

2016

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Reply Brief, *State of Utah v Simmons*, No. 20151012 (Utah Court of Appeals, 2016).
https://digitalcommons.law.byu.edu/byu_ca3/3155

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

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.

MARK C. FIELD (8340)
Assistant Attorney General
SEAN D. REYES (7969)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellee

SAMUEL P. NEWTON (9935)
LAW OFFICE OF
SAMUEL P. NEWTON, PC
The Historic KM Building
40 2nd Street E, Suite 222
Kalispell, MT 59901

Attorney for Appellant

FILED
UTAH APPELLATE COURTS

DEC 12 2016

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 McKelvic, Judge, presiding.

MARK C. FIELD (8340)
Assistant Attorney General
SEAN D. REYES (7969)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellee

SAMUEL P. NEWTON (9935)
**LAW OFFICE OF
SAMUEL P. NEWTON, PC**
The Historic KM Building
40 2nd Street E, Suite 222
Kalispell, MT 59901

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS _____ **III**

TABLE OF AUTHORITIES _____ **V**

INTRODUCTION _____ **1**

ARGUMENT _____ **1**

POINT I _____ **1**

**Mr. Simmons alleged that the court sentenced him on inaccurate
information that would warrant resentencing** _____ **1**

CONCLUSION _____ **4**

RULE 24 CERTIFICATE OF COMPLIANCE _____ **4**

CERTIFICATE OF SERVICE _____ **5**

TABLE OF AUTHORITIES

CASES

<i>State v. Hernandez</i> , 2005 UT App 476 (unpublished) _____	3
<i>State v. Jaeger</i> , 1999 UT 1, 973 P.2d 404 _____	2
<i>State v. Maroney</i> , 2004 UT App 206, 94 P.3d 295 _____	3
<i>State v. Monroe</i> , 2015 UT App 48, 345 P.3d 755 _____	3

STATUTES

Utah Code Ann. § 77-18-1 _____	2
--------------------------------	---

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ROGER WAYNE SIMMONS,
Defendant/Appellant.

Case No. 20151012-CA

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* Aplt’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

I hereby certify that on 12th December, 2016, I have caused to be mailed

hand-delivered eight copies of the foregoing to:

Utah Court of Appeals
450 South State
P.O. Box 140230
Salt Lake City UT 84114-0230

I certify that on 12th December, 2016, two copies of the foregoing brief were

mailed hand-delivered to:

MARK C. FIELD
Utah Attorney General
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854

A digital copy of the brief was also included: Yes No

