2015

State of Utah, Appellee, v. Victoria Fanton, Appellant : Reply Brief of Appellant

Utah Court of Appeals

38829

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee, **v.** **VICTORIA FANTON,** Appellant.	Court of Appeals No.: 20150300

CONSOLIDATED REPLY BRIEF OF APPELLANT

ON APPEAL TO THE UTAH COURT OF APPEALS
FROM TWO JUDGMENTS ENTERED BY
THE FIFTH DISTRICT JUDICIAL COURT,
IN AND FOR IRON COUNTY, STATE OF UTAH

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ORAL ARGUMENTS/PUBLISHED OPINION REQUESTED

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IN THE UTAH COURT OF APPEALS

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REPLY BRIEF OF APPELLANT

ARGUMENT

I. FANTON REMAINS INCARCERATED ON THESE CHARGES, THUS ONE OF HER ISSUES CHALLENGING HER SENTENCE REMAINS VIABLE ON APPEAL AND IS NOT MOOT.

In *State v. Martinez* moot issues on appeal are discussed as follows:

> An issue on appeal is considered moot when 'the requested judicial relief cannot affect the rights of the litigants.'" *State v. Sims*, 881 P.2d 840, 841 (Utah 1994) (citation omitted); *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981). "[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1889, 1900, 20 L.Ed.2d 917 (1968).

Ibid., 925 P.2d 176, 177 (Utah 1996).

On April 7, 2015, the two Judgments challenged herein entered, sentencing Fanton to one (1) to fifteen (15) years in the Utah State Prison for her conviction of robbery, and one (1) to fifteen (15) years on her conviction for possession of a controlled substance. (20150300) R0074; (20150301) R0067. The sentences were ordered to run concurrent. The

Judgments both stayed their respective prison sentences in favor of 36 months' probation and 270 days served in the Iron County Jail with credit for time served. (20150300) R0075; (20150301) R0067. On August 5, 2015, the dockets for both cases indicate that notices of completion of jail commitment had been filed. *See, Brief of Appellee* at Addendum "B" and "C." However, on August 26, 2015, the court issued an *Order to Show Cause* and a bench warrant against Fanton on allegations that she had violated her probation. *Id.* On September 29, 2015, the court entered its *Amended Order Revoking Probation, Order Executing Original Sentence, Order Referring Outstanding Financial Obligations tot eh Office of Debt Collection and Commitment* (the "**Probation Revocation Order**"). *Id.* By note on the docket for September 8, 2015, it indicates that the court lifted the stay on Fanton's sentences and sentenced her to the original sentence of prison, with recommendation of credit for time served. *Id.* Fanton is currently incarcerated at the Utah State Prison under the two Judgments challenged herein.

Fanton has challenged in this appeal the trial court's denial of her request to serve her time in 3-4 day weekends so as to enable her to provide child care for her children[1]; the trial court denial of her request to serve her time in Michigan to allow her extended family to help care for her children[2]; and her counsel's ineffectiveness or the trial court's plain error

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[1] Given that Fanton is no longer incarcerated in the Iron County Jail, but is instead serving her sentence herein in the Utah State Prison, she concedes that this issue is likely moot given that her trial counsel did not re-raise the issue at her probation revocation hearing to have her prison sentence served in the Iron County Jail under these terms, and no appeal was taken from her revocation determination.

[2] UTAH CODE ANN. §77-28a -2 states that, "[t]he Department of Corrections may transfer an inmate ... to any institution within or without this state if this state has entered into any contracts for the confinement of inmates in said institutions pursuant to Article III of that Compact." UTAH CODE ANN. §77-28a -3 provides that the courts "shall enforce this Compact" and "shall do all things necessary and appropriate to the effectuation of the purposes and intent of this Compact." Fanton raised the issue in her opening brief that the

for failing to obtain or order a mental health assessment be performed given the PSI's indication that she suffered from mental illness. The State argues that all of these issues are moot because Fanton served her jail time and did not appeal her probation revocation; however, the State concedes that Fanton remains incarcerated on these charges. The State's brief attempts to separate the jail sentence from her current prison sentence; however, they are of the same sentences from the same Judgments. Further, the State has provided no authority indicating that Fanton was required to appeal her probation revocation in order to proceed on her timely raised challenges to the underlying sentence from which it originates. Because Fanton remains incarcerated under the Judgments, her issues challenging the sentencing contained therein remain viable.

Although Fanton is no longer incarcerated in the Iron County Jail on these charges, the issue remains as to her issue[3] respecting trial counsel's ineffectiveness or the court's plain error in not having a mental health assessment conducted prior to sentencing—an issue which is now of utmost importance given that she is serving prison sentences based upon the lack of a mental health assessment in the PSI for sentencing. The State argues that it is "too late" for her to be released into treatment or community-based supervision based on a mental health assessment. *See, Brief of Appellee* at p. 9. However, Fanton's requested judicial relief was that her sentence be vacated and she be sent back for resentencing with direction

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court should have considered her request to transfer to Michigan in its sentencing; however, in researching the State's position on this issue raised in their appellee brief, Fanton has learned from Annie at the Inmate Placement Program at the Utah State Prison in Draper, Utah (telephone 801-545-5558), that Michigan informed their office in 2014 that they were not interested and do not participate in these types of programs. Thus, Fanton's second issue is respectfully withdrawn.

[3] *See,* footnote "1" and "2."

that the trial court order that a mental health evaluation be conducted. It is not too late for this to occur. Fanton's sentence is still being served and is subject to these alterations. Thus, a decision from this Court on these matters can and will affect Fanton's rights. *Martinez* at 177, *citing Sims* at 841; *Duran* at 45. Other than its bold, yet unsupported statements that it is "too late", the State has failed to show that there is no possibility that any collateral legal consequences can be imposed on the basis of the challenged sentence. *Id.*, *citing Sibron,* 392 U.S. at 57, 88 S.Ct. at 1900. The issues remain viable and capable of impacting Fanton's rights; thus, the State's suggestion of mootness is without merit and should be denied

II. IT WAS INEFFECTIVE ASSISTANCE FOR FANTON'S COUNSEL TO FAIL TO OBJECT TO THE ABSENCE OF A MENTAL HEALTH EVALUATION IN THE PSI, OR ALTERNATIVELY PLAIN ERROR FOR THE TRIAL COURT TO NOT ORDER A MENTAL ASSESMENT AFTER IT RECEIVED THE PSI.

Under *State v. Thurston* the sentencing judge is to be "provided with complete background information on the defendant and the crime so that he or she might impose a sentence more intelligently." *Ibid.*, 781 P.2d 1296, 1299 (Utah App 1989). The Department of Corrections is to provide the investigative functions for this purpose and prepare reports, such as pre-sentence investigation reports, to assist the courts in their sentencing functions, including recommendations as to appropriate measures for specific offenders. *Ibid.*, *citing* UTAH CODE ANN. §64–13–20(1)(b)(1986)(amended 1989).

In *State v. Post*, this Court recently addressed a challenge to a pre-sentence investigation report where the defendant asserted that the district court had abused its discretion by sentencing him without ordering a statutorily required screening and assessment. *Ibid.*, 2015 UT App 162, ¶ 3, 354 P.3d 810. In citing to UTAH CODE ANN. §77-18-1.1(2)(a) and (b), this Court acknowledged the legislative directives that an offender

convicted of a felony be ordered to participate in a screening prior to sentencing and participate in an assessment prior to sentencing if the screening indicated an assessment to be appropriate. *Id.* The *Post* decision defined "screening" as "a 'preliminary appraisal' to determine whether 'the person is in need of: (A) and assessment; or (B) an educational series.'" *Id.*, *citing* UTAH CODE ANN. §41-6a-501(1)(f)(2014); *see also* §77-18-1.1(1)(c)(2012). An "assessment" on the other hand, was defined as "an in-depth clinical interview with a licensed mental health therapist." *Id.*, *citing* UTAH CODE ANN. §41-6a-501(1)(a)(2014); *see also* §77-18-1.1(1)(a)(2012). *Post* recognized that "[t]he findings from any screening and any assessment conducted under this section shall be part of the [PSI] submitted to the court before sentencing the offender." *Id.*, *citing* UTAH CODE ANN. §77-18-1.1(3); *see also* UTAH CODE ANN. §77-18-1(5)(b)(iii).

Herein, a Pre-Sentence Investigation Report ("**PSI**") was filed on February 23, 2015. (20150300) R0030; (20150301) R0028. The PSI contained a recitation of Fanton's mental health history indicating that she had been diagnosed with PTSD and bi-polar disorder. (20150300) R0043; (20150301) R0042. The *Brief of Appellee* argues that "Fanton cannot show either ineffective assistance of counsel or plain error in not obtaining a more detailed mental health assessment where she has not shown what such an assessment would have revealed that the PSI did not already reveal, or that such an assessment would have been reasonably likely to prompt the trial court to impose a lighter sentence than it did." *Ibid.* at pp. 11-12. However, without a proper assessment the trial court could not presume how her diagnoses affected her.

The trial court needed to have complete background information on Fanton so that it could impose a sentence intelligently. *Thurston* at 1299. The court did not have this. Under UTAH CODE ANN. §77-18-1.1 the court was to order an assessment for Fanton because the screening or preliminary appraisal presumptively conducted by Adult Probation and Parole in their preparation of the PSI showed that Fanton was in need of an assessment. *Post* at ¶ 3, *citing* UTAH CODE ANN. §§77-18-1.1(2)(a) and (b), UTAH CODE ANN. §41-6a-501(1)(f)(2014); *see also* §77-18-1.1(1)(c)(2012). Fanton suffers from PTSD and bi-polar disorders, which are significant mental health issues. AP&P was to provide the investigative functions for this purpose and prepare the PSI in a manner to fulfill its statutory duty to assist the courts in their sentencing functions, including recommendations as to appropriate measures specifically catered towards Fanton. *Thurston*, *citing* UTAH CODE ANN. §64–13–20(1)(b)(1986)(amended 1989). It could only accomplish this statutory duty by preparing an assessment. It was not only within the court's authority to order that such assessment take place, rather the code directed it.

An "assessment" is "an in-depth clinical interview with a licensed mental health therapist." *Post* at ¶ 3, *citing* UTAH CODE ANN. §41-6a-501(1)(a)(2014); *see also* §77-18-1.1(1)(a)(2012). Given this definition, it is clear that neither AP&P nor the district court were a proper substitute for a "licensed mental health therapist" and that the recitation of diagnoses in the PSI were insufficient to rise to "an in-depth clinical interview." Mental health issues are so particular to the individual that the law typically relies upon properly trained individuals to provide the scientific knowledge. *See, e.g.,* UTAH R. EVID. 702. Although expert witnesses are not required at sentencing, it is clear that the Utah Legislature

infused such proceedings with the same concept when it came to mental health assessments by requiring they be conducted by licensed individuals who can provide information to AP&P and the court for recommendations particular to the offender. UTAH CODE ANN. §§41-6a-501(1)(a)(2014) and 77-18-1.1(1)(a)(2012). This requirement cannot be substituted for the experience of individuals employed by the Department of Corrections nor the district court. Recitation of the diagnoses in the PSI was insufficient to meet the criteria of an "an in-depth clinical interview with a licensed mental health therapist." By its very nature, it is axiomatic that an assessment would have revealed information the PSI did not. Then, as is proper for the statutory procedure for such matters, the findings from such assessment would have been made part of the PSI submitted to the district court, allowing the court to "impose a sentence intelligently." *Post* at ¶ 3, *citing* UTAH CODE ANN. §77-18-1.1(3); *see also* UTAH CODE ANN. §77-18-1(5)(b)(iii); *see also*, *Thurston* at 1299.

Thus, as argued in Fanton's *Brief of Appellant*, trial counsel was either ineffective for having failed to object to the PSI and request a mental health assessment be part of such report, or the trial court committed plain error in review of the PSI noting Fanton's significant mental health issues and the absence of a mental health evaluation. Fanton is thus entitled to reversal of her sentencing, and a remand to direct that these matters be corrected and resentencing occur.

CONCLUSION

WHEREFORE, based upon the foregoing, Fanton respectfully requests that this Court reverse both the *Judgment, Sentence, Stay of Execution of Sentence, Order of Probation and Restitution, and Commitment*, dated April 7, 2015 and the *Judgment, Sentence, Stay of Execution of*

Sentence, and Order of Probation dated April 7, 2015, and remand the matter for resentencing in accordance with the arguments contained herein, additionally taking any such further action as this Court deems necessary.

DATED this 2nd day of February, 2016.

Matthew Carling
Attorney for Victoria Fanton

CERTIFICATE OF COMPLIANCE WITH UT. R. APP. P. 24(f)(1)(C)

Counsel hereby certifies the *Reply Brief of Appellant* complies with the type-volume limitation: 2282 words are contained herein, in compliance with UT. R. APP. P. 24(f)(1)(A) and was determined by the word processing system used to prepare *Reply Brief of Appellant.*

DATED this 2nd day of February, 2016.

Matthew Carling
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy, postage pre-paid, of the foregoing *Reply Brief of Appellant* with attachments, on this 2nd day of February, 2016 to the following:

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