

1992

Utah v. Wicks : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 920307-CA
v. :
DAVID BRYANT WICKS, : Priority No. 2
Defendant/Appellant.:

BRIEF OF APPELLEE
- - - - -

APPEAL FROM A SENTENCE FOLLOWING A CONVICTION
FOR FORGERY, A THIRD DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANN. § 76-6-501
(1990), IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, THE HONORABLE ROBERT
T. BRAITHWAITE, PRESIDING.

UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
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DAVID BRYANT WICKS, : Priority No. 2
Defendant/Appellant.:

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a sentence following a conviction for forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (1990), in the Fifth Judicial District Court in and for Iron County, the Honorable Robert T. Braithwaite, presiding. This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF THE ISSUES AND

STANDARD OF APPELLATE REVIEW

The issues presented in this appeal are:

1. Did defendant fail to preserve for appeal his claim concerning insufficient time to challenge the presentence report, and if not, did the trial court fail to provide defendant with sufficient time to allow defendant to controvert alleged inaccuracies in the report? An appellate court will not consider issues raised for the first time on appeal. State v. Steggell, 660 P.2d 252 (Utah 1983). "For questions of fact [involved in sentencing decisions], frequently constituting threshold

inquiries that must be satisfied prior to addressing the legal intricacies, a 'clearly erroneous' standard applies." State v. Rhodes, 818 P.2d 1048, 1049-50 (Utah App. 1991).

2. Did defendant fail to provide an adequate record for review by this Court? It is a well established rule of appellate procedure that the party asserting error has the "duty and responsibility of supporting such allegation by an adequate record." State v. Wulffenstein, 657 P.2d 289, 294 (Utah 1982), cert. denied, 460 U.S. 1044 (1983). An appellate court will presume regularity in the proceedings below where no transcript of the sentencing hearing was provided the appellate court and there was no suggestion that a presentence report was effectively concealed from the defendant. State v. Mitchell, 671 P.2d 213, 215 (Utah 1983).

3. Did the trial court abuse its discretion in sentencing defendant to consecutive terms of imprisonment and a \$ 5,000 fine? "[B]efore the reviewing court may 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 an abuse of discretion.'" State v. Rhodes, 818 P.2d 1048, 1051 (Utah App. 1991) (citing State v. Gerrard, 584 P.2d 885, 887 (Utah 1978) (emphasis added) (citation omitted)).

4. Did the trial court improperly refuse to order defendant undergo a 90-day diagnostic evaluation ? An appellate court will not disturb a sentence or a denial of an diagnostic evaluation unless it constitutes an abuse of discretion. State

v. Gibbons, 779 P.2d 1133, 1135 (Utah 1989); State v. Russell, 772 P.2d 971, 971 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Determinative constitutional provisions, statutes and rules are compiled in Appendix A where not set forth in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged by information with forgery, a second degree felony, in violation of Utah Code Ann. § 76-6-501 (1992) (R. 3). In exchange for a reduced charge, defendant pled guilty to forgery, a third degree felony (R. 8-15). Thereafter, the court sentenced defendant to a term of not more than five years in the Utah State Prison, to be served consecutively with another conviction in Washington County, upon which defendant had been sentenced six days earlier. The court also ordered defendant to pay a fine of \$5,000.00 and to pay restitution in the amount of \$750.00 (R. 51-53; T. 19). Defendant appeals from that order.

STATEMENT OF FACTS

Prior to his sentencing, defendant sought the production of various documents which would inform him of the existence of fugitive warrants appearing on his record and which he had learned would affect the recommendations of the Department of Corrections concerning his sentencing (see Defendant's

Petition for Records, Document and Things, R. 37-38).¹ The record is silent as to whether defendant received any documents in response to his motions. However, defendant was sentenced on a separate felony in the Washington County District Court on April 8, 1992, six days before his sentencing in this matter, during which the same presentence report, less an addendum, was used (T. 2-3).²

At the beginning of the sentencing hearing defense counsel informed the trial court as follows:

Bear in mind that Mr. Wicks has informed me that he didn't get an opportunity to review this report in Washington County. That here in Iron County was really the first time that he's had a chance to go through the report. And I should point out that he really didn't have a chance to really read the report, but I pointed out the -- what I considered to be the key factors in the report as to why the evaluation came out the way it did, which was his extensive record that is set out in there."

(T. 2-3) (emphasis added). He claimed that the report

¹ Defendant also filed an affidavit stating that his lawyer, who is also representing defendant on appeal, was not assisting him in obtaining the necessary documents, and a motion requesting that he be allowed to proceed pro se (see Affidavit, dated March 31, 1992 (R. 39) and Motion for Self Representation, filed March 27, 1992 (R. 34). Notwithstanding defendant's complaints of his counsel's performance prior to the sentencing hearing, no claim of ineffective assistance had been made, and although defendant's motion for self representation does not appear to have been explicitly ruled on, it is apparent that defendant abandoned any claim he might have had when, at the sentencing, he did not respond to the opening remarks concerning pending motions (T. 2), and when he did not object to Mr. Jackson's representation on appeal (T. 14).

² A complete copy of the sentencing hearing is attached at Addendum B.

inaccurately referenced numerous fugitive warrants and convictions (T. 4-8). However, the trial court noted that, notwithstanding these alleged inaccuracies, there were sufficient accurately reflected convictions to support the recommendations made in the presentence report, and, in view of defendant's having lied to the court before, the court would sentence in accordance with the recommendations (T. 17-19). The court also refused to order a 90-day diagnostic evaluation for defendant (T. 15-16).

SUMMARY OF ARGUMENT

Defendant waived his claim that the trial court did not allow him sufficient time in which to rebut alleged inaccuracies in the presentence report. At the sentencing hearing defendant remarked only that he had not had much opportunity to review the report. He neither indicated that the opportunity was insufficient nor did he request a continuance. In any event, because defendant received a similar report six days earlier, he had sufficient opportunity to challenge the report, of which he took full advantage.

Defendant has not provided this Court with a copy of the presentence report, and so it should presume regularity in the proceedings below and decline to consider defendant's claims. However, even without the report, the transcript of the sentencing hearing shows that the trial court did not abuse its discretion in sentencing defendant to consecutive prison terms and ordering him to pay a \$ 5,000 fine. Defendant admitted that

the "poor" rating he received on the matrix might still not change even if the alleged inaccuracies were discounted. Further, the sentence, based on defendant's having received a "poor" rating, was in accord with the Utah Sentence and Release Guidelines.

The trial court properly refused to order defendant undergo a 90-day diagnostic evaluation. First, defendant's claim on appeal, that he requested the diagnostic evaluation for the purpose of further challenging the inaccuracies in the presentence report, was not made to the trial court. Therefore, the claim has not been preserved for appeal and this Court should decline to review it. Second, the transcript of the sentencing hearing indicates that the trial court had sufficient information on which to base its refusal to order defendant undergo a 90-day diagnostic evaluation.

ARGUMENT

POINT I

DEFENDANT DID NOT RAISE AN OBJECTION IN THE TRIAL COURT THAT HE HAD INSUFFICIENT TIME TO REBUT EVIDENCE COLLECTED IN THE PRESENTENCE REPORT, THEREBY WAIVING THE CLAIM ON APPEAL. IN ANY EVENT, THE TRIAL COURT'S DISCLOSURE OF THE PRESENTENCE REPORT TO DEFENDANT, PLUS DEFENDANT'S OPPORTUNITY TO REVIEW A COMPARABLE PRESENTENCE REPORT SIX DAYS PRIOR TO HIS SENTENCING, ACCORDED DEFENDANT DUE PROCESS.

A. Defendant Waived his Claim on Appeal.

"As a general rule, a timely and specific objection must be made in order to preserve an issue for appeal. Absent a

timely objection, [an appellate court] will review an alleged error only if it is obvious and harmful, i.e., only if it constitutes "plain error." State v. Whittle, 780 P.2d 819, 820-21 (Utah 1989) (citations omitted).

At the sentencing hearing defendant informed the trial court, through counsel, that he had reviewed the presentence report, but that he had not really read it (T. 2-3). However, he in no way indicated to the court that he had not had sufficient time to consider the report, nor did he claim that he had not had "sufficient time to properly challenge the inaccuracies contained in the presentence investigation report," as he now claims for the first time on appeal (Point I of Appellant's Brief at 8). Further, at no time did defendant move the court for a continuance in order to challenge the report's alleged inaccuracies. On appeal, defendant has not claimed the trial court's handling of the presentence report was plain error. Therefore, this Court should decline to review the merits of defendant's claim.

The State's resort to waiver in this matter is further strengthened in the context of defendant's challenge by State v. Sanwick, 713 P.2d 707 (Utah 1986) (per curiam). In Sanwick, the defendant was denied the opportunity to cross-examine his daughters, victims of the offense to which he had pled guilty and whose statements were the basis of damaging testimony of others whose statements were included in the presentence report. Id. at 708-09. In holding the defendant was not denied due process,

notwithstanding his right to information that would bear on his sentencing, the Utah Supreme Court cited with approval State v. Trangsrud, 651 P.2d 37 (Mont. 1982), wherein the Supreme Court of Montana also held that there was no denial of due process where a defendant took the stand to rebut the accuracy of the presentence report. Id. at 40. Though not specifically referenced by Sanwick, the supreme court in Trangsrud also found that the defendant had waived for appeal the claim that he had insufficient time to acquire witnesses to rebut information contained in the presentence report where he had failed to request a continuance from the court. Ibid.

B. Defendant Had Sufficient Access to the Presentence Report.

Fundamental fairness requires that the trial court disclose to a criminal defendant his presentence report prior to sentencing in order to better insure that the trial court's sentencing discretion is based on accurate information. State v. Lipsky, 608 P.2d 1241, 1248 (Utah 1980); accord, State v. Casarez, 656 P.2d 1005, 1007 (Utah 1982); State v. Howell, 707 P.2d 115, 118 (Utah 1985).

"If the defendant thinks the report inaccurate, he should then have the opportunity to bring such inaccuracies to the court's attention." Lipsky, 608 P.2d at 1244; Casarez, 656 P.2d at 1008. See also Sanwick, 713 P.2d at 709 (noting the admissibility of hearsay in the presentence report "as long as the defendant had the opportunity to rebut the adverse evidence and to challenge the reliability of the evidence presented").

Defendant does not claim, like the defendant in Lipsky, that the trial court denied him due process by denying him access to the presentence report, but rather that the court failed to provide him with sufficient time to rebut certain alleged inaccuracies in the report (Point I of Appellant's Brief at 7-8). Defendant relies on State v. Rhodes, 818 P.2d 1048, 1050-51 (Utah App. 1991) (finding the defendant's access to the presentence report and the diagnostic evaluation for almost two weeks prior to defendant's second hearing afforded him sufficient opportunity to effectively contest the alleged factual inaccuracies). In so arguing, defendant misconstrues the breadth of rebuttal, and consequently the right of confrontation, allowed a defendant in a sentencing hearing by Lipsky and its progeny.

In expanding the defendant's due process rights in Lipsky, the Utah Supreme Court simultaneously restricted the extent to which the bases of the trial court's sentencing decision could be exposed by a defendant. Thus, the court held that the defendant had a right of access to the presentence report prior to sentencing, for the purpose of challenging alleged inaccuracies, but at the same time the trial court could receive a presentence report without having to allow its author to personally appear and testify in open court to defend the report. Id. at 1244.

One year later, in State v. Hanson, 627 P.2d 53 (Utah 1981), the court rejected a defendant's claim that he had been denied due process because he was not allowed to appear at a

staff meeting of the Department of Adult Probation and Parole where recommendations for the presentence report were developed. In rejecting the defendant's challenge, the court again referred to the trial court's prerogatives in receiving a presentence report without having to require its authors to appear, stating that the right to disclosure was not accompanied by the right of confrontation. Id. at 55.

Finally, in Sanwick, the court cited with approval Trangsrud, wherein the Montana high court held there was no denial of due process where a defendant was restricted to simply taking the stand to rebut claimed inaccuracies in the presentence report. Sanwick, 651 P.2d at 40. Viewed from this perspective, this Court's holding in Rhodes does not require a certain minimum period of time which a defendant must be allowed in order to properly challenge alleged inaccuracies in a presentence report, but instead merely indicates that having two weeks notice of the contents of a presentence report was quite sufficient for the defendant in that case to muster his challenge.

Even if this Court were to find in Rhodes, a requirement of a certain minimal time which should be afforded a defendant to challenge claimed inaccuracies in a presentence report, a requirement nowhere to be found Lipsky and its progeny, or supported by any authority cited by defendant, the facts of this case would still support the adequacy of disclosure in this case.

First, defendant was given the presentence report (T.

2). Second, defendant admitted that he had been sentenced on the basis of the same presentence report presented in a sentencing in Washington County, less an addendum prepared for the Iron County District Court in the present case (T. 2). The date of the sentencing in Washington County does not formally appear in the record, however, defendant acknowledged in a letter to a clerk in the Iron County District Court that he was being sentenced in Washington County on April 8, 1992 (R. 45). It is also apparent from the record that the presentence report used to sentence defendant in Washington County must have been substantially similar to the one used in this case because defendant's counsel, in addition to essentially admitting that the reports were the same (T. 2), informed the trial court that defendant was moving the Washington County court to reconsider the judgment for reasons similar to those which he would raise in this case (T. 3). Thus, it would appear from the record that defendant had access to the presentence report almost one week prior to his sentencing in this case, notwithstanding his assertions that he had not had the opportunity to review the Washington County presentence report (T. 3). See Mitchell, 671 P.2d at 215 (holding the defendant's request for a remand for resentencing frivolous where there was no suggestion that the presentence report was presented in such a way as to conceal it or deter the defendant from inspecting it).

Finally, defendant was freely permitted to challenge the alleged inaccuracies in the presentence report. He testified

at length that he was unaware of twenty-four arrest warrants listed in the report, and he denied the accuracy of nineteen misdemeanors (T. 7-8). He specifically denied listed convictions in Cleveland, Ohio, Horsham and Philadelphia, Pennsylvania and Los Alamitos, California (T. 4-7). He also specifically challenged the listing of fugitive warrants in Wyoming and Cuyohoga County, Ohio, claiming that he knew nothing about them (T. 3-4). In response, the court asserted that it was not relying on these disputed arrest and misdemeanor convictions, but rather on the remaining unchallenged record set forth in the presentence report (T. 19-20).

On such facts defendant cannot reasonably maintain that he was denied disclosure of the contents of the presentence report, or a sufficient opportunity to rebut the accuracy of the report.

POINT II

REGULARITY IN THE PROCEEDINGS BELOW SHOULD BE PRESUMED WHERE DEFENDANT FAILED TO INCLUDE IN THE RECORD ON APPEAL THE PRESENTENCE REPORT. HOWEVER, RELYING ONLY ON THE RECORD OF THE SENTENCING HEARING, THE RECORD INDICATES THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING DEFENDANT ON THE UNCHALLENGED INFORMATION IN THE PRESENTENCE REPORT.

"[B]efore the reviewing court may 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 an abuse of discretion.'" State v. Rhodes, 818 P.2d 1048, 1051 (Utah App. 1991) (citing State v. Gerrard, 584 P.2d 885, 887 (Utah 1978) (emphasis added) (citation omitted)).

"The burden of showing error is on the party who seeks to upset the judgment." State v. Noren, 704 P.2d 568, 571 (Utah 1985) (quoting State v. Jones, 657 P.2d 1263, 1267 (Utah 1982)).

In this case defendant has failed to include in the record on appeal the presentence report containing the alleged inaccuracies of which he complains and which undoubtedly formed the basis of the trial court's sentencing decision. On such failure this court may decline to review the merits of defendant's claim, presuming regularity in the proceedings below. See State v. Eloge, 762 P.2d 1, 2 (Utah 1988) (per curiam) (presuming regularity in the proceedings below where the defendant, challenging the trial court's discretion in denying him a 90-day diagnostic evaluation and sentencing him to a potential life sentence, failed to provide the court with a copy of the presentence report from which it might have assessed the trial court's discretion); Mitchell, 671 P.2d at 215 (presuming regularity in the proceedings below where, though no transcript of the sentencing hearing was provided the appellate court, there was no suggestion that a presentence report was effectively concealed from the defendant); but see Lipsky, 608 P.2d at 1246 n.9 (citing State v. Carson, 597 P.2d 862, 866 (Utah 1979), for the proposition that, in order "[t]o avoid errors, sentencing procedures require a somewhat stricter standard than the general presumption of regularity").

Even if this Court were to take the more rigorous stance, refusing to presume the regularity of the proceedings

below in absence of the presentence report, the proceedings at the sentencing hearing amply show the trial court did not abuse its discretion.³

After having challenged in detail the accuracy of the presentence report's list of his prior crimes, defendant admitted to three prior felony convictions and numerous prior confrontations with the authorities, albeit encounters in which

³ While no Utah case has expressly held that following a defendant's identification of inaccurate information in the presentence report the court may then proceed to sentence him in reliance on the accurate, unchallenged information in the report, the proposition is implicit in Lipsky and its progeny, and express in the caselaw of other jurisdictions. See Lipsky, 608 P.2d at 1249 ("The fair administration of justice at the least requires that the information upon which the judge relies in imposing punishment is accurate."); Rhodes, 818 P.2d at 1050 ("The Lipsky court emphasized that the decision to compel disclosure of presentence reports was not intended to impinge upon the sentencing judge's discretion to determine what punishment fits both the crime and the offender. Rather, the court was interested in shoring up the soundness and reliability of the factual basis upon which the judge relies in the exercise of that sentencing discretion."); State v. Bingman, 745 P.2d 342, 349 (Mont. 1987) (finding that even without the questionable presentence report incidents, there was substantial support for the challenged criminal offender designation found by the court); Thurkill v. State, 551 P.2d 541, 545 (Alaska 1976) (holding that whenever a presentence report contains improper reference to "police contacts," the trial court shall indicate on the record that it has not relied on such information in imposing sentence).

Indeed, in State v. Roberts, 612 P.2d 360, 361 (Utah 1980), a post-Lipsky case, the Utah Supreme Court found a failure to disclose a presentence report was not prejudicial. The defendant did not claim that there were inaccuracies in the report, but merely that the failure to furnish him with a copy prior to sentencing was a denial of his rights to counsel and confrontation of witnesses. The court upheld the sentence, noting that the trial court had stated the information in the report that it relied on and gave the defendant to refute the matter. The court found no prejudice where the record did not indicate that the defendant would have received probation if he had received a copy of the report prior to sentencing.

charges had either been dropped or not even filed (T. 8). He specifically admitted to a charge in Duval, Florida for forgery, which had been dismissed.⁴ Following the prosecution's presentation, defense counsel acknowledged that defendant had lied to the court on previous occasions (T. 16-19). In sentencing defendant, the trial court explicitly noted that the recommendations of the Adult Probation and Parole investigators were justified even after discounting the challenged felonies (T. 19-20).

Most significantly, defendant admitted that even discounting the challenged convictions, it was not clear that his classification on the matrix would change (T. 9). Defendant was assigned a "poor" rating in the presentence report (T. 8). The "General Disposition Matrix - Felonies" for determining fines and bails suggests a fine of \$ 5,000 for a third degree felon assigned a "poor" rating. See Appx. C, Code of Jud. Admin. (1992) (attached at Addendum A). The Utah Sentence and Release Guidelines provide that the court may sentence a defendant to serve consecutive prison terms if the defendant is a fugitive. See Form 4, Appx., Code of Jud. Admin. (1992) (attached at Addendum A). While defendant denied knowledge of 24 listed arrest warrants in the report, he did not refute their existence. However, he did acknowledge the existence of at least one

⁴ See Howell, 707 P.2d at 118 (noting that in sentencing the trial court may also consider facts relating to dismissed charges in related crimes); State v. Lipsky, 639 P.2d 174, 176 (Utah 1981) ("Lipsky II") (noting the propriety of the trial court's considering an acquittal in sentencing).

fugitive warrant, issued out of Colorado Springs, on which he had not yet been arraigned (T. 7). Therefore, if discounting the challenged inaccuracies in the report might still not have changed defendant's classification, as defendant admits, then it cannot have been an abuse of discretion for the trial court to have sentenced him to consecutive prison terms and a \$ 5,000 fine, a result in accord with the Code of Judicial Administration. Further, since the trial court had sufficient, accurate information on which to sentence defendant as it did, there was again no abuse of discretion in the sentencing.

POINT III

DEFENDANT FAILED TO PRESERVE FOR APPEAL THE ARGUMENT THAT HE REQUESTED A 90-DAY DIAGNOSTIC EVALUATION TO FURTHER DISPUTE THE INACCURACY OF THE PRESENTENCE REPORT. FURTHER, THE RECORD SUPPLIED ON APPEAL SHOWS THAT THE TRIAL COURT HAD SUFFICIENT INFORMATION IN THE PRESENTENCE REPORT UPON WHICH TO BASE THE SENTENCE, THUS PROPERLY DENYING DEFENDANT'S REQUEST.

On appeal defendant claims that the trial court erred in refusing to order a 90-day diagnostic evaluation because: (1) the court deprived him of the means to challenge the accuracy of the presentence report and (2) the court restricted its consideration of legally relevant factors bearing on his sentencing (Point IV of Appellant's Brief at 10-11).

A. Failure to Preserve Issue for Appeal.

This Court should simply decline to consider defendant's first argument because at the sentencing hearing his request for the 90-day diagnostic evaluation was based

exclusively on his belief that he was in need of psychological treatment (T. 11-16). See State v. Johnson, 774 P.2d 1141, 1144-45 (Utah 1989) (noting general rule that the grounds for the objection must be distinctly and specifically stated in the trial court before an appellate court will review those grounds on appeal).

B. 90-Day Diagnostic evaluation is Not Necessary if Trial Court has Enough Information.

An appellate court will "set aside a sentence imposed by the trial court . . . if the trial judge fails to consider all legally relevant factors, or if the sentence imposed exceeds the limits prescribed by law," State v. Gibbons, 779 P.2d 1133, 1135 (Utah 1989) (citations omitted), or "if it can be said that no reasonable man would take the view adopted by the court." State v. Gerrard, 584 P.2d 885, 887 (Utah 1978).

Utah Code Ann. § 76-3-404(1)(a)(i) (Supp. 1992) provides:

In felony cases where the court is of the opinion imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, the court may in its discretion commit a convicted defendant to the custody of the Department of Corrections for a diagnostic evaluation for a period not exceeding 90 days. [Emphasis added.]

Ordering "an evaluation before passing sentence is clearly within [the judge's] discretion, based on his own judgment of the case before him." Gerrard, 584 P.2d at 887. However, the law does not compel a trial court to order a 90-day

diagnostic evaluation merely "because it would have given the judge more information on which to base the sentence." State v. Brown, 771 P.2d 1067, 1067-68 (Utah 1989).

The proper inquiry is whether the court is "sufficiently apprised of the pertinent background facts concerning the defendant," Id. at 1068 (finding that where the trial court had sufficient background information refusal to order a 90-day diagnostic evaluation was not an abuse of discretion); see also State v. Russell, 772 P.2d 971 (Utah 1989) (90-day diagnostic evaluation was not necessary because judge had sufficient information).

The record of the sentencing hearing indicates that defendant clearly articulated his reasons for requesting a 90-day diagnostic evaluation and, in so doing, informed the trial court of his drug problem (T. 11-16, 18-19). The record also indicates that the trial court had sufficient information on which to sentence defendant (T. 8-19). Furthermore, defendant can only reasonably support his claim that the trial court abused its discretion in refusing to order a 90-day diagnostic evaluation by presenting this Court with the presentence report. Defendant has neither supplied the necessary record on appeal nor successfully refuted the report's designation of him as a "poor" candidate, which designation justifies the trial court, in its discretion, to sentence a defendant to prison rather than a treatment alternative. See Form 3, Appx. E, Code of Jud. Admin. (attached at Addendum A). See also Eloge, 762 P.2d at 2 (per curiam)

(presuming regularity in the proceedings below where the defendant, challenging the trial court's discretion in denying him a 90-day diagnostic evaluation and sentencing him to a potential life sentence, failed to provide the court with a copy of the presentence report from which it might have assessed the trial court's exercise of discretion). Therefore, this Court should presume regularity in the proceedings below and find that the trial court did not abuse its discretion in refusing to order defendant undergo a 90-day diagnostic evaluation.

CONCLUSION

Based upon the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

RESPECTFULLY submitted this 5th day of October, 1992.

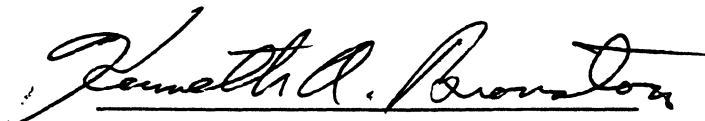
R. PAUL VAN DAM
Attorney General



KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to J. Bryan Jackson, Attorney for Defendant, 111 North Main, Post Office Box 519, Cedar City, Utah 84720, this 5th of October, 1992.



ADDENDA

ADDENDUM A

76-3-404. Presentence investigation and diagnostic evaluation — Commitment of defendant — Sentencing procedure.

- (1) (a) (i) In felony cases where the court is of the opinion imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, the court may in its discretion commit a convicted defendant to the custody of the Department of Corrections for a diagnostic evaluation for a period not exceeding 90 days.

(ii) The Department of Corrections shall conduct a complete study and evaluation of the defendant during that time, inquiring into matters including:

- (A) the defendant's previous delinquency or criminal experience;
- (B) his social background;
- (C) his capabilities;
- (D) his mental, emotional, and physical health; and
- (E) the rehabilitative resources or programs which may be available to suit his needs.

- (b) (i) By the expiration of the commitment period, or by the expiration of additional commitment time the court may grant, not exceeding a further period of 90 days, the defendant shall be returned to the court for sentencing and the court, prosecutor, and the defendant or his attorney shall be provided with a written diagnostic evaluation report of results of the study, including any recommendations the Department of Corrections or the Utah State Hospital believes will be helpful to a proper resolution of the case.

(ii) Any diagnostic evaluation report ordered by the court is supplemental to and becomes a part of the presentence investigation report.

(iii) After receiving the diagnostic evaluation report and recommendations, the court shall proceed to sentence a defendant in accordance with the sentencing alternatives provided under Section 76-3-201.

- (2) Any commitment for presentence investigation under this section does not constitute a commitment to prison. However, any person who is committed to prison following proceedings under this section shall be given credit against his sentence for the time spent in confinement for a presentence investigation report.

GENERAL DISPOSITION MATRIX FELONIES

		CRIME SEVERITY						
		1ST DEGREE		PERSON CRIMES			OTHER CRIMES	
		MUR 11	OTHER	Homicide 2ND SEX	2ND DEG 3RD SEX	3RD DEG	2ND DEG	3RD DEG
CRIMINAL HISTORY	Poor	\$10,000 ↑	\$10,000 ↑	\$10,000 ↑	\$5,000 ↑	\$5,000 ↑	\$10,000 \$5,000	\$5,000 \$2,500
	Fair						\$5,000 \$2,500	\$2,500 \$1,500
	Moderate		\$5,000	\$5,000	\$2,500	\$2,500	\$2,500	\$1,500
	Good	\$5,000	\$5,000	\$5,000 \$2,500	\$2,500 \$1,500	\$2,500 \$1,500		
	Excellent	\$5,000 \$2,500	\$2,500 \$1,500	\$2,500 \$1,500	\$1,500 \$600	\$1,500 \$600	\$1,500	\$600

DRUG DISTRIBUTION OF OR INTENT TO DISTRIBUTE OVER \$500 &
RESIDENTIAL BURGLARY SHOULD BE "PERSON" CRIMES

<input type="checkbox"/>	PRISON
<input type="checkbox"/>	PROBATION
<input type="checkbox"/>	ALTERNATE

Amounts do not include surcharge

Form 3

CRIMINAL HISTORY ASSESSMENT

PRIOR FELONY CONVICTION (SEPARATE CRIMINAL INCIDENTS)	0 2 4 6 8	NONE ONE TWO THREE MORE THAN THREE	SUBTRACT 1 POINT FOR EACH CONSECUTIVE YEAR OF ARREST-FREE STREET TIME SINCE LAST ARRESTED. REDUCTION LTD. TO 1/2 OF TOTAL.
PRIOR MISD. CONVICTIONS (SEPARATE CRIMINAL INCIDENTS) (INCLUDES DUI & RECKLESS) (EXCLUDES OTHER TRAFFIC)	0 1 2 3 4	NONE ONE TWO TO FOUR FIVE TO SEVEN MORE THAN SEVEN	NUMBER OF YEARS: _____ ***** FINAL PLACEMENT SCORE: *****
PRIOR JUVENILE REFERRALS (FINDINGS OF DELINQUENT FOR INCIDENTS THAT WOULD HAVE BEEN FELONIES IF COMMITTED BY AN ADULT) (3 NON-STATUS MISD. - 1 FELONY)	0 1 2 3 4	NONE ONE TWO TO FOUR MORE THAN FOUR SECURE PLACEMENT	CRIMINAL HISTORY CATEGORY
SUPERVISION HISTORY (ADULT OR JUVENILE)	0 1 2 3 4	NO PRIOR SUPERVISION PRIOR SUPERVISION PRIOR RESIDENTIAL PLACEMENT PRIOR REVOCATION CURRENT SUPERVISION OR PRE-TRIAL RELEASE	POOR 16 - 28 FAIR 12 - 15 MODERATE 8 - 11 GOOD 4 - 7 EXCELLENT 0 - 3
SUPERVISION RISK (ADULT OR JUVENILE)	0 1 2 3 4	NO ESCAPES OR ABSCONDINGS FAILURE TO REPORT (ACTIVE OFF.) ABSCONDED FROM SUPERVISION ABSCONDED FROM RESIDENTIAL PROG. ESCAPED FROM CONFINEMENT	PLEASE CIRCLE THE CORRECT CATEGORY
WEAPONS ENHANCEMENT (ACTIVE OFFENSE)	0 2 3 4	NONE (NOTE: 2nd FIREARMS CONVICTION REQUIRES MANDATORY 5 - 10 YEAR CONSECUTIVE SENTENCE) OTHER KNIFE FIREARM OR EXPLOSIVE	

TOTAL PLACEMENT SCORE: _____

GENERAL DISPOSITION MATRIX

CAPITAL		CRIME SEVERITY										
		1ST DEGREE		PERSON CRIMES			OTHER CRIMES		MISDEMEANORS			
		MUR II	OTHER	2ND SEX	2ND DEG	3RD DEG	2ND DEG	3RD DEG	A	B		
CRIMINAL HISTORY	POOR											JAIL
	FAIR			PRISON								
	MODERATE								PROBATION			
	GOOD				ALTERNATE P.							FINE 6/0R RESTITUTION (SUPERVISION ONLY IF VIOLENCE OR ACCORDING TO CORR./JUDICIAL COGN. GUIDELINE)
	EXCELLENT											

DRUG DISTRIBUTION OF OVER \$500 & RESIDENTIAL BURGLARY SHOULD BE CONSIDERED "PERSON" CRIMES

Form 4

TIME MATRIX

USED TO CALCULATE MINIMUM TIME IF SENTENCE IS INCARCERATION:

	CRIME SEVERITY		PERSON CRIMES			OTHER CRIMES		MISDEMEANORS	
	CAPITAL	1ST DEGREE	2ND SEX	2ND DEC	3RD DEC	2ND DEC	3RD DEC	A	B
		NUR II	OTHER	3RD SEX					
CRIMINAL HISTORY	POOR	12 YRS	10 YRS	6 YRS	36 MON	24 MON	24 MON	18 MON	12 MON
	FAIR	10 YRS	7 YRS	5 YRS	30 MON	21 MON	21 MON	15 MON	10 MON
	MODERATE	7 YRS	5 YRS	4 YRS	24 MON	18 MON	18 MON	12 MON	8 MON
	GOOD	5 YRS	3 YRS	3 YRS	21 MON	15 MON	15 MON	9 MON	4 MON
	EXCELLENT	3 YRS	2 YRS	2 YRS	18 MON	12 MON	12 MON	6 MON	3 MON
CONSECUTIVE ENHANCEMENTS									
	36 MON	30 MON	24 MON	18 MON	12 MON	12 MON	6 MON	3 MON	3 MON
CONCURRENT ENHANCEMENTS ADDED BY B.O.P.									
	18 MON	15 MON	12 MON	9 MON	6 MON	6 MON	3 MON	3 MON	3 MON

DRUG DISTRIBUTION OF OVER \$500 & RESIDENTIAL BURGLARY SHOULD BE CONSIDERED "PERSON" CRIMES

ACTIVE CONVICTIONS

	DEGREE	YEARS	MONTHS
MOST SERIOUS	_____	_____	_____
NEXT MOST SERIOUS	_____	_____	_____
OTHER	_____	_____	_____
OTHER	_____	_____	_____

SENTENCES SHOULD GENERALLY BE CONCURRENT. HOWEVER, THE EXISTENCE OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES SUGGEST CONSIDERATION OF CONSECUTIVE SENTENCES:

1. ESCAPE OR FUGITIVE
2. UNDER SUPERVISION OR BAIL RELEASE WHEN OFFENSE WAS COMMITTED
3. UNUSUAL VICTIM VULNERABILITY
4. INJURY TO PERSON OR PROPERTY LOSS WAS EXTREME FOR CRIME CATEGORY
5. OFFENSE CHARACTERIZED BY EXTREME CRUELTY OR DEPRAVITY

IF THE SENTENCES ARE TO BE CONSECUTIVE, USE THE CONSECUTIVE ENHANCEMENTS PORTION OF THE "TIME MATRIX" FOR ALL CONSECUTIVE SENTENCES EXCEPT THE "MOST SERIOUS" CONVICTION.

TOTAL _____

CONDITIONS OF PROBATION:

TOTAL MONTHS / 3 = MONTHS TO BE SERVED AS A CONDITION OF PROBATION
WHERE 1 "AS A CONDITION" MONTH = 150 COMMUNITY SERVICE HOURS = \$500 FINE.

JAIL _____

COMM. SERVICE HRS _____

FINE \$ _____

ADDENDUM B

ORIGINAL

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF IRON, STATE OF UTAH

HON. ROBERT T. BRAITHWAITE, Judge

STATE OF UTAH,)

Plaintiff,)

vs.)

DAVID BRYANT WICKS,)

Defendant.)

Criminal No. 911000644

(Tape-Recorded Proceedings)

REPORTER'S HEARING TRANSCRIPT

Tuesday, April 14, 1992

APPEARANCES OF COUNSEL:

For the State:

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DEPUTY IRON COUNTY ATTORNEY
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Cedar City, Utah 84720

For the Defendant:

J. BRYAN JACKSON, ESQ.
111 North Main Street
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PAUL G. McMULLIN
OFFICIAL COURT REPORTER

P.O. BOX 1534
ST. GEORGE, UTAH 84770
(801) 673-5315

FILED

JUL 13 1992

COURT OF APPEALS

920307.1A

1 CEDAR CITY, UTAH; TUESDAY, APRIL 14, 1992

2 -oOo-

3
4 THE COURT: The Court calls State versus David Bryant
5 Wicks. This matter is on for sentencing. There's some
6 pending motions, I guess, since the last hearing with the
7 Court. I've provided both defense counsel and the
8 prosecution with copies of pro se correspondence as -- as it
9 has been received.

10 MR. JACKSON: I'm not sure where we're at on all of
11 that, Your Honor, in terms of his earlier request, but we
12 are prepared to go ahead with sentencing.

13 THE COURT: All right. Go ahead and -- there's been a
14 presentence report prepared.

15 And you have that?

16 MR. JACKSON: Yeah. I've had an opportunity to go
17 through this with Mr. Wicks. Basically, as I'm
18 understanding what we have is actually a presentence report
19 that was prepared through the Washington County court, in
20 which he's been sentenced on.

21 THE COURT: And then an addendum for this court.

22 MR. JACKSON: And then an addendum for this court.

23 Okay. He was sentenced in Washington County -- he
24 was sentenced in Washington County to serve on a
25 third-degree felony, zero to five, and I guess the -- the

1 real question that we have in this case, really, is whether
2 or not this case should run consecutively or concurrently
3 with that order of commitment.

4 The -- what Mr. Wicks has requested that I ask the
5 Court do is to consider -- consider rather than the
6 commitment, an order to have him go up and serve a
7 diagnostic -- have a diagnostic evaluation done. He feels
8 that he is going to be entitled to this partly because he
9 has made a motion in Washington County to have the Court
10 reconsider judgment down there. And the reasons are
11 similar, and I'll go through those.

12 Bear in mind that Mr. Wicks has informed me that
13 he didn't get an opportunity to review this report in
14 Washington County. That here in Iron County was really the
15 first time that he's had a chance to go through the report.
16 And I should point out that he really didn't have a chance
17 to really read the report, but I pointed out the -- what I
18 considered to be the key factors in the report as to why the
19 evaluation came out the way it did, which was his extensive
20 record that is set out in there.

21 And in the record, Mr. Wicks -- basically I'll go
22 ahead and give this to the Court. But he's made a notation
23 by the offenses that he doesn't feel apply to him. And one
24 of those is the first offense listed July 19, 1991. It's a
25 bad check. It's a Casper, Wyoming, matter.

1 Do you want to go ahead and tell the Court --

2 MR. WICKS: Yes.

3 THE COURT: Go ahead.

4 MR. WICKS: Your Honor, I don't have an arrest warrant
5 from Casper, Wyoming, as far as I know. At least I have not
6 been served with one.

7 In the presentence report, it also has that I have
8 a warrant in the state of Ohio.

9 MR. JACKSON: Yeah. Cleveland, Ohio, on 8-9-91.
10 There's an arrest warrant listed there, plus also Cuyahoga.

11 MR. WICKS: Cuyahoga County. A conviction.

12 MR. JACKSON: Cuyahoga County. A conviction -- there's
13 a conviction in Cleveland, Ohio. There's a warrant issued
14 in Cuyahoga, Ohio, 8-20-91.

15 You're saying that one doesn't apply to you?

16 MR. WICKS: No, Your Honor. Because Ohio -- the state
17 of Ohio is the one that released me to the state of Utah for
18 extradition. I was not convicted there; so, how can they
19 have a warrant for me when they gave me to this state? I
20 haven't been released since Ohio released me to this state.

21 THE COURT: Okay.

22 MR. JACKSON: Okay. And then we have one in Oklahoma
23 that you've made a notation of for cocaine.

24 MR. WICKS: Yes. I was stopped by a police officer
25 there, and I was brought in for possession of cocaine.

1 There was residue in a bowl. But I wasn't the driver of the
2 car, and it wasn't my car. I was released. I was never
3 convicted as it says on here for 353 days.

4 MR. JACKSON: It does indicate that he was sentenced for
5 353 days.

6 MR. WICKS: I wasn't. I was released, because I wasn't
7 the driver of the car, nor was I the owner of the car. And
8 it wasn't found on my person; so, they dismissed it.

9 THE COURT: Were you in jail 353 days --

10 MR. WICKS: No, sir.

11 THE COURT: -- waiting for trial or anything?

12 MR. WICKS: No, sir. I was released two days after I
13 was in jail, and the public defender says -- said something
14 about a standing that I-- I didn't -- I was not the owner of
15 the car, and I wasn't the driver, and he -- they -- I was
16 released, and I never got sentenced to 300 and some days on
17 anything like that.

18 MR. JACKSON: Then he's noted Maywood, Illinois, there's
19 a -- there's something. It makes reference to a Florida
20 warrant. Extradited to Florida.

21 Were you picked up in Illinois on --

22 MR. WICKS: No. Your Honor, I never was extradited to
23 the state of Florida. I have -- I was in Duval -- when it
24 mentions in there about Duval County Court, that's in
25 Jacksonville. Yes. I was there, and I was charged with

1 forgery, and it was dismissed. But I was never -- this
2 Maywood, Illinois -- Illinois. I've never heard of them.

3 MR. JACKSON: And Middleton, Pennsylvania?

4 MR. WICKS: Philadelphia, Pennsylvania, is where I had
5 my first conviction.

6 MR. JACKSON: There is a Philadelphia, Pennsylvania,
7 conviction listed on here, but --

8 MR. WICKS: Maywood, no; Middleton, no.

9 MR. JACKSON: Okay. There's also a second Philadelphia
10 conviction.

11 MR. WICKS: Yeah. Your Honor, a lot of them, they are
12 repeating, like the same -- you look at that one. That's
13 the same thing as the ones on the other page. They're just
14 repeating them.

15 MR. JACKSON: Well, this one was listed as 11-6, 1988,
16 and this one is 11-2, 1989.

17 MR. WICKS: Okay. Yeah -- yeah. That's correct.

18 MR. JACKSON: So there's two of them?

19 MR. WICKS: Yes. But I was sentenced together on them.
20 They ran them together. And Horsham -- this one in Horsham,
21 Pennsylvania --

22 MR. JACKSON: These two -- you're saying these two
23 Pennsylvania ones were sentenced together?

24 MR. WICKS: Yes, sir.

25 MR. JACKSON: Okay. What about Horsham, Pennsylvania?

1 MR. WICKS: No. That's not me.

2 MR. JACKSON: All right. Los Alamitos, California.

3 MR. WICKS: No, sir. That's not me.

4 MR. JACKSON: All right.

5 MR. WICKS: And I'm -- I haven't seen anything since
6 I've been locked up. I was in Cuyahoga County Jail. They
7 ran the NCIC there. I was locked up in the jail in
8 St. George, and I had a negative NCIC there, and now all of
9 a sudden I'm told that I'm the 10 most wanted person. I
10 haven't seen anything -- I have no -- I have one fugative
11 warrant. I haven't seen anything else that would indicate
12 that I'm the 10 most wanted person in the world.

13 MR. JACKSON: He's -- he's got -- received a fugative
14 warrant from Colorado Springs.

15 Is that correct?

16 MR. WICKS: Right. And I haven't been -- the county
17 attorney's office hasn't served me with a fugitive warrant
18 on it, and I haven't been arraigned on it yet. But the
19 presentence report says that there's 24 outstanding fugitive
20 warrants pending, and they used their matrix to evaluate me
21 and to stop me from going to the ninety day program, but I
22 haven't seen 24 warrants.

23 MR. JACKSON: He's basically saying that he wants to
24 address whatever is out there, but presently, there's --
25 he's not aware of what these 24 states have on him, because

1 he's never been -- he's never received a warrant.

2 THE COURT: Okay. What's his --

3 Mr. Wicks, what is your -- how many felonies do
4 you claim that you have been convicted of?

5 MR. WICKS: I have three prior felony convictions and --
6 numerous amounts of confrontations with the law where they
7 either dropped charges or no charges were brought. I have
8 cashed bad checks. And Cleveland, Ohio, is one of them.
9 But they didn't convict me. They dismissed the charges
10 pending extradition to the state of Utah. And the judge
11 there is Judge Willman. And they can call 443 -- is it
12 8560? And they can confirm that they did not convict me of
13 any crime.

14 I have -- if I have 24 fugitive warrants, Your
15 Honor, I'd like to see them. But as far as I know, the
16 reason why I'm not being permitted to be evaluated on the
17 ninety day is because of -- all these warrants has brought
18 my matrix score up, but I have not seen what they're
19 alleging [sic.] in this presentence report.

20 MR. JACKSON: And on the matrix score, Your Honor,
21 basically what we have here is their score comes up to 17,
22 which categorizes him as a poor candidate. If he had a
23 score of 15 or less -- if there were two points deducted
24 off -- and I don't know if we get there or not. Basically
25 it looks like from the report, that there is 19 prior

1 misdemeanors, according to the schedule. And so they've
2 given him the worst classification. But in order for him to
3 have that readjusted, he has to -- he can't have really any
4 more than seven.

5 And so we've knocked out -- well, let's just --
6 for argument's sake, let's just say that Mr. Wicks is right,
7 and so this Casper, Wyoming, one goes -- one, two, three,
8 four, five, six, seven, eight -- let's -- yeah. Let's try
9 it that way. Let's count it one, two, three, four, five,
10 six, seven, eight -- there's eight that the disposition is
11 listed as being a conviction. There's a couple here where
12 disposition is unknown. That's eight, not counting the ones
13 that he's taking issue with. So I don't know if it changes
14 the -- it may not change the classification, but the one
15 place that I think it might is in the category involving
16 supervision history. They have really -- they've listed him
17 with the worst category, which is basically that he
18 committed this violation while he was under current
19 supervision. And that doesn't seem to bear that out in the
20 report, which if that were reclassified down to a -- one of
21 the other categories below three, then of course he would be
22 right on the borderline as being a fair candidate, which
23 would put him into the category of considering an
24 alternative to prison of -- and to where a 90-day diagnostic
25 evaluation might -- might come into play.

1 MR. WICKS: I'm not on probation; I'm not on parole.
2 I'm not on anything from the court. So that is not true
3 what they have that I'm wanted someplace because of release
4 and supervision. That would have put me in the ninety day
5 category.

6 The last time when I was here before you, and I
7 asked that motion about -- to dismiss, because I said that I
8 was in Ohio for all that -- for these seven months, and that
9 I didn't get a opportunity to have due process by an
10 attorney and all that stuff, you said because I didn't have
11 a memorandum or any type of case law -- any proof to what I
12 was saying, that you dismissed it. Well, here, Your Honor.
13 There's no proof that I am the one -- 10 most wanted, and
14 there's no proof of 19 misdemeanors, and there's no proof of
15 any of supervised release that I'm wanted, and I'm on
16 probation and parole. And I think if you was to use that
17 against me without any proof, it would be unfair.

18 MR. JACKSON: We would take issue with the fact that
19 there's -- the report makes mention of this, that he's on
20 the 10 most wanted list. We don't know that. I haven't
21 seen anything that reflects that. It does come into
22 consideration in the -- in the actual evaluation. Where the
23 summary is put together -- evaluative summary is put
24 together, it does list that as a factor that was considered
25 in coming in with this.

1 It's also listed that he's made false statements
2 and filed numerous grievances and stuff. And -- and while
3 he has tried to effectuate his rights in this case, I don't
4 think he's done it with the intent to try to hassle anybody
5 or whatever. He certainly objects to the classification
6 that -- that he's filed false statements.

7 And I guess in a nutshell, what we're requesting
8 is two things. Number one, that the Court consider rather
9 as -- rather than just committing him, that the Court
10 consider a 90-day evaluation to -- for further
11 consideration. We believe that it's warranted in -- given
12 his -- his acknowledged substance abuse problem as well as
13 his mental health problem. There might be something that he
14 could -- even if he is committed, that he could start
15 accessing while he were in prison. And it's worth it to the
16 State to try to -- to try to reconcile that. And so the
17 ninety day would be very helpful in diagnosing Mr. Wicks,
18 even if the Court ultimately did convict him -- or did
19 sentence him to -- to prison after the ninety day.

20 Secondly, we would ask the Court to consider
21 running this matter concurrently with the Washington County
22 matter. And this we would request the Court do, number one,
23 because he has cooperated. He came in; he pled guilty
24 pursuant to a plea agreement. He -- he has cooperated.
25 Granted, he's made an extensive effort to try to assert

1 certain rights and whatnot, but in every sense, he's tried
2 to cooperate in providing information and whatnot.

3 And additionally, that -- that these matters are
4 just really related to the same -- it's just a continuation
5 of his same mental condition when it was all happening,
6 which he's acknowledged. And so as a consequence, we would
7 ask that the Court run that together.

8 There's also the additional factor for the Court
9 to consider in terms of restitution. Where there is a
10 significant amount of restitution involved, if -- if they
11 were to run consecutively, the victims would be that much
12 further down the road before he could start paying on
13 restitution, whereas if they were run concurrently, it would
14 allow him to get out and start making restitution sooner to
15 the victim.

16 And we'd submit it on that, unless you have
17 something further you want to add.

18 MR. WICKS: Your Honor, I had the opportunity to sit
19 here and witness a lot of people go before you, and a lot of
20 them asked you to give them a break. Well, with my record,
21 I don't expect you to give me a break. You're the judge,
22 and I'm the criminal, and I'm not going to deny that. I
23 don't have any excuse for my previous behavior other than
24 the fact that I'm -- I'm addicted to drugs. And that's the
25 bottom line.

1 I've been to prison before. I was at the Arizona
2 State Penitentiary. I was sentenced to four years. I did
3 18 months of that four years. They gave me \$50 to get out
4 of prison, and the first thing -- the whole time I was in
5 prison, I didn't do any drugs. But as soon as I got out --
6 and they gave me a brand new pair of shoes and pants and
7 \$50. What I did with the \$50 is went and bought some.

8 The the whole time that I've been on the street,
9 I've been -- I went to -- the military spent a lot of money
10 on me to train me to be a good paralegal. To train me to be
11 a cook. I've been to college and made pretty good money,
12 but I've still got this problem with drugs.

13 I can't go to a drug rehab program, because you've
14 got too many other people out there on the street with the
15 same kind of problem that I have. So the only way you can
16 get into a program is if you were rich -- and if I was rich,
17 I probably would buy drugs with the money -- or a judge can
18 put you in a program. They've got programs at the prison;
19 so -- they call you while you're sitting there. Talk about
20 your problems. But it's not effective. I've -- I've been
21 through it. I've tried. And that's the reason why I have
22 been writing you so many letters. And if you read the
23 letters that I wrote to you, that's the reason I was asking
24 for a ninety-day commitment in the mental hospital. If they
25 think I belong there, they'll keep me there more than what

1 you can even sentence me on this charge.

2 I am asking you for some help. I don't want you
3 to just put me in a prison and say, "Hey, in 18 months, let
4 him back on the street and see who else he's going to
5 victimize." I want to cure this problem. And the only way
6 I'm going to get it cured is -- I mean if you put me in
7 prison -- I don't know. That's --

8 THE COURT: All right. I have -- I've read the
9 correspondence. And let me just address a few of the
10 matters that you've raised.

11 First of all, you've indicated in one letter that
12 Mr. Jackson won't represent anything on appeal.

13 But it's my understanding that your contract --
14 you and Mr. Park -- with the county is to handle that
15 appeal.

16 MR. JACKSON: That's correct, Your Honor. We handle the
17 first appeal.

18 THE COURT: Okay. And that may be affected since one of
19 the rights you gave up with a guilty plea in general is the
20 right to an appeal. And the guilty plea was entered. But
21 Mr. Jackson, if an appeal is appropriate, would represent
22 you on that.

23 MR. JACKSON: Sure.

24 THE COURT: Secondly, your request for mental health
25 treatment I don't quite understand. I understand the

1 request for a 90-day diagnostic or however many days it ends
2 up being with the department of corrections. They have now
3 changed it to where it's for an indeterminate amount of
4 time. Anywhere from 45 to 90 days, as I understand it.
5 It's different than -- than the Court finding you mentally
6 incompetent and sending you to a state mental hospital for a
7 period of time.

8 I haven't seen anything from you that would
9 indicate to me that you're not intelligent; that you don't
10 know where you are, and what's going on. You're
11 articulate. And while everything has been pro se, there's
12 been nothing that I've read that made me think that -- that
13 you weren't competent to -- to be here in court.

14 MR. WICKS: I was in the state hospital twice for drug
15 addiction with a -- where they put me in there, and they
16 made me -- lock -- they locked me in the maximum lock down,
17 and they were -- give me -- I'm on Sinequan and Thorazine.
18 That's why they said in the report that I have a severe
19 mental health. It's not because the hospital thinks I'm
20 stupid or anything, they just -- at the hospital, if I had
21 had the money to stay, they could treat me for the
22 addiction.

23 But I can't be released. That's the reason why I
24 was asking for the hospital. Because for me to say, "Hey
25 Judge, I want to go to Horizon," you know, are you kidding?

1 I can walk right in and walk right out of there. I was
2 asking someplace where you would know that they can't
3 release me; that I will be under the state, and that I'm not
4 going to be released until somebody that has enough
5 intelligence to realize, "Hey, this guy has a problem, and
6 he's well now."

7 THE COURT: So your request for mental health treatment
8 is a request that rather than prison, you be sent to a
9 facility that has drug addiction --

10 MR. WICKS: The state hospital.

11 THE COURT: Okay.

12 MR. JACKSON: And that's something that could be
13 evaluated and assessed on a ninety day.

14 THE COURT: All right. I understand that point, then,
15 now, I believe. And on the habeas corpus, I think that
16 would have to be addressed after some resolution or a final
17 determination of appeal rights has been concluded.

18 Having said that, I'm going to now let the State
19 respond. I'll give you both another chance in a minute, as
20 far as sentencing.

21 MR. LATIMER: As far as the habeas corpus, I can inform
22 the Court that that's been filed in Judge Eves' court. It
23 was called on last week's calendar -- yeah. Last Monday.
24 It hadn't been served on the attorney general's office; so,
25 the Court continued it until service could be made on the

1 attorney general. So that's in the process.

2 In response to the PSI, the State concurs strongly
3 in the recommendation for a consecutive prison sentence and
4 is kind of dumbfounded to sit here and listen to Mr. Wicks
5 go on and on about how he disputes everything, when what we
6 have is a person with multiple convictions involving
7 dishonesty, multiple false names, multiple false dates of
8 employment, multiple false Social Security numbers, claims
9 of military record that can't be verified, claims of
10 employment that can't be verified. He lied as to his
11 criminal record. He said in his letter that he started at
12 26. He had convictions for forgery in 1979 and 1980, when
13 he was only 20. He lied to the bank clerks here; he's lied
14 to this court. He's come in and is asking you to be
15 released from jail. He claimed an excuse once, and that
16 didn't work. Came back in the next week and claimed another
17 excuse; that didn't work. He comes back in. I think three
18 different excuses. But he claims he can't remember of
19 committing the crime.

20 It's the State's position that all the evidence in
21 the PSI is -- is trustworthy. Just because Mr. Wicks
22 doesn't know about it doesn't mean it doesn't exist. There
23 are the warrants; there is the status on the 10 most wanted
24 list. We think he's had his chances. A diagnostic is going
25 to be a waste of time.

1 THE COURT: That was a regional 10 most wanted --

2 MR. LATIMER: A regional. I got -- I don't remember who
3 it was that reported it.

4 THE COURT: -- wasn't it? I'm just going off memory.

5 MR. JACKSON: It says in the report it's a regional.

6 THE COURT: Okay.

7 MR. LATIMER: We just think that he's earned a
8 consecutive prison sentence, and we'd ask the Court to
9 follow that recommendation.

10 THE COURT: Okay. And the reason I'm saying I'm going
11 off memory is I've given the defendant my copy; so --

12 MR. JACKSON: Just a couple of other items, Your Honor.
13 We concede that the -- that the amount of time that the
14 defendant has served to date is 218 days. We're requesting
15 that he be given credit for the time served, if the Court
16 is -- is inclined to just go ahead and commit him to prison,
17 as they did in Washington County.

18 At the same time, however, Your Honor, we -- we
19 would rebut by simply saying that -- that by sending
20 Mr. Wicks up on a ninety day, the State -- the State isn't
21 prejudiced by that. If anything, it just gives this court
22 further information on which to make an assessment.

23 And one of the questions I guess that's -- that's
24 there -- and I guess we have to say to Mr. Latimer, he's
25 right -- he's exactly right on everything. He's lied, and

1 he's -- he's deceived. He's done that. And we would
2 respond by simply saying but that's what happens when a
3 person has really got a problem.

4 Here's the first time where there's really any
5 evidence or any -- anything being confronted where Mr. Wicks
6 is saying, "Yeah. I've got a problem. I want to deal with
7 that problem." And really just to see if he's sincere or
8 not, we'd ought to send him up on a ninety day. And if they
9 tell him, and he doesn't jump through the hoops or whatever
10 to get into a program, or he's not willing to do that, then
11 he's going to be back here and sentenced per statute
12 anyway. So I don't see that the State loses anything by
13 sending him up there, but there is the opportunity there --
14 however slim it is -- that Mr. Wicks does fall within
15 something, that he might get some help, and we put an end to
16 all of this criminal behavior, where otherwise when
17 Mr. Wicks serves his 18 months or two years or five years or
18 whatever it is, and he goes on and -- and never really
19 corrects that sort of behavior anyway.

20 We'll submit it on that, Your Honor. We do feel
21 that he ought to get credit on the time served.

22 THE COURT: All right. Could you give me the
23 presentence report back. I'll have a look at that.

24 Even if I take out some of these felony
25 convictions, I still think the matrix -- and I'm not sure

1 that that's a good idea, based on the defendant's lack of
2 honesty with the Court in the past -- the criminal record is
3 too extensive, and I'm going to follow the agency's
4 recommendation and impose sentence pursuant to the statute.
5 Zero to five years in the Utah State Prison, a \$5,000 fine,
6 restitution of \$750 and to serve the sentence consecutive to
7 any sentence received out of the Washington County case.
8 I'll give the defendant credit for 218 days served, if
9 that's, in fact, what -- the number of days.

10 MR. LATIMER: My understanding -- I'm not sure, but I
11 know this comes up before in Judge Eves' court. It's his
12 opinion that the board of pardons makes that call.

13 THE COURT: All right.

14 MR. LATIMER: But I'll include it in the judgment.

15 THE COURT: Let's include it in the judgment. And then
16 if it's within their jurisdiction, they'll have the final --

17 MR. WICKS: Is that 218? Is that what --

18 MR. JACKSON: 218.

19 THE COURT: That's what I was told --

20 MR. LATIMER: All right.

21 THE COURT: -- that's what the actual days are.

22 All right. That's the order to be prepared by the
23 county attorney's office.

24 MR. JACKSON: Your Honor, the -- there is a --

25 THE COURT: Okay.

1 MR. JACKSON: There is apparently a van or something
2 that's going up pretty quick. He'd like to be sent up as
3 soon as possible.

4 THE COURT: All right. As soon as transportation can be
5 arranged, it's to occur.

6 MR. JACKSON: Thank you.

7 (Whereupon the proceedings in the above-entitled
8 matter were concluded.)

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C E R T I F I C A T E

STATE OF UTAH)
) ss.
 COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, an Official Court Reporter in and for the Fifth Judicial District, State of Utah, do hereby certify:

That, the foregoing matter, to wit, STATE OF UTAH VS. DAVID BRYANT WICKS, CRIMINAL NO. 911000644, was tape-recorded at the time and place therein named and thereafter, to the best of my listening and understanding, reduced to computerized transcription under my direction.

I further testify that I am not interested in the event of the action.

WITNESS my hand and seal this 29th day of May, 1992.

Paul G. McMullin

 PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah
 MY COMMISSION EXPIRES: 6-17-95

