

1990

# State of Utah v. Richard N. Wittenbraker : Brief of Appellee

Utah Court of Appeals

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
                   Plaintiff-Appellee, : Case No. 900235-CA  
 v. :  
 RICHARD N. WITTENBRAKER, : Category No. 2  
                   Defendant-Appellant. :

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BRIEF OF APPELLEE

- - - - -

APPEAL FROM A CONVICTION OF ATTEMPTED  
AGGRAVATED SEXUAL ABUSE OF A CHILD, A FIRST  
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.  
§§ 76-5-404.1 AND 76-4-102(2) (SUPP. 1989) IN  
THE SECOND JUDICIAL DISTRICT COURT, IN AND  
FOR WEBER COUNTY, STATE OF UTAH, THE  
HONORABLE STANTON M. TAYLOR, JUDGE,  
PRESIDING.

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DEPOSITED BY THE  
STATE OF UTAH  
AUG 20 1990

IN THE UTAH COURT OF APPEALS

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Plaintiff-Appellee, : Case No. 900235-CA  
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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDING

This appeal is from a conviction of attempted aggravated sexual abuse of a child, a first degree felony, in violation of Utah Code Ann. §§ 76-5-404.1 and 76-4-102(2) (Supp. 1989), in the Second Judicial District Court, in and for Weber County, the Honorable Stanton M. Taylor, presiding.

This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2-2(4) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARD OF APPELLATE REVIEW

The sole issue on appeal is whether the trial court abused its discretion in sentencing the defendant to prison. This Court will not overturn the sentence given by the trial court unless it finds that the actions of the judge were "so inherently unfair as to constitute abuse of discretion." State v. Gerrard, 584 P.2d 885, 887 (Utah 1978).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statutory provisions are relevant to this case:

Utah Code Ann. § 76-3-208(1)(a) and (2) (1978):

(1) Persons sentenced to imprisonment shall be committed to the following custodial authorities:

(a) Felony commitments shall be to the Utah State Prison;

. . .

(2) Custodial authorities may place a prisoner in a facility other than the one to which he was committed when:

(a) It does not have space to accommodate him; or

(b) The security of the institution or inmate requires it.

STATEMENT OF THE CASE

Defendant pled guilty to attempted aggravated sexual abuse of a child, a first degree felony, in violation of Utah Code Ann. §§ 76-5-404.1 and 76-4-102(2) (Supp. 1989) (R. 26-31; Transcript of Aug. 7, 1989 hearing (TA.) 11). Defendant was sentenced to serve an indeterminate term of not less than five years and which may be for life in the Utah State Prison with a recommendation that he be treated at the Sex Offender Program at the Utah State Hospital (R. 34). Defendant filed his notice of appeal on December 4, 1989.

### STATEMENT OF FACTS

Defendant pled guilty to attempted aggravated sexual abuse of a child, a first degree felony, in violation of Utah Code Ann. §§ 76-5-404.1 and 76-4-102(2) (Supp. 1989) (R. 26-31; TA. 11). The trial court remanded defendant to the custody of the Division of Corrections for the purpose of a 90-day diagnostic study, pursuant to Utah Code Ann. § 76-3-404 (Supp. 1989) (R. 24; TA. 12).

Upon reviewing the 90-day diagnostic evaluation, the trial court sentenced defendant to not less than five years and which may be life in the Utah State Prison with a recommendation that defendant be placed in the Sexual Offender Program at the Utah State Hospital (R. 34; Transcript of Nov. 6, 1989 hearing (TB.) 5). In sentencing defendant to the Utah State Prison, the trial court noted that it was beyond its power to sentence defendant to the Utah State Hospital and that the decision to enter defendant in the Sexual Offender Program at the Utah State Hospital was a matter that had to be decided by the hospital and the prison (TB. 5-6).

### SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in sentencing defendant to the Utah State Prison.

### ARGUMENT

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION  
IN SENTENCING DEFENDANT TO THE UTAH STATE  
PRISON.**

Defendant argues that the trial court abused its discretion in sentencing defendant to serve a term in the Utah



State Prison with a recommendation that defendant be placed in the Sexual Offender Program at the Utah State Hospital.

Defendant states that the trial court should have sentenced him directly to the Sexual Offender Program at the Utah State Hospital.

In State v. Gerrard, 584 P.2d 885 (Utah 1978), this Court articulated the standard of review it would apply in reviewing a trial court's sentence, stating:

Before this Court will overturn the sentence given by the trial court, it must be clear that the actions of the judge were so inherently unfair as to constitute abuse of discretion. To do otherwise would have a chilling effect on the trial court which has the main responsibility for sentencing and which attempts to arrive at a proper sentence based on the facts and law before it.

In State v. Harris, [10 Wash.App. 509, 518 P.2d 237 (1974)] the court there said that the exercise of discretion in sentencing necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if it can be said that no reasonable man would take the view adopted by the trial court.

Id. at 887 (footnotes omitted). See also State v. Russell, 772 P.2d 971 (Utah 1989); State v. Gibbons, 779 P.2d 1133, 1135 (Utah 1989).

In the instant case the trial court sentenced defendant as it was required to by law. Pursuant to Utah Code Ann. § 76-3-208(1)(a) (1978), "[f]elony commitments shall be to the Utah State Prison" (emphasis added). At defendant's sentencing hearing the trial court correctly apprised defendant that it did not have the power to commit anyone to the Sexual Offender Program at the Utah State Hospital (TB. 5). Because the trial

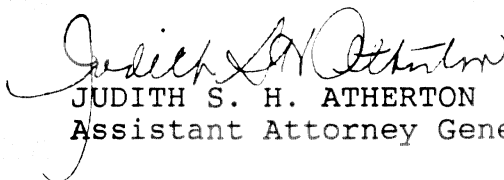
court complied with the statutory sentencing mandate, it did not abuse its discretion in sentencing defendant.

CONCLUSION

In light of the foregoing argument, defendant's conviction and sentence should be affirmed.

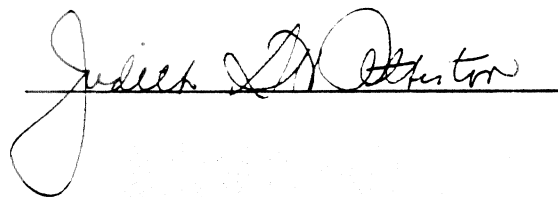
RESPECTFULLY submitted this 30 day of April, 1990.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Stephen A. Laker, Attorney for Appellant, 2568 Washington Blvd., Suite #203, Ogden, Utah 84401, this 30 day of April, 1990.

  
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