI

Page

- ___ 1. The victim suffered substantial bodily injury.
- ___ 2. The offender has an extensive history of such offenses. Relevant factors include number of victims, length of involvement, number of incidents, and continued involvement after arrest.
- ___ 3. The offense was characterized by extreme cruelty or depravity.
- ___ 4. The victim was unusually vulnerable.
- ___ 5. There existed a non-familial relationship of trust.

Mitigating Circumstances

- ___ 1. The offense represents a single incident and the offender has no prior history of such offenses.
- ___ 2. The offender was exceptionally cooperative with law enforcement.
- ___ 3. Incest offender has strong, supportive family relationships.
- ___ 4. Offender is a good candidate for a recognized treatment program. Substance abuse treatment may be appropriate if the offense was specifically substance related.
- ___ 5. Developmental disabilities of the offender may be considered in mitigation if highly structured alternatives can be utilized to control the offender's criminal behavior.

MANDATORY MATRICES

DRIVING UNDER THE INFLUENCE

ALL DUIS	MANDATORY ADDITIONS TO SENTENCE	
2-6 MONTHS JAIL \$299 FINE OR BOTH 12 MONTH & \$1000 MAX. IF OTHERS ARE INJURED	PLUS \$100 RESTITUTION & 2-10 DAYS IN JAIL OR COMMUNITY SERVICE	1ST VIOLATION
	PLUS \$100 RESTITUTION & 2-10 DAYS IN JAIL OR 10-30 DAYS COMM SERVICE	2ND VIOLATION WITHIN 5 YEARS
	PLUS \$100 RESTITUTION & 30-90 DAYS IN JAIL OR COMMUNITY SERVICE	3RD VIOLATION WITHIN 5 YEARS OF 2ND VIOLATION

PORNOGRAPHY

\$500 MINIMUM FINE AND 30 DAYS IN JAIL...W/O EXCEPTION
--

MANDATORY SENTENCES (HB 209)

	CHILD RAPE CHILD OBJECT RAPE CHILD KIDNAPPING CHILD SODOMY AGG. SEX ASSAULT AGG. KDNPG.	AGG. SEX ABUSE OF A CHILD*	
ADD 3 YEARS FOR EACH PRIOR CONVICTION FOR THESE CRIMES (LIFE, IF MORE THAN 2)	15 YEARS	9 YEARS	SUBSTANTIAL BODILY INJURY OR AGGRAVATING CIRCUMSTANCES
	Prison 10 YEARS	6 YEARS	NO AGGRAVATING OR MITIGATING CIRCUMSTANCES
	5 YEARS	3 YEARS	MITIGATING CIRCUMSTANCES
	Probation		SEE U.C.A. 76-5-406.5

*SEX ABUSE OF A CHILD IS A 2nd DEGREE FELONY (1-15 YRS)