

2016

**State of Utah, Plaintiff/Appellee, v. Nathan Sexton, Defendant/
Appellant**

Utah Court of Appeals

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Case No. 20151069-CA

IN THE
UTAH COURT OF APPEALS
FILED
UTAH APPELLATE COURTS

APR 14 2016
State of Utah,
Plaintiff/Appellee,

v.

Nathan Sexton,
Defendant/Appellant.

Brief of Appellee

Appeal from sentences for possession of a controlled substances and possession of drug paraphernalia, both class B misdemeanors, running consecutively to an existing prison sentence in the Second Judicial District, Weber County, the Honorable Joseph Bean presiding.

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State of Utah,
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v.

Nathan Sexton,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Sexton appeals from sentences for possession of a controlled substance and possession of drug paraphernalia, both class B misdemeanors. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2016).

STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion by ordering consecutive sentences, where Defendant has not shown that the trial court failed to consider any required factor?
 - a. Standard of Review: This Court reviews a decision to impose consecutive sentences for an abuse of discretion. *State v. Wright*, 893 P.2d 1113, 1120 (Utah Ct. App. 1995). “[T]he exercise of discretion in sentencing necessarily reflects the personal judgment of the court and

the appellate court can properly find abuse only if it can be said that no reasonable [person] would take the view adopted by the trial court.” *Id.* (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1987)).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Annotated § 76-3-401 (West 2016) is relevant for this appeal and is included as Addendum B in Appellant’s Brief.¹

STATEMENT OF THE CASE

On September 25, 2015, the Defendant was charged with a class A misdemeanor for possession of a controlled substances inside a correctional facility and a class B misdemeanor for possession of drug paraphernalia. R. 1-2. On October 22, 2015, the parties reached a plea agreement in which the Defendant pled guilty to an amended count 1 as a class B misdemeanor and count 2 as charged. R. 24-25; 52. The Defendant waived sentencing time and was sentenced on the same day. *Id.* The judgment was filed on October 29, 2015. R. 26-27. On November 20, 2015, the Appellant filed a pro-se notice of appeal to this Court. R. 29.

STATEMENT OF THE FACTS

At the time of the offenses at issue in this case, the Defendant was on probation for prior felony convictions to which his concurrent prison terms of 0-5 years were suspended. R. 52:9. As part of the Defendant’s probation, he was required to successfully complete an environmental structure program held at the Northern Utah

¹ Pursuant to rule 24(b)(2), Utah R. App. P., the State’s brief will rely on Appellant’s addendums, specifically addendums B and C.

Community Correctional Center (“NUCCC”). *Id.* at 9-10. On three prior instances the Defendant failed to complete the program by being taken into custody for use and/or possession of spice, a controlled substance. *Id.* The Defendant’s arrest for possession of spice and drug paraphernalia at NUCCC in May of 2015 was his fourth attempt at completing the program. *Id.* Pursuant to the Defendant’s probation violation on May 28, 2015, which he admitted on July 13, 2015, the Court subsequently revoked the Defendant’s probation and required the Defendant to serve the sentence originally imposed of an indeterminate term of 0-5 years. *Id.*

The criminal charges associated with the conduct that constituted the probation violation were filed by the State on September 25, 2015. R. 1-2. Pursuant to a plea negotiation, the Defendant pled guilty to two class B misdemeanors before the Court on October 22, 2015. R. 24-25; 52. The Defendant then waived sentencing time, at which point there was disagreement whether the sentences should run concurrently or consecutively. R. 52:7-10. The State argued that because the Defendant was on parole the statutory presumption is that the sentences run consecutively. *Id.* at 8. Defense counsel acknowledged the Defendant was on parole and asked that the two new charges be run concurrently and that both run concurrently with the current prison sentence. *Id.* at 7-8.

The Court considered both arguments in addition to asking the Defendant directly for clarification:

THE COURT: Mr. Sexton, I’d like to hear from you. Go ahead.

THE DEFENDANT: I was actually on a charge – they didn't send me to prison. They put me on probation to go to NUCCC and then I violated more than once. And then that's why they decided to drop my probation, and that's what sent me to prison. I hadn't been to prison yet by that time

THE COURT: Okay.

UNIDENTIFIED SPEAKER: That's right. He is on probation right now.

MR. MARSHALL: So that is unusual.

MR. SAUNDERS: I would still say based on fact – this is NUCCC. The Court hears all the time about the problem we have in NUCCC with drugs. And I think it's appropriate to send a message that we're going to run those consecutive when somebody possesses a controlled substance in NUCCC.

THE COURT: All right. Anything further, Mr. Sexton? We kind of –

THE DEFENDANT: Yeah, because this is what – I've already done four months because of this. I mean I would just say please run it concurrent. I mean I'm trying to get my life, you know, over, I mean, started again, you know, and already charges enough. I've already been – this is back from December 2013 is my original charges and I've been going through all this for quite a while now and I would just ask for, you know, let it go with this because I don't want to go to prison and then just go right back to jail after that. I mean I need to get out and get a job and progress my life.

...

UNIDENTIFIED SPEAKER: Your honor, I would like to just say something really fast. This is his fourth attempt at programing at trying to complete NUCCC. He's struggled (inaudible) all four times and it's really frustrating because we get a lot of people standing up here saying they don't want to go back to NUCCC because people are brining drugs in and it really does not help with other people who are trying to be successful and complete their probation. I just wanted you to know that his agent did say that all four times he's struggled with this.

Id. at 9-11.

After the Court decided to run the class B misdemeanor charges concurrent with each other but to run both consecutive to the Defendant's previous prison sentence, the Defendant raised an argument for credit for time served which the Court denied and subsequently explained his reasoning for both decisions:

THE COURT: Well, I don't know that there's credit for time served because you were already in violation of some other sentencing order and I can't give you credit for time that you've served in violation of some other sentencing order which is really what you're doing . . . Mr. Sexton, there's some frustration, I think, among AP&P and a lot of the people working with you that you've had a lot of opportunities given to you. We understand addiction is tough. It's a very difficult thing . . . I've given you a kind of a middle-of-the-road sentence instead of going as harsh as the State wants. I haven't gone quite that harsh, but I haven't been as lenient either as Mr. Marshall or you would like me to be, but it is to send you a message that we've got to try and clean it up. It's got to start somewhere. And I'm not saying it's starting with you, but you're one of those that we're going to get relatively tough on if you're taking that into NUCCC.

Id. at 11-13.

SUMMARY OF THE ARGUMENT

Defendant claims that the trial court abused its discretion by not considering all the statutory factors before ordering the new sentences to run consecutively with the prison sentence previously imposed. In such a challenge, the burden for establishing such an abuse of discretion rests with the Defendant, and it is the State's position that the Defendant has failed to meet that burden. The trial court did not abuse its discretion and the sentence imposed was reasonable.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING CONCURRENT JAIL SENTENCES TO RUN CONSECUTIVELY TO THE DEFENDANT'S CURRENT PRISON SENTENCE.

A trial court's decision to order consecutive or concurrent sentences is governed by Utah Code Annotated § 76-3-401 (West 2016). Under § 76-3-401(2), a court must "consider the gravity and the circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant" when determining whether to impose consecutive sentences. However, on appeal from a sentencing, "the burden is on the defendant to demonstrate that the district court did not properly consider all the factors, and we will not 'assume that the trial court's silence, by itself, presupposes that the court did not consider the proper factors as required by law.'" *State v. McDaniel*, 2015 UT App 135, ¶ 5, 351 P.3d 849 (quoting *State v. Helms*, 2002 UT 12, ¶¶ 11, 16, 40 P.3d 626). A court will uphold the sentencing court's decision "so long as, based on the record before this court, it would be reasonable to assume that the sentencing court actually considered each factor." *Id.* The fact that a trial court "assessed the relevant factors differently than [the defendant] would have liked does not indicate that it exceeded its discretion." *State v. Epling*, 2011 UT App 229, ¶ 22, 262 P.3d 440 (quoting *Helms*, 2002 UT 12, ¶ 14, 40 P.3d 626: "[T]he fact that [defendant] views his situation differently than did the trial court does not prove that the trial court neglected to consider the factors listed in section [76-3-401(2)].").

Defendant claims that the trial court abused its discretion by failing “to fully appreciate three facts” that ultimately in turn resulted in a failure to consider “the statutory factors of gravity and circumstances of the offense, the lack of a victim, and Mr. Sexton’s rehabilitative needs.” Appellant Brief, pg. 5. However, the Defendant in no way shows that the Court failed to consider the appropriate statutory factors. This case is similar to *Epling* where the Court considered the appropriate factors, but assessed them differently than the defendant would have liked and thus there was not an abuse of discretion by the Court.

Defendant argues that “the gravity and circumstances of the offense were fairly minor,” and that the Court failed to consider the Defendant’s rehabilitative needs. However, the record clearly shows that the State, the Court, and AP&P were all concerned that the Defendant was bringing a controlled substances into NUCCC and that there was a ongoing problem for users genuinely attempting to rehabilitate in NUCCC when people keep bringing drugs into the facility. R. 52:9-11. Additionally, in regard to rehabilitative needs of the Defendant, the record shows that the Court considered the Defendant’s repeated failure to complete the program at NUCCC in determining whether the sentences should run consecutively. *Id.* at 9-12. Both of these facts indicate the Court properly considered “the gravity and circumstances of the offense,” and the “history, character, and rehabilitative needs of the Defendant.” Simply because the Defendant did not agree with the Court’s assessment of those factors, does not mean that the Court abused its discretion.

Finally, this case is distinguishable from many of the cases cited by the Defendant in his Appellate Brief. Utah Courts have recognized an abuse of discretion where deciding to impose consecutive sentences would ultimately “infringe upon the Board of Pardon’s duties to monitor a defendant’s progress and abrogate the [B]oard’s flexibility to parole a defendant earlier.” *State v. Valdez*, 2008 UT App 329, ¶ 12, 194 P.3d 195 (quoting *State v. Schweitzer*, 943 P.2d 649 (Utah Ct. App. 1997)). In *Schweitzer*, this Court recognized this distinction:

Although defendant cites *State v. Strunk*, 846 P.2d 1297 (Utah 1993), and *State v. Smith*, 909 P.2d 236 (Utah 1995), as supporting his argument for concurrent rather than consecutive sentences, those cases are clearly inapposite to the circumstances of this case. Both those cases involved consecutive sentences for serious offenses in which the defendants were sentenced to serve a minimum of twenty-four and sixty years, respectively, before being eligible for parole, due to minimum-mandatory sentence requirements. Both the *Strunk* and *Smith* courts reversed those sentences, reasoning that the imposition of consecutive rather than concurrent sentences infringed upon the Board of Pardon’s duties to monitor a defendant’s progress and abrogated the board’s flexibility to parole a defendant earlier . . . In this case, however, it is difficult to argue that defendant’s consecutive sentences, of two-to-five years in prison and six months in jail, have a similar effect.

943 P.2d at 652. In this case the Defendant’s prison sentence is an indeterminate 0-5 year sentence, followed by 180 days for each misdemeanor charge to run concurrently with each other. Such a sentence is potentially shorter than the one upheld as reasonable in *Schweitzer*. *Id.* If the Defendant shows a willingness and commitment to rehabilitation while serving his prison sentence, the Board of Pardon’s retains the “appropriate opportunity to determine the ultimate length of an individual’s sentence,” and “the

consecutive sentences as imposed by the trial court in this case do not deny the Defendant the ability to be rehabilitated and released from prison.” *Valdez*, 2008 UT App 329, ¶ 13.

It is clear from the record that the trial court did not abuse its discretion in deciding to impose the concurrent sentences consecutively to the Defendant’s existing prison sentence. The Court even went as far as to acknowledge that he was giving the Defendant “a middle-of-the-road sentence.” R. 52:12. The concerns raised by the State and AP&P related to the Defendant’s history of having been given opportunities and the Defendant’s conduct of bringing drugs into NUCCC in this case reflect what the Court considered and weighed in creating the “middle-of-the-road sentence” it ultimately imposed. Given these concerns, the Defendant cannot show that no reasonable person would “take the view adopted by the trial court.” There was no abuse of discretion in this case, and Defendant’s claim should accordingly be rejected.

CONCLUSION

For the foregoing reasons, the Court should affirm the Defendant’s sentence.

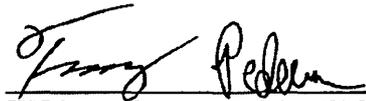
Respectfully submitted on April 15, 2016.



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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 2,506 words, excluding the table of contents and the table of authorities. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally-spaced font using Microsoft Word 2010 in Times New Roman 13 point.



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CERTIFICATE OF SERVICE

I certify that on April 15, 2016, two copies of the Brief of Appellee were mailed

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Also, in accordance with rule 26(b), Utah R. App. P., I hereby certify that on April 15, 2016, I have hand-delivered eight copies of the foregoing to:

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A digital copy of the brief in searchable portable document format (pdf) was also included.