2010

The State of Utah v. Daniel Cornell Cosby : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DANIEL CORNELL COSBY,	:	Case No. 20100974-CA
Defendant/Appellant.	:	Appellant is incarcerated.

APPELLANT'S REPLY BRIEF

Appeal from a judgment of conviction for two counts of Violation of a Protective Order, third degree felonies, in violation of Utah Code section 76-5-108, one count of Tampering with a Witness, a Class A Misdemeanor, in violation of Utah Code section 76-8-508, and one count of Domestic Violence in the Presence of a Child, a Class B Misdemeanor, in violation of Utah Code section 76-5-109.1(2)(c), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable William W. Barrett, presiding.

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INTRODUCTION

Mr. Cosby's Appellant's Brief argues that the district court abused its discretion when it sentenced Mr. Cosby to both jail time and thirty-six months of zero-tolerance probation. This Reply Brief does not repeat those arguments and instead (I) illustrates that Mr. Cosby's appeal is not moot because he requests judicial relief that would still affect his rights, and (II) clarifies that sentencing courts should consider relevant mitigating factors even in cases not involving a concurrent/consecutive sentencing decision and that Mr. Cosby's new fatherhood is one such mitigating factor.

ARGUMENT

I. MR. COSBY'S APPEAL IS NOT MOOT

Because Mr. Cosby argues on appeal that it was an abuse of the trial court's discretion and excessive to sentence him to both jail and probation, his appeal is not moot despite the fact that he is now out of jail and serving probation. As the State notes, "[a]

case is deemed moot when the requested judicial relief cannot affect the rights of the litigants." Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989); Appellee's Br. 9. Mr. Cosby's Appellant's Brief asks this Court to reverse and remand for resentencing because the trial court abused its discretion when it sentenced him to both thirty-six months of zero-tolerance probation and jail. Appellant's Br. 1–2, 9. While it is true that when Mr. Cosby filed his Appellant's Brief on March 2, 2011, he was still serving his jail sentence, and that when the State filed its Appellee's Brief on June 27, 2011, he had been released, Mr. Cosby is still serving the second part of his sentence—thirty-six months of zero-tolerance probation. If this Court granted Mr. Cosby's "requested judicial relief"—reversal of his sentence and remanding for resentencing—the trial court could resentence him to jail, give him credit for time served, and release Mr. Cosby without probation. He would no longer be on probation and the requested judicial relief would have affected his rights. Therefore, Mr. Cosby's appeal is not moot and this Court should consider his issue on its merits.

II. THE TRIAL COURT SHOULD HAVE CONSIDERED MR. COSBY'S CHANGED LIFE CIRCUMSTANCES AS MITIGATING CIRCUMSTANCES WHEN SENTENCING HIM

The trial court should have considered Mr. Cosby's love for his son and his desire to be a part of his upbringing as a mitigating circumstance when sentencing him. Mr. Cosby argued in his Appellant's Brief that even though a district court is accorded "wide latitude in sentencing," a judge's sentencing discretion is not unlimited, State v. Bluff, 2002 UT 66, ¶ 66, 52 P.3d 1210; State v. Carson, 597 P.2d 862, 864 (Utah 1979). A sentencing court may abuse its discretion if (1) the court's actions were "inherently

unfair," State v. Schweitzer, 943 P.2d 649, 651 (Utah 1997) (internal quotation marks omitted), (2) the court imposed a "clearly excessive sentence," id. (internal quotation marks omitted), or (3) the court failed to consider "all the legally relevant factors," id., and "give adequate weight to . . . mitigating circumstances." State v. Helms, 2002 UT 12, ¶ 15, 40 P.3d 626 (internal quotation marks omitted).

The State has responded that Mr. Cosby's reliance on Helms, 2002 UT 12, ¶ 15, as authority for the proposition that the trial court should consider mitigating circumstances in sentencing is misplaced because that case involved "whether the trial court had abused its discretion by failing to consider all of the factors set forth in Utah Code Annotated § 76-3-401 (West 2009) for the imposition of consecutive sentences." Appellee's Br. 13 n.3. But the Utah Supreme Court's directive that Mr. Cosby's Appellant's Brief quotes from that case—that a trial court must give "adequate weight to . . . mitigating circumstances"—applies even in cases where the "mitigating circumstances" to be applied are not enumerated in section 76-3-401. Indeed, the directive for sentencing courts to consider mitigating circumstances appears in cases that do not involve a concurrent/consecutive decision at all. See, e.g., State v. Killpack, 2008 UT 49, ¶¶ 57–61, 191 P.3d 17 (stating, in response to a defendant's argument that she should have been sentenced to probation instead of prison, "[a]lthough courts must consider all legally relevant factors in making a sentencing decision, not all aggravating and mitigating factors are equally important"); State v. Erskine, 2011 UT App 20, ¶¶ 2–3, 246 P.3d 1218 (per curiam) (same). Thus, even if mitigating factors are not statutorily enumerated, sentencing courts must still consider them in their sentencing decision.

Mr. Cosby urges on appeal that the sentencing court did not adequately consider the mitigating circumstance of his new fatherhood. While, as the State notes and as Mr. Cosby conceded in his Appellant's Brief, it was his desire to see his son that caused him to violate the protective orders at issue in this case, see Appellee's Br. 12; Appellant's Br. 9, Mr. Cosby now recognizes that violating a court's protective orders is not the proper way to visit his son and may jeopardize his ability to have a relationship with his son at all. And even Stacey Buchanan, Mr. Cosby's son's mother who was protected by the court order Mr. Cosby violated, agrees that it is in all interested parties' best interest that Mr. Cosby spend time with his son. See Record for Case No. 101905723 at 47:8 ("He takes care of his son very well."). For this reason, Mr. Cosby believes that the district court did not adequately weigh his mitigating evidence and that the sentence of both jail time and thirty-six months of zero-tolerance probation was excessive and inherently unfair. Mr. Cosby urges that this Court reverse his sentence and remand for resentencing.

CONCLUSION

Because this appeal is not moot, this Court should consider Mr. Cosby's issue on its merits. Based on the arguments made above and in Mr. Cosby's Appellant's Brief, Mr. Cosby respectfully asks this Court to reverse and remand for resentencing because he believes that the trial court abused its discretion by failing to give adequate weight to a mitigating factor at sentencing, denying his request to be placed on probation, and sentencing him instead additionally to jail. Upon reversal, now that he has served the jail portion of his sentence, he would respectfully request credit for time served without the added imposition of zero-tolerance probation.

SUBMITTED this 26 day of July, 2011.

E. RICH HAWKES
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, E. RICH HAWKES, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 26 day of July, 2011.

Rich Hawkes
E. RICH HAWKES

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 26 day of July, 2011.