

2016

**State of Utah, Plaintiff/ Appellee, v. Roger Wayne Simmons,  
Defendant/ Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,  
Plaintiff/Appellee,

v.

ROGER WAYNE SIMMONS,  
Defendant/Appellant.

Case No. 20151012-CA

**REPLY BRIEF OF THE APPELLANT**

Appeal from a conviction for Driving Under the Influence of Alcohol/Drugs, a third degree felony, Alcohol Restricted Driver, a class B misdemeanor, and Operating a Motor Vehicle Without an Ignition Interlock System in the Third District Court, State of Utah, the Honorable Richard McKelvie, Judge, presiding.

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**DEC 12 2016**

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**INTRODUCTION**

Mr. Simmons concurs with the State's request that the court remand for purposes of correcting his alleged errors to the presentence report. However, he disagrees that the court should not be able to resentence him given the fact that Mr. Simmons alleged pervasive errors in the presentence report, particularly his criminal history, and given the court's expression that that very history prompted it to impose consecutive sentences.

**ARGUMENT**

**POINT I**

**Mr. Simmons alleged that the court sentenced him on inaccurate information that would warrant resentencing**

The State agrees with Mr. Simmons that the trial court improperly failed to address his claimed inaccuracies with the PSR. Aple's Br. at 10. However, it claims that none of Mr. Simmons' complained of errors would have affected the sentence, so the court should not remand for resentencing. *Id.*

The State argues Mr. Simmons only made some “conclusory assertions” justifying resentencing. Aple’s Br. at 15. However, Mr. Simmons detailed at length the errors in the PSR. *See* Aple’s Br. at 3-6. Mr. Simmons contended that the PSR was inaccurate “in each and every section.” R. 99, 152, 163. He claimed it contained duplicate offenses and included convictions for dismissed crimes. *Id.* For example, he said he only had one prior commitment and a total of three prior offenses, rather than the much lengthier list in the PSR. R. 175-76. He claimed that it misstated his success at prior probation. R. 279. He asserted that he had 110 pages of material showing how he had excellent employment and support and did treatment, none of which was reflected in the report. R. 99, 124, 140-45, 202-03. The PSR said he only did one day of treatment, when in reality, Mr. Simmons did intensive treatment at his own expense. R. 175.

Contrary to the State’s assertions, this may very well have affected the court’s sentence. The court stated that consecutive prison sentences were appropriate because Mr. Simmons had a history of alcohol abuse and had repeatedly decided to drive while intoxicated. R. 296-97. If Mr. Simmons’ criminal history were grossly overstated, as he claimed it was, then it may have prompted the court to impose a concurrent sentence, for example. If he had been successful at probation, which the PSR did not depict, then the court may have been more inclined to give him a probationary sentence.

According to the Utah Supreme Court, Utah Code Ann. § 77-18-1(6) requires the court to not only resolve any alleged inaccuracies in the PSR, but also “determine on the record whether that information is relevant to the issue of sentencing.” *State v. Jaeger*, 1999 UT 1, ¶ 44, 973 P.2d 404, 413; *see also State v. Monroe*, 2015 UT App 48, ¶ 6, 345 P.3d

755, 756 (under the code, when a defendant alleges inaccuracies in the PSI, trial court “must ... determine on the record the relevance of that information *as it relates to sentencing*”) (emphasis added). Indeed, the code requires “the court [to] make a determination of relevance” of the corrected information to its sentence. Utah Code Ann. § 77-18-1(6)(a).

As this court put it in *State v. Maroney*, “[i]f resolution of the objections affects the trial court's view of the appropriate sentence, the trial court may then revise the sentence accordingly.” 2004 UT App 206, ¶ 31, 94 P.3d 295. Mr. Simmons argued that the errors were so pervasive that he was sentenced on unreliable information which would require resentencing. *See* Aplt's Br. at 3-6, 8, 10, 14, 17. “Allowing the district court to revisit the sentences as it deems necessary, after resolving the alleged inaccuracies in the PSI and after considering the relevancy of that information to the sentence imposed, gives appropriate deference to the district court's sentencing function.” *State v. Hernandez*, 2005 UT App 476, \* 1 (unpublished).

The court could determine, in this case, after making its findings, that the corrections would make a difference to its sentence and should be afforded the opportunity to resentence if it so believes.



**CONCLUSION**

For these reasons, Mr. Simmons concurs with the State's request to remand for purposes of resolving the alleged inaccuracies in the presentence report. But he disagrees with the State's request that the court not be able to resentence Mr. Simmons. Because he claimed the errors were pervasive and permeated the presentence report and because the court sentenced Mr. Simmons to consecutive sentences based on an allegedly erroneous criminal history, the court should be afforded the opportunity to resentence him.

RESPECTFULLY SUBMITTED this 9 day of December, 2016.

/s/ Samuel P. Newton  
SAMUEL P. NEWTON  
Attorney for the Defendant/Appellant

**RULE 24 CERTIFICATE OF COMPLIANCE**

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac 2011 in Baskerville 13 point, and contains 746 words, excluding the table of contents, table of authorities, and addenda.

/s/ Samuel P. Newton  
SAMUEL P. NEWTON  
Attorney for the Defendant/Appellant

**CERTIFICATE OF SERVICE**

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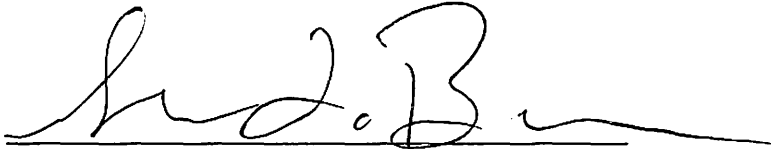
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A handwritten signature in black ink, appearing to read 'Mark C. Field', is written over a horizontal line.