1992

State of Utah v. Thomas Monroe Gray : Brief of Appellee

Utah Court of Appeals

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Michael D. Murphy; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 920462-CA
v.	:	
THOMAS MONROE GRAY,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM THE SENTENCING DETERMINATION OF THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH, THE HONORABLE RODNEY S. PAGE PRESIDING.

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the sentencing determination of the trial court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF ISSUE PRESENTED AND STANDARD OF REVIEW

Was the trial court's sentencing determination proper?

"Sentencing is a prerogative of the trial court and will not be disturbed on appeal unless the sentence 'exceeds that prescribed by law or unless the trial court has abused its discretion.'" State v. Ford, 818 P.2d 1052, 1055 (Utah App. 1991) (quoting State v. Shelby, 728 P.2d 987, 988 (Utah 1986)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issue presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Thomas Moore Gray, was charged with possession of a controlled substance (cocaine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1990) (R. 9).

Defendant entered a plea of guilty to the above charge on January 21, 1992 (R. 16).

The trial court subsequently sentenced defendant to a term of zero to five years in the Utah State Prison, which term was to run consecutive to any sentence defendant was presently serving, and imposed a $5,000 fine (R. 20-22; Transcript of sentencing hearing, February 18, 1992 [T.] at 5). The trial court then granted defendant credit for 104 days served and recommended that he be considered for sexual offender and substance abuse programs (R. 20-21).

STATEMENT OF THE FACTS

At the time of this offense defendant was on probation from a conviction for forcible sexual abuse, a third degree felony (Br. of App. 2-3; R. 9). Defendant was arrested for violating the terms of his probation and booked into the Davis County Jail (R. 10). A search of defendant's person at the jail revealed the presence of controlled substances (R. 9-10).

Defendant entered a plea of guilty to a charge of possession of controlled substances, a third degree felony (R. 16).

Following the preparation of a pre-sentence investigation report, the trial court sentenced defendant to a term of zero to five years in the Utah State Prison (R. 17, 20-21). Based on the recommendations of Adult Probation and Parole (AP&P), the court ordered that defendant's term of imprisonment for this offense be consecutive to any sentence he was presently serving:

> THE COURT: Mr. Gray, I think you are right, you have been before this Court a number of times and I think the Court has complied with the recommendations of Adult Probation and Parole in allowing you sufficient time to see if you could resolve these problems. That has been unsuccessful. I feel that you have long standing problems that are going to take significant time under basically custodial circumstances in order for you to work these problems out.
>
> For that reason, the Court will sentence you to 0 to 5 years in the state prison, order that you serve those consecutively to any sentence you are serving at this time. I will recommend, however, that they will give you credit against that sentence for the 104 days that you have been incarcerated on this matter up to this time. That will be my order. I will recommend that they consider you for the sexual offender program which you might already be in, are you not?
>
> [DEFENDANT]: Yes, your Honor.
>
> THE COURT: That will be the order of the Court. We will remand you back to the custody of the Division of Corrections.

(T. 3-5) (a complete copy of the sentencing transcript is contained in the Addendum).

SUMMARY OF ARGUMENT

The sentencing issue raised in defense counsel's Anders brief is frivolous. Based on defendant's criminal history and demonstrated inability to conform to the conditions of probation, the trial court acted within the scope of its discretion in requiring that defendant's term of imprisonment for this offense be served consecutive to any previously imposed term.

ARGUMENT

DEFENSE COUNSEL'S ANDERS BRIEF FAILS TO ARTICULATE AN ARGUMENT DEMONSTRATING THAT THE SENTENCING ISSUE RAISED IS IN FACT FRIVOLOUS; HOWEVER, BASED ON THE STATE'S REVIEW OF THE RECORD IT APPEARS THAT THE ISSUE IS FRIVOLOUS AND THUS THERE IS NO REASON WHY COUNSEL'S REQUEST TO WITHDRAW SHOULD NOT BE GRANTED AND DEFENDANT'S CONVICTION AFFIRMED.

Defendant's counsel has filed an "Anders brief" and motion to withdraw which do not appear to be in substantial compliance with the requirements of Anders v. California, 386 U.S. 738 (1967), and Dunn v. Cook, 791 P.2d 873 (Utah 1990). Specifically, an Anders brief, unlike a regular brief, "must demonstrate that the potentially meritorious issues" raised in the brief are in fact frivolous. Dunn, 791 P.2d at 877. Defense counsel's Anders brief is deficient in this respect. For example, he has failed to articulate an argument demonstrating that the sentencing issue raised is in fact frivolous (Br. of App. at 4-5). To the contrary, defense counsel asserts that the trial court abused its discretion by imposing a consecutive sentence (Br. of App. 5).

However, although defense counsel's analysis fails to assure this Court that the sentencing issue raised is wholly frivolous, it does not appear to the State that there is any reason why counsel's request to withdraw should not be granted and the trial court's sentencing determination affirmed.

This Court will not disturb the sentencing determinations of the trial court on appeal "unless the sentence 'exceeds that prescribed by law or unless the trial court has abused its discretion.'" State v. Ford, 818 P.2d 1052, 1055 (Utah App. 1991) (quoting State v. Shelby, 728 P.2d 987, 988 (Utah 1986)).

Utah Code Ann. § 76-3-401(1) (1990) authorizes the trial court to determine "whether to impose concurrent or consecutive sentences." In so deciding, the trial court is required to consider the "gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant." Section 76-3-401(2). Additionally, where a defendant "is sentenced at different times for one or more offenses, . . . or has already been sentenced by a court other than the present sentencing court, . . . the aggregate maximum of all sentences imposed may not exceed 30 years' imprisonment." Section 76-3-401(4)-(5). The trial court complied with section 76-3-401 in imposing a consecutive sentence in this case.

Rejecting the arguments of defendant and his counsel, the court followed the sentencing recommendations of AP&P and imposed a consecutive sentence (T. 5; see Addendum). In so

ruling, the court noted defendant's numerous appearances before the bench and his apparent inability to resolve "long standing problems" (T. 5; see Addendum). Thus, the court determined that defendant required "significant time under basically custodial circumstances" (T. 5; see Addendum). The court then granted defendant credit for 104 days served and recommended that he be considered for sexual offender and substance abuse programs (R. 20-21; T. 5, see Addendum).

Imposition of a consecutive sentence under these facts is in compliance with the requirements of section 76-3-401. The trial court appropriately considered defendant's criminal history and his inability to conform to the conditions of previously granted probation. Additionally, the "aggregate maximum" of the consecutive zero to five year terms does not exceed 30 years. Thus, it was not an abuse of the trial court's discretion to require that defendant's term of imprisonment for this offense be consecutive to any previously imposed term.

CONCLUSION

The sentencing determination of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of October, 1992.

R. PAUL VAN DAM
Attorney General

Marian Decker
MARIAN DECKER
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 Michael D. Murphy, attorney for appellant, 92 S. Main, Suite 4, Kaysville, Utah 84037, this 19th day of October, 1992.

Marian Decker

ADDENDUM

FARMINGTON, UTAH, TUESDAY, FEBRUARY 18, 1992

* * * * *

THE COURT: State of Utah vs. Thomas Monroe Gray.

Your name is Thomas Monroe Gray?

MR. GRAY: Yes, your Honor, it is.

THE COURT: Mr. Gray, you are before the Court for the purpose of sentencing. Is there any legal reason known to either of you why sentence should not be imposed?

MR. MURPHY: No, your Honor.

THE COURT: Is there anything either of you wish to say before I impose sentence?

MR. MURPHY: I would, your Honor. I think the agency recommendations are in line though my client and I disagree with the consecutive aspect of the sentence. So arguing against that I would just like to state, your Honor, when he was sentenced originally on this offense, I believe he has done 18 months in prison in addition to that 90 days diagnostic and 30 days in jail, so he already has served a substantial amount of time for the offense that has been violated. In addition since this offense occurred, he has served approximately 104 days, your Honor. Therefore, Mr. Gray has indicated to me that he, in his opinion, he thinks he will max out on the remainder of his prison term that he is serving for his probation violation and that will be

approximately 21 months. So if he will do the 21 months on that and then be placed in a sex offender program in the Bonneville Community Center and then fulfill the additional requirements, your Honor, we think given the amount of time that he has already served and the time that he will likely serve plus the addition time that he will hopefully serve in the sex offender program, we think that that will be adequate to address the concerns and problems that had been brought out in the presentence report.

THE COURT: Anything you wish to say, Mr. Gray?

MR. GRAY: Yes, your Honor, I would. I would like to add to this that the charge that brought me back in front of the Court, possession of a controlled substance, I never really received any help or programming as far as dealing with my drug problem and alcohol problem. Since being out at the prison I have been attending drug and alcohol therapy, and I believe that with the time that the prison is going to give me as well as attending this programing out at the prison, that I will be able to get out and make something of my life from there on out.

I also would like to say that I know that I have appeared in front of you several times and that I feel right now within me that I can get out and make something of my life if given a chance, and I don't know whether it's good to say or not, but I think that probation recommendation is

really harsh and that they are not really giving me an opportunity to get out and make something out of my life, and that's all I have to say, your Honor.

THE COURT: Mr. Gray, I think you are right, you have been before this Court a number of times and I think the Court has complied with the recommendations of Adult Probation and Parole in allowing you sufficient time to see if you could resolve these problems. That has been unsuccessful. I feel that you have long standing problems that are going to take significant time under basically custodial circumstances in order for you to work these problems out.

For that reason, the Court will sentence you to 0 to 5 years in the state prison, order that you serve those consecutively to any sentence you are serving at this time. I will recommend, however, that they will give you credit against that sentence for the 104 days that you have been incarcerated on this matter up to this time. That will be my order. I will recommend that they consider you for the sexual offender program which you might already be in, are you not?

MR. GRAY: Yes, your Honor.

THE COURT: That will be the order of the Court. We will remand you back to the custody of the Division of Corrections.

(Whereupon the proceedings were concluded.)