

2017

**State of Utah, Plaintiff/Appellee, v. Daniel Wayne Fakatou,
Defendant/Appellant.**

Utah Court of Appeals

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Case No. 20150328-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DANIEL WAYNE FAKATOU,
Defendant/Appellant.

Brief of Appellee

Appeal from sentencing on a conviction for one count of aggravated assault, a third degree felony, in the Third Judicial District, Salt Lake County, the Honorable Mark Kouris presiding

JENNIFER PAISNER WILLIAMS (15942)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0122

ALEXANDRA S. MCCALLUM
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, UT 84111

JAMES M. WATABE
Salt Lake District Attorney's Office

Counsel for Appellant

Counsel for Appellee

ORAL ARGUMENT NOT REQUESTED

FILED
UTAH APPELLATE COURTS

JAN 31 2017

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JAMES M. WATABE
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Counsel for Appellant

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IN THE
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STATE OF UTAH,
Plaintiff/Appellee,

v.

DANIEL WAYNE FAKATOU,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from sentencing on a conviction for one count of aggravated assault, a third degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2012).

INTRODUCTION

Following an argument, Defendant climbed into his former girlfriend's home through a window, punched her in the head, squeezed her breasts, and strangled her to near unconsciousness. He pled guilty to one count of aggravated assault. At sentencing, Defendant admitted that he needed help, and his counsel requested that Defendant be sentenced to probation and required to complete an inpatient treatment program at First Step House. Despite Defendant's track record and the violent nature of the

offense, the trial court decided to give him one more chance. The trial court sentenced him to probation with a suspended sentence of 0 to 5 years in prison. The terms of the probation included one year in jail with no credit for time served but early release upon admission to the inpatient treatment program at First Step House. Defendant did not challenge the requirement that he complete the inpatient treatment program as a condition of his probation.

STATEMENT OF THE ISSUE

Defendant claims that the trial court plainly erred when it sentenced him to complete an inpatient treatment program as a condition of his probation, rather than an outpatient treatment program. But he cites no authority and includes no meaningful analysis to show that the trial court plainly erred. Instead, he says only that he “feels” and “believes” that the requirement was “excessive” and “not the best option for his needs.”

Whether this Court should consider Defendant’s inadequately briefed arguments.

Standard of Review. An appellate court has discretion not to address an inadequately briefed issue. *State v. Roberts*, 2015 UT 24 ¶18, 345 P.3d 1226.

STATUTES

There are no determinative constitutional provisions, statutes, or rules in this case.

STATEMENT OF THE FACTS AND CASE

Defendant went to his former girlfriend's home to get some of his belongings after he moved out. R3. They started to argue and Defendant began destroying her property. *Id.* She ran from the home, and Defendant chased her outside. *Id.* She ran back into the home, and locked the door. *Id.* Defendant climbed through an open bedroom window and punched her in the head. *Id.* The force of the blow knocked her into a closet and she fell to the floor. *Id.* Defendant climbed on top of her, grabbed her breasts, and squeezed. *Id.* When she hit him, Defendant wrapped both of his hands around her neck and strangled her to near unconsciousness. She reached up and scratched Defendant's neck, and he released her. *Id.*

The State charged Defendant with one count of aggravated burglary (domestic violence), a first degree felony; one count of aggravated assault (domestic violence), a third degree felony; one count of sexual battery (domestic violence), a class A misdemeanor; one count of criminal mischief (domestic violence), a class B misdemeanor; and one count of interference with arresting officer, a class B misdemeanor. R1-2. Defendant accepted a

plea deal from the State. R33-39; R87:1. Under the deal's terms, Defendant pled guilty to one count of aggravated assault (domestic violence), a third degree felony, and the remaining charges against him were dismissed. R33, R87:1.

At sentencing, defense counsel asked that Defendant go to First Step House, an inpatient treatment facility, instead of prison. R88:2-3.¹ Counsel recognized that Defendant had been on probation a number of times, but argued that Defendant had "taken advantage of" his time in jail, and recognized that he needed treatment and help. R88:2.

Defendant then addressed the sentencing court. *Id.* Defendant said that he was "truly remorseful" for his actions, and that he knew it was his fault. R88:4. Defendant also admitted that he "needed some . . . help." *Id.* When the trial court told Defendant that he should get prison time based on his track record, Defendant replied that he understood, but thought he did not "really deserve it." *Id.*

The trial court decided to give Defendant "one last chance." R88:5. The court sentenced Defendant to a suspended sentence of zero to five years in prison, and 48 months of zero tolerance probation. *Id.* Because the First Step House had a waiting list, Defendant would serve one year in jail with

¹ The sentencing hearing transcript is attached at Addendum A.

no credit for time served and get early release as soon as a bed at First Step House opened up. R88:6. If Defendant violated his probation in any way or did not complete the residential treatment program, he would go to prison.

Id. Defendant objected to none of these terms.

Defendant timely appealed his sentence. R76.²

SUMMARY OF ARGUMENT

Defendant argues that the trial court plainly erred when it sentenced him to complete an inpatient treatment program as a condition of his probation, rather than an outpatient treatment program. He concedes that he did not raise this argument below and it is therefore unpreserved.

The Court should not consider Defendant's argument because it is inadequately briefed. To allow for meaningful appellate review, briefs must comply with the briefing requirements enough so the Court can understand what errors the appellant contends the trial court made, where to find those errors in the record, and why, under applicable law, those errors would entitle the appellant to relief.

Trial courts have broad discretion to decide whether to grant probation to a defendant and to set the probation terms when it chooses to

² As Defendant concedes, he is barred from challenging the validity of his plea in this appeal. *See* Aplt. Br. 4 n.3.

grant it. And to show the trial court plainly erred when it imposed a probation term that required in-patient treatment, Defendant must cite authority available to the trial court that plainly entitled him to out-patient treatment.

Defendant's brief cites no such authority. And it fails to show even simple error. Defendant argues only that he "feels" the in-patient treatment was "excessive" and not "the best option" for him. But defendant cites no case clearly establishing that his personal feelings set the boundaries of a trial court's sentencing discretion.

Defendant has clearly failed to carry his burden of persuasion. The Court should disregard his brief and affirm the trial court's sentence.

ARGUMENT

DEFENDANT HAS NOT CARRIED HIS BURDEN OF PERSUASION TO SHOW THAT HE WAS PLAINLY ENTITLED TO OUT-PATIENT TREATMENT AS A CONDITION OF HIS PROBATION.

Defendant claims that the trial court plainly erred by requiring him to complete an inpatient treatment program as a condition of his probation. He says that the trial court should have allowed him to complete an out-patient program instead.

An appellate court will reverse a trial court's sentencing decision only when it is "clear that the actions of the trial judge were so inherently unfair as to constitute an abuse of discretion." *State v. Killpack*, 2008 UT 49, ¶18, 191 P.3d 17 (citation and quotations omitted). This occurs if "the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence." *State v. Montoya*, 929 P.2d 356, 358 (Utah App. 1996) (citation and quotations omitted). Put differently, a court abuses its discretion only when "no reasonable [person] would take the view adopted by the trial court." *Id.* (alteration in original); accord *State v. Thorkelson*, 2004 UT App 9, ¶12, 84 P.3d 854.

Thus, 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. McClendon*, 611 P.2d 728, 729 (Utah 1980). However, the "exercise of discretion in sentencing" also "necessarily reflects the personal judgment of the court." *State v. Moreau*, 2011 UT App 109, ¶6, 255 P.3d 689 (quotations and citation omitted).

Here, Defendant did not complain to the trial court about its decision to require inpatient treatment as a condition of probation. So Defendant must do more than show that the trial court abused its discretion. He must

show that it plainly did so. *See State v. Tingey*, 2014 UT App 228, ¶ 3, 336 P.3d 608.

Defendant has not met his burden of persuasion. The rules of appellate procedure required Defendant to state “the contentions and reasons of the appellant with respect to the issues presented, . . . with citations to the authorities, statutes, and parts of the record relied on.” Utah R. App. P. 24(a)(9). This Court may disregard inadequately briefed arguments, as it is not “a depository in which the appealing party may dump the burden of argument and research.” *State v. Jaeger*, 1999 UT 1, ¶ 31, 973 P.2d 404 (citation and quotations omitted). The Court should exercise that option here.

To show plain error, Defendant must point to controlling law available to the trial court that would have informed it that Defendant had a clear right to out-patient treatment rather than inpatient treatment as a condition of probation. *See State v. Davis*, 2013 UT App 228, ¶ 32, 311 P.3d 538 (noting that “an error is not obvious if ‘there is no settled appellate law to guide the trial court.’”) (citing *State v. Ross*, 951 P.2d 236, 239 (Utah Ct. App. 1997)). Defendant has not done that. Instead, he says only that he “strongly believes that the trial court erred by ordering him to complete inpatient treatment at the First Step House as a condition of his probation.”

He continues that he “feels that requiring inpatient treatment—as opposed to a less-intensive outpatient treatment program—was ‘excessive’ and was not the best option to suit his personal needs.” Aplt. Br. 5-6. But he cites no controlling authority to show that his belief and feelings about what would be excessive or the best option for him bounded the trial court’s discretion in fixing the terms of probation—a leniency that he had no clear entitlement to in the first place. *See State v. Rhodes*, 818 P.2d 1048, 1051 (Utah Ct. App. 1991) (a “defendant is not entitled to probation, but rather the court is empowered to place the defendant on probation”). And even if he could have found that authority, he failed to inform the trial court of his feelings and beliefs about what would be excessive. He did not explain below and has not explained on appeal what “personal needs” made inpatient treatment excessive, especially in light of the violent nature of his crime, his admission at sentencing that he needed help, and the fact that he had been on probation a number of times already. R88:2-4.

The dearth of analysis and authority in defendant’s brief is best explained by the simple truth that he cannot show that the trial court abused its discretion, let alone plainly did so. Defendant—a repeat probationer—violently attacked his girlfriend after breaking into her home. He admitted that he had a problem and needed help. On these facts, the


trial court legitimately concluded that it would best serve defendant's and the community's interests not to release him back into the community until he got that help.

CONCLUSION

For the foregoing reasons, the Court should affirm the sentencing order.

Respectfully submitted on January 31, 2017.

SEAN D. REYES
Utah Attorney General


JENNIFER PAISNER WILLIAMS
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on January 31, 2017, two copies of the Brief of Appellee were ☐ mailed ☒ hand-delivered to:

Alexandra S. McCallum
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, UT 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Melina Fryer

Addenda

Addendum A

FILED DISTRICT COURT
Third Judicial District
IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

MAY - 7 2015

SALT LAKE COUNTY

Deputy Clerk

STATE OF UTAH,

: Case No. 141909742 FS

Plaintiff,

: Appellate Court Case No. 20150328

vs.

DANIEL WAYNE FAKATOU ,

Defendant,

: With Keyword Index

SENTENCING MARCH 23, 2015

BEFORE

JUDGE MARK KOURIS

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

FILED
UTAH APPELLATE COURTS

JUN 17 2015

ORIGINAL

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11-2015-0000-01

APPEARANCES

For the Plaintiff:

JAMES M. WATABE
Deputy District Attorney

For the Defendant:

RAYMOND S. SHUEY
Attorney at Law

* * *

1 SALT LAKE CITY, UTAH - MARCH 23, 2015

2 JUDGE MARK KOURIS PRESIDING

3 (Transcriber's note: speaker identification
4 may not be accurate with audio recordings.)

5 P R O C E E D I N G S

6 THE COURT: Good morning.

7 MR. SHUEY: Good morning, Your Honor. If we could
8 call Fakatou?

9 THE COURT: Bakatou (sic), okay.

10 MR. SHUEY: Daniel.

11 THE COURT: Let's call the case, find it here.

12 MR. WATABE: Who?

13 MR. SHUEY: Fakatou.

14 THE COURT: Oh, it's an "F" isn't it-

15 MR. SHUEY: - yes, (inaudible).

16 THE COURT: I'm sorry, I was looking for a "B." I
17 apologize.

18 Call the case of State of Utah versus Mr. Fakatou.

19 Good morning, Mr. Fakatou.

20 DEFENDANT FAKATOU: (Inaudible).

21 THE COURT: This is the time and place set for
22 sentencing.

23 Mr. Shuey, have you had an opportunity to review
24 the pre-sentence report with your client?

25 MR. SHUEY: Yes, Your Honor.

1 THE COURT: Are there any factual inadequacies that
2 need to be addressed?

3 MR. SHUEY: The only thing I would update is because
4 we, we had continued this out to get Mr. Augustine's input
5 and to get some program alternatives. So on Page 5 the
6 number of days that he served is now 206.

7 THE COURT: Okay.

8 MR. SHUEY: And during that time, Your Honor, he has
9 really taken advantage of his time. I don't know if I could
10 approach the bench, but I do have this giving the number of
11 programs. He's basically taken advantage of everything he
12 can.

13 THE COURT: Okay. I'll give these back to Mr.
14 Shuey.

15 MR. SHUEY: We've had him assessed by Mark
16 Augustine. He's recommending that he go to the First Step
17 House. The pre-sentence report does indicate, you know, it
18 indicates he's had a number of times he's been on probation,
19 but he's been in a jail a very long time now. He's taken
20 advantage of it. It also, I think the pre-sentence report
21 does reflect this very well, I don't really have a problem
22 kind of a thing. And I think that he's, he's getting some
23 insight into that, and that, and that he recognizes he does,
24 he does need some treatment and he needs some help.

25 I think it's also very important that the victim in

1 this case is not looking for a pound of flesh and she very
2 much feels that, you know, he does need some (inaudible). In
3 both the pre-sentence report and in her separate letter, you
4 know, indicates that, which was sent to the Court, and I got
5 - did the Court review that also?

6 THE COURT: Yes, I have.

7 MR. SHUEY: And so she would like to see some, and
8 she specifically mentioned residential treatment so.

9 THE COURT: Okay.

10 MR. SHUEY: I'm hoping that the Court will give him
11 that, that chance. I think people, people do change. And
12 he's gone, he went through a long period where kind of
13 denying he had the problem or denying the extent of it but he
14 does need some help with that and he can get it.

15 THE COURT: Has Mr. Augustine given you any
16 indication in terms of the wait list for First Step?

17 MR. SHUEY: Well, he says unfortunately it's
18 substantial. It's probably, it's probably gonna be at least
19 two or three months.

20 THE COURT: Okay. All right, very good.

21 Anything from the State?

22 MR. WATABE: The victim is not here today, Your
23 Honor.

24 THE COURT: She's not, does not want to be here,
25 okay.

1 MR. SHUEY: He, he has been on the list for a couple
2 months now so.

3 THE COURT: Okay. All right, very good.

4 MR. WATABE: The State (inaudible).

5 THE COURT: All right.

6 Sir, what would you like me to know before I
7 sentence you?

8 DEFENDANT FAKATOU: Um, I, I would like to say that
9 I am truly remorseful for my actions. I know it's my fault.
10 I know I needed to sit back and cool off and take a little
11 time to reflect on myself. Um, it's, it's been an eyeopener
12 this time around. I've been to jail before, but I, I see
13 that I, I needed some, some help.

14 THE COURT: You know your track record indicates
15 that I should put you in prison, do you understand that?

16 DEFENDANT FAKATOU: Yes.

17 THE COURT: And the nature of the, this charge, that
18 is you beat up a woman tells me I should put you in prison.
19 Why do you think I shouldn't put you in prison today,
20 everything tells me to?

21 DEFENDANT FAKATOU: Um, I don't think, if, if
22 memory's correct, I don't think, uh, I really deserve it.

23 THE COURT: You don't? You beat up a woman.

24 DEFENDANT FAKATOU: I know I deserve, I deserve that
25 but - I guess I don't have nothing to say.

1 THE COURT: So you-

2 DEFENDANT FAKATOU: You caught me off guard.

3 THE COURT: So you don't have a good reason that I
4 shouldn't put you in prison today?

5 DEFENDANT FAKATOU: I'm totally remorseful. If you
6 can read, read her note, I guess that was pretty favorable.
7 Um, the, the pictures I'm not saying were the greatest but,
8 um, I feel like I've, I've sat back and had some time to
9 think about it. And um, I, I do admit I'm guilty.

10 THE COURT: Well, there's really not a good reason I
11 can see to keep you out of prison, but I'm gonna give you one
12 last chance and that's based upon a couple things. First of
13 all, the good work of your attorney. And second of all the
14 fact that the victim doesn't want to send you to prison. If
15 she had given the word, that's precisely where I'd put you.

16 That said, what I'm going to do is sentence you to
17 zero to five years in the Utah State Penitentiary. I'm going
18 to suspend that time, instead put you on probation with AP&P
19 for a period of 48 months. You have an unbelievably poor
20 history with probation. So that tells me if you have one
21 violation of probation and you end up back in front of me I'm
22 going to put you in prison. So there's going to be no
23 strikes here. A lot of people they get a few extra shots at
24 the apple to try to get things going; you're gonna get none.
25 You've been appropriately warned.

1 The terms of your probation will be the following:
2 Number one, you'll do one year in the Salt Lake County Jail
3 with no credit for time served, no good time and no ankle
4 monitor. You will get early release as soon as a bed at
5 First Step House opens up. I will release at you that point
6 to Legal Defenders. They'll transport you to the First Step
7 House. That's an in-patient program. If you choose to walk
8 away from that program, you're choosing to walk into prison.
9 So understand what you're doing there. You have to stay in
10 that program and do it well and hopefully get some help.

11 Once you complete that program you will complete
12 aftercare however AP&P sees is necessary. The first 90 days
13 after you're out of the program you'll do 90 AA classes. All
14 the drug and alcohol conditions be in place. You can't be
15 around people that use or sell illegal drugs. Anything
16 you're taking legally you'll make sure AP&P is aware of it,
17 they'll monitor it for you. You're to have no alcohol, no
18 bars, no liquor stores. Any ounce of alcohol at all that
19 will send you to prison. You will have, you'll complete 50
20 hours of community service. You'll have at the minimum rate
21 of 10 hours per month that will begin two months after your
22 release from, from the First Step House. You'll have
23 absolutely no contact with the victim in this matter.
24 Period. All the standard and ordinary conditions of AP&P
25 will be in place. All right, good luck to you.

1 MR. SHUEY: Thank you, Your Honor. And that's the
2 only case (inaudible).

3 THE COURT: Thanks, Mr. Shuey.

4 (Whereupon the hearing was concluded)
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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceeding held by Judge Mark Kouris was transcribed by me from an audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed April 27, 2015 in Sandy, Utah.

Carolyn Erickson
Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber