2017

State of Utah, Petitioner/Cross-Respondent, v . Thomas Randall Ainsworth, Respondent/Cross-Petitioner.

Utah Supreme Court

No. 20160173-SC
No. 20130924-CA

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,
Petitioner/Cross-Respondent,

v.

THOMAS RANDALL AINSWORTH,
Respondent/Cross-Petitioner.

Respondent/Cross-Petitioner is incarcerated.

REPLY BRIEF OF RESPONDENT AND CROSS-PETITIONER ON CERTIORARI REVIEW

This writ of certiorari arises from a court of appeals' decision reversing a judgment of conviction arising from a *Sery* plea to three counts of Driving with a Measurable Controlled Substance in the Body and Causing Serious Bodily Injury or Death, a second degree felony, in violation of Utah Code §58-37-8(2)(g) and (2)(h)(i) (2012), the Honorable Deno G. Himonas, Judge, Third District Court, Salt Lake County, State of Utah, presiding.

JEFFREY S. GRAY (5852)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Petitioner/ Cross-Respondent

LORI J. SEPPI (9428)
DAVID P.S. MACK (4370)
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
appeals@sllda.com
(801) 532-5444

Attorneys for Respondent/Cross-Petitioner

No. 20160173-SC
No. 20130924-CA

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,
Petitioner/Cross-Respondent,

v.

THOMAS RANDALL AINSWORTH,
Respondent/Cross-Petitioner.

Respondent/Cross-Petitioner is incarcerated.

REPLY BRIEF OF RESPONDENT AND CROSS-PETITIONER ON CERTIORARI REVIEW

This writ of certiorari arises from a court of appeals' decision reversing a judgment of conviction arising from a *Sery* plea to three counts of Driving with a Measurable Controlled Substance in the Body and Causing Serious Bodily Injury or Death, a second degree felony, in violation of Utah Code §58-37-8(2)(g) and (2)(h)(i) (2012), the Honorable Deno G. Himonas, Judge, Third District Court, Salt Lake County, State of Utah, presiding.

JEFFREY S. GRAY (5852)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Petitioner/ Cross-Respondent

LORI J. SEPPI (9428)
DAVID P.S. MACK (4370)
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
appeals@sllda.com
(801) 532-5444

Attorneys for Respondent/Cross-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

No. 20160173-SC
No. 20130924-CA

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,
Petitioner/Cross-Respondent,

v.

THOMAS RANDALL AINSWORTH,
Respondent/Cross-Petitioner.

Respondent/Cross-Petitioner is incarcerated.

REPLY BRIEF OF RESPONDENT AND CROSS-PETITIONER ON CERTIORARI REVIEW

INTRODUCTION

As outlined in the Brief of Respondent and Cross-Petitioner (Rspt.Br.), this Court should affirm *Ainsworth* because a unanimous panel of the court of appeals correctly concluded that the Measurable Amount Statute's second-degree-felony designation violates the uniform operation of laws provision. *See* Rspt.Br. 12-25. As explained by the court of appeals, the Measurable Amount Statute is unconstitutional because it subjects "unimpaired users of Schedule I and II controlled substances ... to a greater charge for what is otherwise [statutorily] defined to be a lesser crime." *State v. Ainsworth*, 2016 UT App 2, ¶16, 365 P.3d 1227.

Alternatively, this Court should affirm the result reached by the court of appeals for either of the following reasons: (1) the Measurable Amount Statute's

second-degree-felony designation violates state and federal due process, or (2) the Measurable Amount Statute's prescription exemption violates Utah's uniform operation of laws clause. *See* Rspt.Br. 25-37. Additionally, this Court should reverse the court of appeals' decision on the sentencing issue because the court of appeals erred in concluding that the district court did not abuse its discretion in imposing consecutive sentences. *See* Rspt.Br. 37-43.

This brief replies to the State's response to the cross-petition. *See* Order dated July 20, 2016. This brief is "limited to answering any new matter set forth in the opposing brief." Utah R. App. P. 24(c). The brief does not restate arguments from the Brief of Respondent and Cross-Petitioner or address matters that do not merit reply.

ARGUMENT

I. This Court should reverse the court of appeals' decision on the sentencing issue because the court of appeals erred in concluding that the district court did not abuse its discretion in imposing consecutive sentences.

The court of appeals correctly vacated Ainsworth's second-degree-felony convictions and remanded for entry of third-degree felonies and resentencing. *State v. Ainsworth*, 2016 UT App 2, ¶¶13-19, 22, 365 P.3d 1227. Rather than stopping there, however, the court of appeals went on to address the trial court's original sentencing decision and ruled that the trial court did not abuse its discretion in imposing consecutive sentences. *See id.* ¶¶19-21.

The cross-petition issue on certiorari is: "Whether the Court of Appeals erred in concluding the district court did not abuse its discretion in imposing consecutive sentences." Order dated July 20, 2016. Ainsworth asks this Court to reverse because the court of appeals "erred in concluding that the district court did not abuse its discretion in imposing consecutive sentences" in two ways: The court of appeals erred by making the conclusion at all, or, alternatively, the court of appeals erred by affirming the trial court's consecutive sentencing order. *See* Rspt.Br. 37-43.

In the Reply Brief of Petitioner and Brief of Cross-Respondent (Pet.Rply.), the State argues that the question of whether the court of appeals erred by addressing the consecutive sentencing issue is not before this Court on certiorari. *See* Pet.Rply.Br. 30-31. Alternatively, the State argues that the court of appeals correctly addressed the trial court's consecutive sentencing decision, *see* Pet.Rply.Br. 31-33, and correctly concluded that the trial court did not abuse its discretion in imposing consecutive sentences. *See* Pet.Rply.Br. 34-40. For the reasons stated below and in the Brief of Respondent and Cross-Petitioner, the State's claims fail. *See* Rspt.Br. 37-43.

First, the question of whether the court of appeals erred by addressing the consecutive sentencing issue is properly before this Court on certiorari. "In determining the scope of an order granting certiorari," this Court is "guided by rule 49(a)(4) of the Utah Rules of Appellate Procedure." *State v. Leber*, 2009 UT 59, ¶10, 216 P.3d 964. Rule 49(a)(4) "states that '[o]nly the questions set forth in

the petition or *fairly included therein* will be considered by the Supreme Court.'" *Leber*, 2009 UT 59, ¶10 (quoting Utah R. App. P. 49(a)(4)) (emphasis in original). "Questions presented for review within the petition for certiorari 'will be deemed to comprise every subsidiary question fairly included therein.'" *Leber*, 2009 UT 59, ¶10 (quoting Utah R. App. P. 49(a)(4)). "Furthermore, 'this rule should be construed broadly to avoid the rigid exclusion of reviewable issues, however peripheral.'" *Leber*, 2009 UT 59, ¶10. But "[i]ssues not presented in the petition for certiorari, or if presented, not included in the order granting certiorari or *fairly encompassed within such issues*, are not properly before this Court on the merits." *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995) (emphasis added).

Here, this Court should reach the question of whether the court of appeals erred by addressing the consecutive sentencing issue because the issue was raised in the cross-petition for certiorari and is fairly included within the order granting the cross-petition.

Ainsworth raised the question of whether the court of appeals erred by addressing the consecutive sentencing issue in the conditional cross-petition for certiorari (Cross-Pet.). In the cross-petition, Ainsworth asked this Court to address the court of appeals' sentencing decision based on two theories:

> Whether the court of appeals erred by addressing the consecutive sentencing issue after it had already reduced Ainsworth's convictions and remanded with an order for resentencing or, in the alternative, whether the court of appeals erred by holding that the trial court did

not abuse its discretion when it sentenced Ainsworth to serve three consecutive terms of one-to-fifteen years in prison.

Cross-Pet. 4. Regarding the first theory, Ainsworth argued that, having vacated Ainsworth's second-degree-felony convictions and remanded for imposition of third-degree felonies and resentencing, the court of appeals should have left the question of whether to run the third-degree felonies consecutively to the trial court to decide on remand. *Compare* Cross-Pet. 17-18; *with* Rspt.Br. 37-39.

This Court granted the cross-petition on the following issue: "Whether the Court of Appeals erred in concluding the district court did not abuse its discretion in imposing consecutive sentences." Order dated July 20, 2016. This question fairly includes both theories presented in the cross-petition. As argued by Ainsworth in the Brief of Respondent and Cross Petitioner, the court of appeals erred in concluding that the district court did not abuse its discretion either because the court of appeals should not have made the conclusion at all or, in the alternative, because the decision the court of appeals made was incorrect. *See* Rspt.Br. 37-43.

Thus, this Court should address whether it was improper for the court of appeals to address the consecutive sentencing issue because the issue was raised in the cross-petition for certiorari and is fairly included within the order granting the cross-petition.

Second, it was improper for the court of appeals to address the consecutive sentencing issue. Rule 30 of the Utah Rules of Appellate Procedure says: "If a

judgment of conviction is reversed [in a criminal case], a new trial shall be held unless otherwise specified by the court. If a judgment of conviction or other order is affirmed or modified, the judgment or order affirmed or modified shall be executed." Utah R. App. P. 30(b); *see* Utah R. Crim. P. 28(a). Further, rule 30 says: "*If a new trial is granted*, the court may pass upon and determine all *questions of law* involved in the case presented upon the appeal and necessary to the final determination of the case." Utah R. App. P. 30(a) (emphasis added).

The State acknowledges rule 30, but argues that it was appropriate for the court of appeals to address the consecutive sentencing issue because rule 30 "does not preclude the Court from addressing other issues that are likely to arise on remand for resentencing." Pet.Br. 32-33.

But the State's claim is contrary to rule 30 and case law. Resentencing is not "a new trial," and sentencing decisions are not "questions of law." Utah R. App. P. 30(a). Rather, sentencing decisions are reviewed for an abuse of discretion. *See LeBeau v. State*, 2014 UT 39, ¶16, 337 P.3d 254. The court of appeals "vacate[d] Ainsworth's convictions and remand[ed] with instructions for the district court to enter his convictions as third-degree felonies and to resentence him accordingly." *Ainsworth*, 2016 UT App 2, ¶22. It is clear from the opinion that the court of appeals intended the trial court to conduct a new sentencing hearing. *See id.* ¶19 (noting that the issue of consecutive sentences is "likely to arise on remand" because the *Ainsworth* decision will "require that the district court also resentence [Ainsworth]"). Having ordered the trial court to

resentence Ainsworth, the court of appeals should have left the question of what sentence to impose to the trial court on remand. *See, e.g.*, *State v. Dunn*, 850 P.3d 1201, 1229 (Utah 1993) (vacating conviction, imposing reduced conviction, and remanding for resentencing); *State v. Bruce*, 779 P.2d 646, 657 (Utah 1989) (same); *State v. Suniville*, 741 P.2d 961, 965 (Utah 1987) (same), *superseded by statute on other grounds as stated in State v. Ireland*, 2006 UT 82, ¶12, 150 P.3d 532.

As pointed out by the State, "later developments regarding [Ainsworth's] rehabilitation, conduct in prison, and programming during appeal" are not contained "in the record" on appeal. Pet.Br. 33. Rather, those "developments" are "new, and unknown" to the appellate courts. Pet.Br. 33. In other words, resentencing will require the trial court to consider new information that was not available to the court of appeals. *See* Rspt.Br. 39. This is why it was incorrect for the court of appeals to address the consecutive sentencing issue. Having vacated Ainsworth's second-degree-felony convictions and remanded for imposition of third-degree felonies and resentencing, the court of appeals should have left the question of whether to run the third-degree felonies consecutively to the trial court to decide on remand. *See* Rspt.Br. 37-39.

Finally, the court of appeals incorrectly affirmed the trial court's consecutive sentencing order. The State asks this Court to affirm the court of appeals' decision affirming the sentence because the trial court stated at sentencing that it had considered the number of victims and Ainsworth's history,

character, and rehabilitative needs. *See* Pet.Br. 34-40. The State claims that "[t]his is all that is required by statute." Pet.Br. 35.

But it is not enough that a court says that it has considered "the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant." Utah Code §76-3-401(2) (2012); *see* Pet.Br. 34-40. "[B]eing aware of" mitigating information and "taking it into account are not the same thing." *State v. Strunk*, 846 P.2d 1297, 1300 (Utah 1993). Thus, when a sentencing issue is raised on appeal, the appellate court will review the record to determine whether the trial court "may not have given adequate weight to" mitigating information. *State v. Galli*, 967 P.2d 930, 932, 938 (Utah 1998).

In *LeBeau*, *Galli*, *State v. Smith*, and *Strunk*, for example, this Court did not uphold the sentences simply because the sentencing judges were made aware of mitigating information. *See LeBeau*, 2014 UT 39,¶¶56-67; *Galli*, 967 P.2d at 932, 938; *Smith*, 909 P.2d 236, 244-45 (Utah 1995); *Strunk*, 846 P.2d at 1300-01. Instead, this Court reviewed the record and held that the sentencing judges abused their discretion by failing to adequately consider the mitigating information provided to them. *See LeBeau*, 2014 UT 39,¶¶56-67; *Galli*, 967 P.2d at 932, 938; *Smith*, 909 P.2d at 244-45; *Strunk*, 846 P.2d at 1300-01.

In *LeBeau*, this Court held that the trial court abused its discretion by failing to adequately consider "several mitigating factors raised by Mr. LeBeau," including "strong provocation," "good employment history," "strong family ties,"

and "an extended period of arrest-free time prior to" the offense. *LeBeau*, 2014 UT 39,¶¶11, 56-67.

In *Galli*, this Court reversed because the trial court "may not have given adequate weight to certain mitigating circumstances" or to the defendant's minor criminal history. *Galli*, 967 P.2d at 932, 938. In *Smith*, this Court reversed even though the trial court stated that it had considered the statutory factors, including "defendant's history, character, and rehabilitation possibilities," because the trial court failed to adequately consider that the crimes "arose out of one criminal episode" and that its sentence was "tantamount to a minimum mandatory life sentence." *Smith*, 909 P.2d at 244-45.

And in *Strunk*, this Court faulted the trial court for failing to adequately consider defendant's age, noting "that the trial court was clearly aware of [defendant's] age," as it "was discussed" at the time of the guilty plea and at sentencing, but did not consider it as a mitigating circumstance. *Strunk*, 846 P.2d at 1300-01.

In this case, Ainsworth's claim is not that the trial court failed to consider information that was never provided to the court. *See* Rspt.Br. 39-43. Rather, Ainsworth claims that the trial court abused its discretion at sentencing because it failed to adequately consider the mitigating information provided about his history, character, and rehabilitative needs. *See* Rspt.Br. 39-43. As explained in the Brief of Respondent and Cross-Petitioner, the offenses arose from a single act of negligent driving. *See id.* Moreover, Ainsworth's deep remorse, change of heart

about rehabilitation, progress toward rehabilitation at the time of sentencing, family support, emotional stability, and ability to support himself suggest that "all three terms should be ordered to run concurrently to afford the Board of Pardons the flexibility to adjust [Ainsworth's] prison stay to match his progress in rehabilitation and preparation to return to society." *Strunk*, 846 P.2d at 1302; *see* Rspt.Br. 39-43.

Thus, for the reasons stated above and in the Brief of Respondent and Cross-Petitioner, Ainsworth asks this Court to reverse the court of appeals' decision on the sentencing issue because the court of appeals erred in concluding that the trial court did not abuse its discretion by imposing consecutive sentences. *See* Rspt.Br. 37-43.

CONCLUSION

This Court should affirm *Ainsworth* because the court of appeals correctly concluded that the second-degree-felony designation in the Measurable Amount Statute violates Utah's uniform operation of laws clause. Alternatively, this Court should affirm the result reached by the court of appeals for either of the following reasons: (1) the Measurable Amount Statute's second-degree-felony designation violates the federal and state due process provisions, or (2) the Measurable Amount Statute's prescription exemption violates Utah's uniform operation of laws clause. Additionally, this Court should reverse the court of appeals' decision on the sentencing issue because the court of appeals erred in concluding that the trial court did not abuse its discretion by imposing consecutive sentences.

SUBMITTED this 27th day of January, 2017.

LORI J. SEPPI
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2,363 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

LORI J. SEPPI

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Supreme, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@utah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 27th day of January, 2017

Lori Seppi
LORI J. SEPPI

DELIVERED this 27th day of January, 2017.