2016

The State of Utah, Plaintiff/Appellee, v. Landin Dee Moosman, Defendant/Appellant

Utah Court of Appeals

39127

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. LANDIN DEE MOOSMAN, Defendant/Appellant.	Case No. 20150588-CA Appellant is incarcerated.

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for three counts of violation of a protective order, under Utah Code § 76-5-108, entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Bruce Lubeck, presiding.

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As outlined in the Opening Brief, the errors in this case warrant reversal. According to the Utah Rules of Appellate Procedure, this reply brief is "limited to answering any new matter set forth in the opposing brief." Utah R. App. P. 24 (c). Matters not addressed herein were adequately addressed in the Opening Brief.

POINT I. MR. MOOSMAN PRESERVED HIS OBJECTION TO THE TRIAL COURT'S PRISON SENTENCE.

The issue in this case is whether the trial court abused its discretion in sentencing Mr. Moosman to prison for his accidental text message and subsequent apologetic text messages to the mother of his child. *See generally* OB.

The state suggests that this Court need not address Mr. Moosman's claim on the merits as "he has not argued plain error." SB.11 (formatting omitted). Despite Mr. Moosman's lengthy argument to the trial court on the reasons supporting probation over to the state's recommendation of jail, the state feels he failed to preserve his argument on

appeal that the trial court abused its discretion in imposing prison. *Id.* The state tries to claim Mr. Moosman is arguing for the first time on appeal the reasons why the trial court abused its discretion. *Id.* That claim is without merit and this Court should address Mr. Moosman's claim on the merits.

Mr. Moosman preserved his objection to the trial court's sentence of prison. He expressly argued to the sentencing court that it should impose probation, setting forth facts in the record and arguing therefrom that probation was justified based on: the probation-order-violations by Ms. Allen (R.74:14-17); the accidental nature of the text messages (*Id.* 18-19); that the text messages were non-threatening (*Id.* 20). He further supported his claim for probation, stating "AP&P's recommendation for prison is ridiculous, given what these messages actually are," urging the court that he "deserves a chance to go back on probation and stop doing stupid things." R.74:20. The state recognized this as an argument for probation as it suggested to the court that Mr. Moosman "would do more time in jail," and thus did not "recommend[] prison." R.74:32. The trial court imposed prison, rejecting the arguments made by Mr. Moosman for probation. R.74:35-36. This issue was preserved. *See Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, ¶ 27, 299 P.3d 990 ("To preserve an issue for appeal, the party asserting error must (1) specifically raise the issue, (2) in a timely manner, and (3) support the claim with evidence and relevant legal authority." (quotation omitted)).

Nor is the state correct that Mr. Moosman's development of this issue on appeal means it was unpreserved below. SB.10 (suggesting Mr. Moosman "points to no place in

the record where he objected that the court was considering irrelevant or unreliable information or basing its decisions on such information" and therefore that the abuse of discretion claim is unpreserved). The state forgets that it is always an abuse of discretion to violate a defendant's due process rights. *See* OB.7 (trial courts have no discretion to violate a defendant's dues process right to be sentenced on relevant and reliable information). Then, it is "[t]he due process clause in both the United States and Utah Constitutions" that both require "a sentencing judge [to] act on reasonably reliable and relevant information in exercising discretion in fixing a sentence." *State v. Johnson*, 856 P.2d 1064, 1071 (Utah 1993) (quotation omitted). Indeed, it is due process that limits a trial court's very "exercise of [] discretion" as that discretion "may not be exercised on the basis of unreliable information." *State v. Howell*, 707 P.2d 115, 117 (Utah 1985); *see also State v. Moa*, 2012 UT 28, ¶ 34, 282 P.3d 985("we have stated that it is an abuse of discretion if a district court relies upon irrelevant information to reach its decision" (citing *Howell,* 707 P.2d at 117-18)); *State v. Bowers*, 2012 UT App 353, ¶ 12, 292 P.3d 711; *United States v. Tucker*, 404 U.S. 443, 447 (1972) (reversing, where the "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue" (quotation omitted)). Thus, the basis for Mr. Moosman's claim that the trial court abused its discretion—by relying on unreliable and irrelevant information—cannot be parsed, rather, it is simply the development of a preserved issue on appeal. *See Torian v. Craig*, 2012 UT 63, ¶ 19, 289 P.3d 479 ("this is not a circumstance in which the appellant has asked us to consider on appeal claims or theories of 'first impression' that were never presented for decision below"); *see also State v. Gonzalez*, 2015 UT 10, ¶¶

25-26, 345 P.3d 1168 (a sufficiency challenge in a self-defense case was preserved although the defendant "did not specifically argue the state failed to meet its burden of showing that he had not acted in self-defense"); *Salt Lake City Corp.*, 2012 UT 84, ¶ 34 (issue preserved although appellant did not "strictly comply with rule 24(a)(5) of the Utah Rules of Appellate Procedure" where appellant "did raise their claim . . . and the district court was aware of their position"); *R.C.S. v. A.O.L (In re Baby Girl T.)*, 2012 UT 78, ¶ 37, 298 P.3d 1251 (due process objection preserved where counsel "repeatedly made due process arguments, although not labeled as such").

Finally, if there is any doubt as to preservation, this Court should be guided by our courts' liberal approach to procedural rules, favoring addressing an issue on the merits in order to give litigants their day in court. *Madsen v. Borthick*, 658 P.2d 627, 631 (Utah 1983) ("An important legal consequence should not be at the mercy of semantics"); *see also State v. Brown*, 856 P.2d 358, 361 (Utah Ct. App. 1993) (issue raised "'indirectly'" is still preserved when it is "'raised to a level of consciousness such that the trial judge can consider it.'"); *Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270, 272 (Utah 1992) (issue preserved even though objection not a "textbook example[] of specificity" because it "adequately directed the trial judge's attention to the claimed error"); *State v. Garcia*, 2007 UT App 228, ¶ 10, 164 P.3d 1264 (argument relying on "*Franks* doctrine" preserved even though State did not formally cite that case but "argued the underlying premise of the *Franks* doctrine"); *State v. Bujan*, 2006 UT App 322, ¶¶ 21-22, 142 P.3d 581 ("counsel's objections . . . were sufficient to preserve the issue for appeal" because policies of judicial economy and fairness were satisfied), *aff'd*, 2008 UT 47, 190 P.3d

1255; *State v. Valenzuela*, 2001 UT App 332, ¶ 25 n.4, 37 P.3d 260 (addressing identity even though not specifically preserved but included in preserved issue).

Mr. Moosman raised this issue to the sentencing court, and that court considered it. Mr. Moosman's claim is too important to be rejected on the basis of an overly rigorous application of a procedural rule that would prevent his claim from being considered on the merits.

POINT II. THE TRIAL COURT RELIED ON IRRELEVANT AND UNRELIABLE INFORMATION IN IMPOSING ITS SURPRISE SENTENCE OF PRISON.

The trial court sentenced Mr. Moosman to prison, which was "a surprise to everyone," as the trial court based its decision "*not at all what anyone has addressed here*," but on what it perceived as "a dynamic [] that is pretty well known in the literature and in experience, and it is you are indeed a danger to her." R.74:36 (emphasis added).

The state nonetheless suggests it did not rely on "literature and [] experience," but on the defendant's record. SB.12. To the extent the court *should* have relied on Mr. Moosman's record in sentencing him, the state is correct, but the state is incorrect that the court actually did so here. The court specified that it imposed prison based "not at all what anyone has addressed here," which had been the arguments for and against probation based on the facts of this case and Mr. Moosman's relationship with Ms. Allen. R.74:36; *see also* R.74:14 (defense counsel discussing "the history between Mr. Moosman and Ms. Allen"); R.74:32 (prosecutor stating "I am not recommending prison" but a year in jail and leaving "it to the Court's discretion whether he is put back on

probation or not"). Indeed, prior to articulating its sentencing decision, the court was specific, telling Mr. Moosman why it rejected his arguments:

> I understand you [Mr. Moosman] and your lawyer and people in your side saying, well, this was a text about this. That was a mistake. This text wasn't a threat. It was just that. But, on the other hand, and I don't claim to be any kind of expert, but there is a great deal of literature about the simple fact of not letting go, continued efforts at control, however innocuous they may seem is very, very dangerous.

R.74:35. The court then used that idea to impose its "surprise" prison sentence. R.74:36.

The trial court was specific about the basis for its prison sentence, and this Court must take it at its word. *State v. Strunk*, 846 P.2d 1297, 1300–02 (Utah 1993) (where a trial court stated the mitigating factors it considered to impose a sentence, it abused its discretion not to also consider the defendant's age, as demonstrated by court not including it in its ruling). By its own words, this sentencing court "actually relied on the specific information in reaching [his] decision and . . . the information [] relied upon was irrelevant." OB.9-12 (quoting *Moa*, 2012 UT 28, ¶ 35). There is therefore a clear record of "a judge's affirmative representation of reliance." *Moa*, 2012 UT 28, ¶ 35; *see also Howell*, 707 P.2d at 117 (concluding trial court relied on information where it specifically stated at the sentencing hearing that the decision was reached after having "taken into consideration" the information the defendant's argued was unreliable and irrelevant).

Then, the state tries to defend the court's reliance on "literature" and "experience," framing it as having "merely address[ing] what common sense teaches—repeated violations of the law show an unwillingness to obey the law, and such unwillingness is dangerous." SB.12. But the state's view of "common sense" does not make it a legal,

relevant, or reliable basis for a prison sentence, nor does it make this a sentencing decision that comports with due process. Rather, a sentencing court must rely on information in sentencing that has "indicia of reliability and [is] relevant in sentencing." *Moa*, 2012 UT 28, ¶ 36. And reliability is not established by one person's view of common sense. The court's reliance on a "dynamic [] that is pretty well known in the literature and in experience" to sentence Mr. Moosman, was simply an inherently unreliable and irrelevant basis to sentence any defendant, specifically Mr. Moosman with this factual record. R.74:36; *see also* OB.8-9,11-12.

Nor, contrary to the state's suggestion, does Mr. Moosman need to point to "scientific studies" or "case law" to show "the information [the court] relied upon was irrelevant" or unreliable. SB.13; *Moa*, 2012 UT 28, ¶ 35. The actual record and the facts of this case establish that relying on something irrelevant like "literature" was an unreliable basis for sentencing . OB.8-9,11-12; *Howell*, 707 P.2d at 118 n.2 (a court's reliance on "misinformation" and information "in making the sentencing determination" but which is "not reliable," violates due process" (quotations omitted)). The state has not established how "literature" fits Mr. Moosman or the facts of this case, nor can it as it is wholly irrelevant to Mr. Moosman's case. *See State v. McClendon,* 611 P.2d 728, 729 (Utah 1980) ("[a] sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system"); *State v. Wanosik*, 2001 UT App 241, ¶ 34, 31 P.3d 615 (The trial court must exercise its discretion to determine "what punishment fits both the crime and the offender"). Where "[t]he sentencing philosophy of the criminal

law is that the punishment should not only fit the crime but the defendant as well," and "[i]t is essential that fairness in sentencing both be perceived as such by the public and the defendant and, in fact, be fair," this court abused its sentencing discretion. *State v. Lipsky*, 608 P.2d 1241, 1248-49 (Utah 1980); *see also* OB.6 (quoting *Wanosik*, 2001 UT App 241, ¶ 34 (our courts "have consistently sought to shore up the soundness and reliability of the factual basis upon which the judge must rely in the exercise of that sentencing discretion").

For the reasons set forth herein and in the opening brief, this court should hold that the trial court abused its discretion in sentencing Mr. Moosman to prison, where that sentence was unfair and based on unreliable and irrelevant information.

CONCLUSION

Mr. Moosman respectfully requests that this Court reverse his sentence and order a new sentencing hearing.

SUBMITTED this 12th day of April, 2016.

JOANNA E. LANDAU
Attorney for Defendant/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 2,156 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 Times New Roman 13 point.

JOANNA E. LANDAU

CERTIFICATE OF DELIVERY

I, JOANNA E. LANDAU, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 12th day of April, 2016.

JOANNA E. LANDAU

DELIVERED this 12 day of April, 2016.