

2012

State of Utah v. David W. Ward : Brief of Appellee

Utah Court of Appeals

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J. Edward Jones; Counsel for Appellant.

Karen A. Klucznik; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; McKay King; Counsel for Appellee.

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Case No. 20120165-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/ Appellee,

vs.

DAVID W. WARD,
Defendant/ Appellant.

Brief of Appellee

Appeal from a conviction for aggravated assault, a third degree felony, in the Fourth Judicial District, Wasatch County, the Honorable Derek P. Pullan presiding

KAREN A. KLUCZNIK (7912)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

J. EDWARD JONES
190 North Main St., 2nd Floor
Heber City, UT 84032

MCKAY KING
Wasatch County Attorney's Office

Counsel for Appellant

Counsel for Appellee

No Oral Argument Requested

~~FILED~~
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Case No. 20120165-CA

IN THE
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STATE OF UTAH,
Plaintiff/ Appellee,

vs.

DAVID W. WARD,
Defendant/ Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for aggravated assault, a third degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUE

1. Did the trial court abuse its discretion when it sentenced Defendant to prison, rather than probation, where Defendant pleaded guilty to aggravated assault, has a history of criminal behavior, and exhibited selfish, aggressive behavior on the night of the assault?

Standard of Review. "The trial court has substantial discretion in conducting sentencing hearings and imposing a sentence, and [this Court] will in general overturn the trial court's sentencing decisions only if [it]

find[s] an abuse of discretion.” *State v. Patience*, 944 P.2d 381, 389 (Utah App. 1997) (quotations and citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute is reproduced in Addendum A: Utah Code Ann. § 76-3-201 (West Supp. 2011).

STATEMENT OF THE CASE

A. Summary of facts.¹

On October 10, 2011, after bickering with her boyfriend Defendant all day and late into the night, Melissa decided to give up and go to bed. R67, 102. Defendant, however, persisted. He woke her up “complaining again over some random stuff.” *Id.* Melissa, after chiding him for watching pornography and telling him to delete it from his computer, told him “they were over” and again tried to fall asleep. *Id.* Defendant then turned up the computer speakers to full blast. *Id.* Melissa, exasperated, took the computer speakers away. *Id.*

At this point, Defendant became increasingly aggressive and started threatening Melissa. *Id.* She responded by telling him to leave and that if

¹ Because Defendant pleaded guilty before a preliminary hearing, the facts of the crime are taken primarily from the police’s Warrantless Arrest Probable Cause Statement (R67) and the presentence investigation report (R102).

he did not, she would call the police. *Id.* Defendant grabbed Melissa's phone, preventing her from making the call. *Id.*; *see also* Aplt. Br. 6. When she tried to leave the residence, Defendant would not let her. R67, 102. At some point, he also slapped Melissa in the face. *Id.*

When Melissa finally tried to escape by climbing out a south window, Defendant caught up to her, seized her around her throat in a chokehold, and continued to choke her until she passed out. *Id.*

When Melissa regained consciousness, Defendant was gone. *Id.* Melissa went outside and called the police. *Id.* Defendant later returned and was arrested. *Id.*

B. Summary of proceedings.

Defendant was charged with one count of aggravated assault, a third degree felony; one count of damage to or interruption of a communication device, a class B misdemeanor; and one count of aggravated kidnapping, a first degree felony. R34-35. Upon defense counsel's motion, the trial court ordered a competency evaluation. R10-11, 12-16. In two independent evaluations, Defendant was diagnosed with bipolar and post-traumatic stress disorders, but both evaluators concluded that Defendant was competent to proceed with his case. R69-75, 76-84. Defense counsel

stipulated that Defendant was competent to proceed. R105:2. The court found Defendant competent. R30; R105:2.

At the preliminary hearing, defense counsel stated that the case had been resolved and that Defendant would accept a plea offer. R106:2; R36-45. Under its terms, Defendant pleaded guilty to the aggravated assault charge; in exchange, the State dismissed the remaining two charges. R106:2; R40. The State also agreed to (1) not recommend prison time at the sentencing hearing and (2) recommend a statutory reduction on the aggravated assault charge upon successful completion of probation. R106:2; R40.

Before taking Defendant's plea, the court heard from Melissa, who stated, "I honestly think that he needs to go to prison." R106:3. Melissa further stated that she was "going to have to relocate" because of her fear of Defendant. *Id.* She worried that "a protective order's not going to keep him away from me I don't want him to know where I'm living, because I fear for my life." *Id.* Melissa also believed that "he knew exactly what he was doing, and I don't think he feels bad at all." R106:5.

During the plea colloquy, the court advised Defendant that "when it comes time to impose sentence, that's a decision that is mine alone." R106:13. The court explained, "I will consider carefully the recommendations that are made to me by the State, by your attorney . . . but in the end

I am not bound to follow anyone's recommendation." *Id.* The court then asked, "do you understand that?" *Id.* Defendant responded, "Yes, your Honor." *Id.*

After accepting Defendant's plea, the trial court instructed Defendant to "cooperate fully in the preparation" of a pre-sentence report (PSI). R106:15. The court then told Defendant that AP&P's recommendation "isn't binding on me, but it's important." *Id.*

The PSI recommended that Defendant be placed on probation for three years and serve 180 days in jail. R101-2 (hereinafter PSI:__). The report detailed Defendant's criminal history, which included a simple assault committed in 2008, as well as an unlawful detention and interruption of a communication device committed in 2006. PSI:4. Defendant had been placed on probation following these convictions, but each time the probation was unsuccessfully terminated. *Id.* The PSI also indicated a prior juvenile felony conviction for sexual abuse of a child under 14. *Id.* Defendant was placed on the sex offender residential program following this adjudication and probation was terminated successfully. *Id.*

The PSI noted that Defendant was unemployed, had no current income, and owed \$2,000 in back child support and \$6,000 in other debts. PSI:2, 5. The PSI also related Defendant's report that he suffered sexual

abuse from his biological father and then later suffered physical abuse from his adoptive mother. PSI:5. And it noted Defendant's extensive training in Brazilian Jiu-Jitsu. *Id.*

At the beginning of Defendant's sentencing hearing, the trial court noted that the aggravating factors were "significant" and that its "inclination [was] not to accept [AP&P's] recommendation, and sentence [Defendant] to the State Prison." R107:2-3. The court then heard from defense counsel. R107:3.

Defense counsel first argued that this was a case involving two "people with mental health issues," and that it was "at least [a] two sided situation with both people being combatants." R107:3. Defense counsel then claimed that Defendant's "very serious mental health issues . . . take[] this out of the realm" of a prison case. R107:4. Referring to the two competency evaluations, defense counsel noted that Defendant is "extremely mentally ill" and that prior to his recent arrest, "he was functioning in society without any medication or treatment whatsoever." *Id.* Counsel concluded, "[b]eing . . . in jail has probably been helpful because he's had to focus to keep the log of medications . . . and they've been able to adjust it." *Id.*

The State argued that Defendant's criminal history indicated a pattern of "controlling and violent" behavior against women. R107:8. Referring to Melissa's victim impact statement, the State noted that "when [Melissa] would try to leave the relationship, [Defendant] would hold her down in a martial arts move, and force her to apologize and promise not to leave him." *Id.* In her statement, Melissa further described how, on the night in question, Defendant "was choking her to the point where her eyes felt like they were going to explode in her head, and she felt like she was dying." R107:8-9. According to a victim impact statement submitted by Melissa's mother, Defendant also threatened to slash Melissa's tires if she ever tried to leave him. R107:9. Thus, the State explained, "I don't disagree with the Court's previous suggestion that this might be a prison case, and with that I would submit it on the recommendations." *Id.* Finally, the State noted that Melissa did not attend the sentencing hearing, because she was afraid to make a statement in Defendant's presence. *Id.*

Defendant then addressed the trial court and expressed remorse over what he had done. R106:11.

Before announcing Defendant's sentence, the court articulated several aggravating factors. R107:12. The court noted Defendant's 2006 and 2008 convictions "for behavior similar to that exhibited" in the present case. *Id.*

The court also addressed Defendant's behavior leading up to the assault, which it characterized as "selfish." *Id.* In addition, the court noted that Melissa's victim statement "ma[de] clear that whatever acts she took against [Defendant] were in defense of herself" and that Defendant's "response was far in excess of what was required to stop it." R107:13. Finally, the court discussed Defendant's training in Brazilian Jiu-Jitsu. *Id.* The court concluded that Defendant "know[s] that [he] can hurt people" and that Melissa "believed that [he was] going to kill her." *Id.*

The court then found that "the only mitigating factor in the case" was Defendant's mental health. But the court noted there was no guarantee that Defendant would be "medication compliant" when he was let out of jail, and the court expressed concern that the probation department would not be able to properly monitor Defendant's medication compliance. R107:10, 13-14. In its written order, the court also noted Defendant's age of 27 as a mitigating factor. R51.

Based on these factors, the court sentenced Defendant to serve zero to five years in Utah State Prison and ordered him to pay a fine of \$950 and restitution. R48-49; R50-52; R107:14.

Defendant timely appealed. R54.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by sentencing Defendant to prison. Defendant pleaded guilty to aggravated assault. Moreover, Defendant has a history of violent criminal behavior and exhibited selfish aggression on the night of the assault. Under these circumstances, it was not inherently unfair for the court to sentence Defendant to prison instead of probation.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED DEFENDANT TO PRISON RATHER THAN PROBATION

Defendant claims that the trial court abused its discretion when it sentenced him to prison rather than probation, asserting that the court failed to consider certain mitigating factors and improperly considered other factors in aggravation. Aplt. Br. 8-16. Defendant did not preserve most of his objections below and has not claimed plain error or exceptional circumstances on appeal. Accordingly, this Court should not reach the merits of his claim as to those objections. In any event, Defendant's claim fails on its merits.

A. Most of the objections underlying Defendant's claim were not preserved.

It is well settled that "claims not raised before the trial court may not be raised on appeal." *State v. Garner*, 2008 UT App 32, ¶ 11, 177 P.3d 637 (citation omitted). To preserve an issue for appeal, a defendant "must enter an objection on the record that is both timely and specific." *Id.* "The objection must 'be specific enough to give the trial court notice of the very error' of which [the party] complains." *Id.* (quoting *State v. Bryant*, 965 P.2d 539, 546 (Utah Ct. App. 1988)). This preservation rule "applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346 (citations omitted). If a defendant "does not argue that exceptional circumstances or plain error justifies review of the issue," this Court will "decline to consider it on appeal." *State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995).

At the sentencing hearing here, defense counsel primarily argued that Defendant's mental health took this "out of the realm" of a prison case. R107:4. Although counsel acknowledged that Defendant had "some violence" in his criminal history, counsel suggested that Defendant's criminal history was "not long" and that it, too, was "a result of trying to survive in society without medications for somebody who needs that." *Id.*

However, defense counsel never objected to the trial court's consideration of Defendant's prior record, his selfishness during the assault, or his martial arts training as factors in aggravation. R107:12-14. Defendant's claim as to these factors, therefore, was not preserved below. And because Defendant does not argue "exceptional circumstances or plain error" on appeal, this Court should not reach Defendant's claim as to these factors. *Pledger*, 896 P.2d at 1229 n.5.

B. In any event, the trial court did not abuse its discretion by sentencing Defendant to prison rather than probation.

A "defendant is not entitled to probation, but rather the [trial] court is empowered to place the defendant on probation if it thinks that will best serve the ends of justice and is compatible with the public interest." *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991). "The granting or withholding of probation involves considering intangibles of character, personality and attitude." *Id.* at 1049 (quotations and citation omitted).

Consequently, the decision whether to grant or deny probation rests "within the discretion of the judge who hears the case." *State v. Killpack*, 2008 UT 49, ¶ 58, 191 P.3d 17. An appellate court will reverse a trial court's sentencing decision only when it is "clear that the actions of the trial judge were so inherently unfair as to constitute an abuse of discretion." *Id.* at ¶ 18 (quotations and citation omitted). This occurs if "the actions of the judge in

sentencing were inherently unfair or if the judge imposed a clearly excessive sentence.” *State v. Montoya*, 929 P.2d 356, 358 (Utah App. 1996) (quotations and citation omitted). Put differently, a court abuses its discretion only when “no reasonable [person] would take the view adopted by the trial court.” *Id.* (alteration in original); accord *State v. Thorkelson*, 2004 UT App 9, ¶ 12, 84 P.3d 854.

Here, the trial court sentenced Defendant to prison instead of probation based on the following aggravating factors: (1) Defendant’s two prior convictions “for behavior similar to that exhibited” in the current case; (2) Defendant’s “selfish” and aggressive behavior on the night of the assault; and (3) Defendant’s capacity to hurt the victim given his extensive martial arts training. R107: 12-13. Defendant cannot show that no reasonable person would agree with the trial court’s determination.

Defendant’s prior convictions. First, the trial court did not abuse its discretion in considering Defendant’s prior convictions—for unlawful detention and interference with a communication device in 2006 and for assault in 2008—as aggravating factors. Defendant argues that “the trial court’s focus on the nature of the charges instead of the lack of severity was misguided.” Aplt. Br. 11. Defendant further asserts that his criminal history “was more mitigating than aggravating” because he had only two

misdemeanors on his record and “had a period of crime free life for three and a half years prior to the current offense.” *Id.*

However, on both his 2006 and his 2008 convictions, Defendant failed to complete probation successfully. PSI:4. Moreover, both of those prior cases involved attempts by Defendant to control the women he was with, and Defendant showed similarly controlling but escalated violent behavior during the aggravated assault in this case. Specifically, after Melissa warned him that she would call the police if he did not stop threatening her, Defendant grabbed Melissa’s phone away from her to prevent her from making the call. R67, 102. Then, when she tried to escape the house through a window, he caught her in a chokehold and choked her until she was unconscious. R67, 102.

Given Defendant’s pattern of violent and escalating criminal activity, along with his repeated failure to successfully terminate probation, there was nothing “inherently unfair” or “clearly excessive” about the trial court’s conclusion that these factors weighed in favor of a prison sentence. *Montoya*, 929 P.2d at 358.

Defendant's selfish conduct. Second, contrary to Defendant’s contention, the trial court could properly consider Defendant’s aggressive and “selfish” behavior on the night of the assault as a factor in aggravation.

Defendant claims that both he and the victim “were acting immaturely and with selfishness,” and concludes that this “character trait should not be held against [Defendant] as a factor in aggravation.” Aplt. Br. 11. However, Defendant’s conclusory remark does not show that the trial court erred, let alone plainly erred, in considering that prior to the assault, Defendant would not let Melissa sleep, but rather “ke[pt] after her, after her” and would not “let it go,” until he finally engaged in the “horrible assaultive behavior.” R107:12.

A “trial court has broad discretion in considering ‘any and all information that reasonably may bear on the proper sentence.’” *State v. Sweat*, 722 P.2d 746, 746 (Utah 1986) (quoting *State v. Sanwick*, 713 P.2d 707, 708 (Utah 1986)). In making this assessment, a trial court is “best situated to weigh the many intangibles of character, personality and attitude.” *Killpack*, 2008 UT 49, ¶ 58. Moreover, the “exercise of discretion necessarily reflects the personal judgment of the court.” *State v. Moreau*, 2011 UT App 109, ¶ 6, 255 P.3d 689 (quotations and citation omitted).

Here, as the trial court noted, Defendant pled guilty to aggravated assault. R107: 13. The court accordingly accepted Melissa’s description of the events leading to the assault over Defendant’s version. Its decision to do so was permissible, given its “broad discretion” to consider information

that "reasonably" bore on Defendant's sentence. *Sweat*, 722 P.2d at 746. And according to Melissa, Defendant not only acted with "selfishness" on the night he assaulted her, but also with escalating aggression. R67, 102. The trial court was "best situated" to determine that Defendant's behavior was a factor in aggravation, *Killpack*, 2008 UT 49, ¶ 59, and, contrary to Defendant's contention, did not err in giving it substantive weight at sentencing.

Defendant's martial arts training. Finally, the trial court did not abuse its discretion in considering Defendant's extensive training in Brazilian Jiu-Jitsu as a factor in aggravation. R. 170: 13. Defendant argues that "his martial art[s] training should not have been considered an aggravating factor as he clearly did not employ that training in a manner intended to hurt the victim." Aplt. Br. 12. In fact, Defendant contends that "it is possible that the discipline [he] had learned from his martial arts hobby actually gave him restraint." *Id.* at 13.

But defense counsel himself admitted at sentencing that Defendant "has the potential to hurt people," that "[h]e's much stronger," and that "[h]e has that ability to be a danger." R107:4. Defendant's actions on the night of assault confirmed this. As Melissa tried to escape from Defendant, he placed her in a chokehold to wrest her from a window, and he then

choked her until she was unconscious. R67, 102. In her victim statement, Melissa described how Defendant “was choking her to the point where her eyes felt like they were going to explode in her head, and she felt like she was dying.” R107: 8.

Given these facts, the trial court acted well within its “broad discretion” to consider Defendant’s ability to “hurt people”—as represented by his martial arts training—as an aggravator that “reasonably” bore on his sentence. *Sweat*, 722 P.2d at 746.

Defendant’s mental health. Next, Defendant claims that the trial court “quickly dismissed” Defendant’s mental health issues and did not adequately weigh them as a mitigating factor. Aplt. Br. 14-15. However, it is well-settled that “the trial court is in the best position . . . to determine whether any ‘[o]ne factor in mitigation or aggravation [should] weigh more than several factors on the opposite scale.’” *State v. Moreno*, 2005 UT App 200, ¶ 9, 113 P.3d 992 (quoting *State v. Russell*, 791 P.2d 188, 192 (Utah 1990)); accord *State v. Williams*, 2006 UT App 420, ¶ 31, 147 P.3d 497. Moreover, contrary to Defendant’s assertion, the trial court did consider Defendant’s mental health, and twice voiced its concern that a probation sentence would pose a risk that Defendant would not remain “medication compliant.” R107:10, 13-14. Given this, the court did not abuse its discretion

by concluding that Defendant's mental health issues favored sentencing him to prison, where his medication could be more consistently monitored.

Other mitigating factors. Finally, Defendant argues that the trial court violated its obligation under *State v. Galli*, 967 P.2d 930 (Utah 1998), to recognize other mitigating factors. Aplt. Br. 15-16. This Court, however, "has repeatedly rejected the application of the *Galli* factors outside of cases involving consecutive sentences. Because consecutive sentencing is not at issue here, the statutory factors analyzed in *Galli* do not apply and are therefore not legally relevant." *Moreau*, 2011 UT App 109, ¶ 8 (citations omitted).

* * * * *

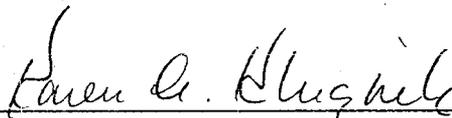
In sum, given Defendant's criminal history, his failure to successfully complete probation for his 2006 and 2008 convictions, his aggressive and selfish behavior leading up to the aggravated assault in this case, and his potential for future violence, as represented by his martial arts training, the trial court did not abuse its discretion when it sentenced Defendant to prison rather than probation. *See Montoya*, 929 P.2d at 358.

CONCLUSION

Defendant was sentenced to prison because of his criminal history, his selfish aggression on the night of the assault, and his potential for future violence. Defendant has not shown that no reasonable person would take this view. Defendant's sentence should therefore be affirmed.

Respectfully submitted on October 16, 2012.

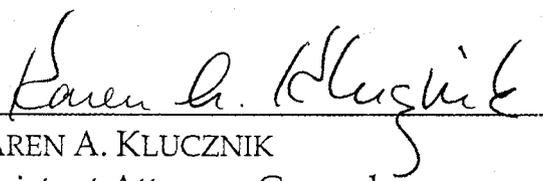
MARK L. SHURTLEFF
Utah Attorney General



KAREN A. KLUCZNIK
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 3,496 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Book Antiqua 13 point.



KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on October 16, 2012., two copies of the foregoing brief were mailed hand-delivered to:

J. Edward Jones
190 North Main St., 2nd Floor
Heber City, UT 84032

Also, in accordance with Utah Supreme Court Standing Order No. 8, a Courtesy Brief on CD in searchable portable document format (pdf):

- was filed with the Court and served on appellant.
- will be filed with the Court and served on appellant within 14 days.

Melina Freyer

Addendum A

Utah Code Ann. § 76-3-201 (West Supp. 2011)

(1) As used in this section:

(a) "Conviction" includes a:

- (i) judgment of guilt; and
- (ii) plea of guilty.

(b) "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.

(c) "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 the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(e)(i) "Victim" means any person who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

- (a) to pay a fine;
- (b) to removal or disqualification from public or private office;
- (c) to probation unless otherwise specifically provided by law;
- (d) to imprisonment;
- (e) on or after April 27, 1992, to life in prison without parole; or
- (f) to death.

(3)(a) This chapter does not deprive a court of authority conferred by law to:

- (i) forfeit property;
- (ii) dissolve a corporation;
- (iii) suspend or cancel a license;
- (iv) permit removal of a person from office;
- (v) cite for contempt; or
- (vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.

(4)(a) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement.

(b) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

(c) In addition to any other sentence the court may impose, the court, pursuant to the provisions of Sections 63M-7-503 and 77-38a-401, shall enter:

(i) a civil judgment for complete restitution for the full amount of expenses paid on behalf of the victim by the Utah Office for Victims of Crime; and

(ii) an order of restitution for restitution payable to the Utah Office for Victims of Crime in the same amount unless otherwise ordered by the court pursuant to Subsection (4)(d).

(d) In determining whether to order that the restitution required under Subsection (4)(c) be reduced or that the defendant be exempted from the restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (iv) and provide findings of its decision on the record.

(5)(a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court, the defendant shall pay restitution of governmental transportation expenses if the defendant was:

- (i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;
- (ii) charged with a felony or a class A, B, or C misdemeanor; and
- (iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

(i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or

(ii) the defendant was not transported pursuant to a court order.

(c)(i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

(A) \$100 for up to 100 miles a defendant is transported;

(B) \$200 for 100 up to 200 miles a defendant is transported;

and

(C) \$350 for 200 miles or more a defendant is transported.

(ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

(d) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted 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.

(6)(a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court pursuant to Subsection (6)(c), the defendant shall pay restitution to the county for the cost of incarceration and costs of medical care provided to the defendant while in the county correctional facility before and after sentencing if:

(i) the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and

(ii)(A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or

(B) the reimbursement does not duplicate the reimbursement provided under Section 64-13e-104 if the defendant is a state probationary inmate, as defined in Section 64-13e-102, or a state parole inmate, as defined in Section 64-13e-102.

(b)(i) The costs of incarceration under Subsection (6)(a) are the amount determined by the county correctional facility, but may not exceed the daily inmate incarceration costs and medical and transportation costs for the county correctional facility.

(ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate qualifying as an individual with a disability as defined and covered by the federal Americans with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining whether to order that the restitution required under this Subsection (6) be reduced or that the defendant be exempted from the restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (iv) and shall enter the reason for its order on the record.

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).