

2001

Utah v. Hammond : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. : Case No. 20010915-CA
BRAD HAMMOND, :
Defendant/Appellant. :

BRIEF OF APPELLEE

- - - - -
APPEAL FROM IMPOSITION OF THREE CONSECUTIVE
SENTENCES ARISING FROM CONVICTIONS ON TWO
COUNTS OF POSSESSION OR USE OF A CONTROLLED
SUBSTANCE, IN VIOLATION OF UTAH CODE ANN. §
58-37-8(2)(a)(i)(1999), AND ONE COUNT OF
POSSESSION OF A CONTROLLED SUBSTANCE WITH
INTENT TO DISTRIBUTE, IN VIOLATION OF UTAH
CODE ANN. § 58-37-8(1)(a)(iii)(1999), ALL
THIRD DEGREE FELONIES, IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR TOOELE COUNTY, THE
HONORABLE DAVID S. YOUNG, PRESIDING

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FILED
Utah
JUN - 27 - 01
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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the trial court's imposition of three consecutive sentences of zero-to-five years in the Utah State Prison for two counts of possession or use of a controlled substance and one count of possession of a controlled substance with intent to distribute, all third degree felonies. This Court has appellate jurisdiction over the case pursuant to Utah Code Ann. § 78-2a-3(2)(f)(1996).

STATEMENT OF THE ISSUE ON APPEAL AND
STANDARD OF APPELLATE REVIEW

Did the trial court abuse its discretion either by failing to consider certain statutory factors or by inadequately weighing them prior to imposing consecutive sentences?

A sentence will not be overturned on appeal unless the trial court has abused its discretion, failed to consider all legally relevant factors, or imposed a sentence that exceeds legally

prescribed limits. State v. Gibbons, 779 P.2d 1133, 1135 (Utah 1989) (citations omitted). The Utah Supreme Court has noted that "the 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." State v. Gerrard, 584 P.2d 885, 887 (Utah 1978).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 76-3-401, governing concurrent and consecutive sentences, provides in pertinent part:

(1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. Sentences for state offenses shall run concurrently unless the court states in the sentence that they shall run consecutively.

. . .

(4) A court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

Utah Code Ann. § 76-3-401(1), -401(4) (1999).

STATEMENT OF THE CASE

Defendant was charged with one count of distributing or arranging to distribute a controlled substance (methamphetamine), a second degree felony (R. 1-2). He eventually pled guilty to one count of possession or use of a controlled substance, a third

degree felony (R. 12-19). At sentencing, the trial court considered the charge in this case as well as two other drug-related third degree felonies to which defendant had pled in another case (R. 26-27, R. 49 at 2). The court then sentenced defendant to three consecutive terms of zero-to-five years in the Utah State Prison (R. 26, R. 49 at 3). Defendant filed a motion for review of the sentence to clarify the reasons underlying the consecutive sentences (R. 28-29). After a hearing on the matter, the court issued findings of fact and conclusions of law, reaffirming its decision to impose consecutive sentences (R. 33-35 at addendum A). Defendant filed this timely appeal (R. 37).

STATEMENT OF THE FACTS

The undisputed facts, taken in their entirety from the court's findings of fact, are as follows:

1. A guilty plea of Illegal Possession or Use of a Controlled Substance, a third degree felony has been entered in case number 0011300257 on August 27, 2001.^[1]
2. A second guilty plea of Possession with Intent to Distribute a Controlled Substance, a third degree Felony has been entered in case number 0011300257 on August 27, 2001.
3. A third guilty plea of Illegal Possession or Use of a Controlled Substance, a third degree felony has been entered in case number

¹ The charges listed in the first two findings of fact arose from a no-knock search warrant executed on defendant's home on June 8, 2001 (PSR at 3).

0011300256 on August 27, 2001.[²]

4. On October 10, 2001, the defendant objected to the Presentence Investigation Report as having errors.

5. On October 17, 2001, the Court accepted Defendant's objections to the PSI and noted that defendant was instrumental in enabling his son to become involved in the drug culture.

6. The Court further noted that the defendant has a significant drug problem and did not appear amenable to probation.

7. The Court, having heard from the defendant and the defendant's demeanor [sic] concluded that the defendant should not be placed upon probation and the defendant was likely to continue violating the law and was a danger to the community.

8. The recommendation of Adult Probation and Parole suggested that a diagnostic evaluation would be appropriate.

9. Defendant refused to participate in a sixty day diagnostic evaluation at the Utah State Prison.

(R. 34-35 at addendum A). Based on these undisputed facts, the court then sentenced defendant to three consecutive terms of zero to five years in the Utah State Prison (R. 33 at addendum A). The court also levied a fine of \$1500 and fees of \$1275 (Id.).

SUMMARY OF ARGUMENT

Defendant argues either that the trial court abused its discretion by ordering consecutive sentences without considering

² This is the charge in the current case, which arose from a controlled buy at defendant's home on June 4, 2001 (PSR at 2).

certain statutory factors or, alternatively, that it considered those factors inadequately. Defendant has not demonstrated that the trial court failed to consider the factors. First, the record reflects that the sentencing court had before it information addressing defendant's criminal history, and the court specifically acknowledged having considered it. Second, because defendant himself, by consciously declining a diagnostic evaluation, precluded the court from accessing information about his rehabilitative needs and appropriate sentencing alternatives, he cannot now complain that the court failed to consider that factor. Similarly, he cannot argue that his counsel's failure to advocate for concurrent sentences constituted ineffective assistance of counsel where, through declining a diagnostic evaluation, he precluded the court from accessing the very information on which his counsel could conceivably have advocated for leniency.

Alternatively, as to weighing the statutory factors, that is the job of the trial court, which was in the best position to make the highly individualistic assessment inherent in the sentencing decision. While defendant may have weighed the factors differently, it cannot be said that no reasonable person would have agreed with the sentencing court. Consequently, the court did not abuse its considerable discretion by imposing consecutive sentences.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION BY FAILING TO CONSIDER
CERTAIN STATUTORY FACTORS OR BY
IMPROPERLY WEIGHING THEM PRIOR TO
IMPOSING CONSECUTIVE SENTENCES

Defendant's argument on appeal is not clear. Either he is arguing that the trial court abused its discretion by ordering consecutive sentences without giving adequate weight to several of the statutory factors specified in Utah Code Ann. § 76-3-401(4) (1999), or he is arguing that the court abused its discretion by not considering those factors at all. See Br. of App. at 6-7. In either case, defendant asserts that the court acted out of anger and ordered consecutive sentences to punish defendant for declining a diagnostic evaluation prior to sentencing (R. 6-7, 8).

Neither of defendant's two possible arguments has merit. Section 76-3-401 of the Utah Code, governing the trial court's authority to impose concurrent or consecutive sentences, directs the court to "consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences." Utah Code Ann. § 76-3-401(4). A trial court may thus abuse its discretion if it imposes consecutive sentences without considering the statutory factors, which are all legally relevant to the sentencing determination. See, e.g., State v.

McCovey, 803 P.2d 1234, 1235 (Utah 1990); State v. Montoya, 929 P.2d 356, 358 (Utah App. 1996). To prevail on appeal, the defendant must affirmatively show that "the trial court failed to consider the appropriate factors." State v. Helms, 2002 UT 12, ¶15, 40 P.3d 626.³

If defendant is asserting that the sentencing court did not consider either his history or his rehabilitative needs before imposing consecutive sentences, he has failed to make the required showing. The presentence investigation report contains a full criminal history as well as a personal history, including defendant's family situation, employment history, drug and alcohol history, and present living situation. See PSR at pp. 5-9. The trial court explicitly stated that it had reviewed the report prior to sentencing. See Tr. of 11/13/01 at 3-5 or addendum B; cf. Helms, 2002 UT 12 at ¶ 11 ("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. Schweitzer, 943 P.2d 649, 652 (Utah App. 1997) (defendant did not show that the trial court failed to consider statutory

³ The sentencing court, however, is not bound to enter specific findings to justify its consecutive sentencing order, although the record must contain evidence from which such findings could be reasonably made. Helms, 2002 UT 12 at ¶¶ 11, 17 (citations omitted).

factors where the record contained mitigating evidence).⁴

The record demonstrates that the trial court acted within the ambit of its discretion in ordering consecutive sentences. At the clarification hearing, the court noted that defendant had "decided to get pretty actively involved in the drug business" (Id.). The court stated:

I'll tell you, really, what my thinking was at the time [of sentencing]. I have had your son in this Court and I believe that you have had a corrupting influence on him and others around you. Your age and circumstance tell me you ought to have a little more maturity than what you were doing in the criminal effort here. And I thought that consecutive sentences were appropriate to you because of your circumstances and your willingness to be involved in crime.

Tr. of 11/13/01 Hearing at 4. This statement reflects the court's serious concern with the kind of ties defendant had with his "community" and with his own familial influence. While defendant had only one other drug charge in his criminal history, the record indicated that he was a high risk because of his "drug and alcohol abuse, sporadic employment and attitude." PSR at 9. Moreover, his active level of involvement with "the drug business" was plainly attested to by his two arrests within five

⁴ Moreover, after the court had ordered consecutive sentences, defendant requested a hearing to clarify the sentence (R. 28-29). At that hearing, the court reassured defendant that errors in the presentence investigation report had been noted prior to sentencing (Tr. of 11/13/01 Hearing at 5). Thus, no extraneous factors influenced the sentencing decision.

days for multiple drug-related felonies. Id. at 2-3. Finally, defendant had been a fugitive from justice for over two months when he was apprehended, a factor which no doubt did little to enhance his standing with the court. Id. at 3.

In addition, the court cited to defendant's refusal to participate in a diagnostic evaluation with the Department of Corrections, observing, "You said you didn't feel that would be beneficial and you know what your circumstances are." Tr. of 11/13/01 Hearing at 5. Defendant's refusal to participate in a diagnostic evaluation significantly influenced the court's sentencing decision, although not for the punitive reason defendant suggests.⁵

A diagnostic evaluation is an important tool available to a court when it is "of the opinion [that] imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report." Utah Code Ann. § 76-3-404(1)(a)(i) (1999). By exercising its discretion in favor of this evaluative tool, the court was plainly seeking more in-depth information

⁵ Defendant contends that the sentencing court "punished" his refusal to participate in a diagnostic evaluation by ordering that his sentences run consecutively (Br. of App. at 5-6, 8). This contention, however, is purely speculative, both lacking in record support and requiring an unreasonable inferential leap. As such, it fails from the outset. Cf. Fernandez v. Cook, 870 P.2d 870, 877 (Utah 1993) ("proof of ineffective assistance of cannot be a speculative matter but must be a demonstrable reality").

about "the rehabilitative resources or programs . . . available to suit [defendant's] needs." Id. at section 76-3-404(1)(a)(ii)(E). Defendant's affirmative choice not to participate in this information-gathering process thus bars him from asserting on appeal that the court did not adequately consider his rehabilitative needs. State v. Perdue, 813 P.2d 1201, 1205 (Utah App. 1991) (discussing invited error doctrine).⁶ Moreover, the court was well within its discretion in considering defendant's obstructionist attitude as a factor in its decision to order consecutive sentences. See State v. Pena, 869 P.2d 932, 939 (Utah 1994) (sentencing court's assessment of defendant's character may be based, at least in part, on the court's personal observation of defendant's body language, demeanor, and tone of voice).

Because the record indicates that the sentencing court had before it information addressing defendant's history, the court did not abuse its discretion by failing to consider that factor. Helms, 2002 UT 12 at ¶11. And because defendant himself

⁶ For the same reason, defendant's assertion of ineffective assistance of counsel must fail. He cannot claim that his counsel performed deficiently when, by his own affirmative action, he precluded access to the very information on which his counsel might have based an argument that he merited concurrent sentences or that rehabilitation should rightly take precedence over punishment. That is, where defendant makes a strategic choice at trial, he is precluded from arguing on appeal that the result of that choice stemmed from ineffective assistance of counsel. State v. Bullock, 791 P.2d 155, 159 (Utah 1989).

precluded the court from accessing specific information about appropriate rehabilitative resources and programs, he cannot now complain that the court failed to consider that factor. Perdue, 813 P.2d at 1205.

Alternatively, if on appeal defendant is arguing that the trial court abused its discretion by according certain statutory factors insufficient weight in fashioning an appropriate sentence, that argument must also fail. The trial court, not an appellate court, is plainly in the most advantaged position to make the highly individualistic assessments required in sentencing decisions. See State v. Woodland, 945 P.2d 665, 671 (Utah 1997) (sentencing "necessarily reflects the personal judgment of the court"). In deciding the appropriateness of a particular sentence, a trial court must consider many intangibles, such as the defendant's "character, personality, and attitude, of which the cold record gives little inkling." State v. Sibert, 310 P.2d 388, 393 (Utah 1957); see also State v. McClendon, 611 P.2d 728, 729 (Utah 1980). Also within the court's discretion is the determination that punishment for the crime should take precedence over rehabilitation. See State v. Nuttall, 861 P.2d 454, 458 (Utah App. 1993) ("trial court did not abuse its discretion by placing more emphasis on punishing defendant rather than rehabilitating him"). Where the trial court here had a direct opportunity to weigh all the factors

contributing to its assessment of defendant's credibility, that judgment and the resultant weight accorded each of the sentencing factors should not be revisited by a reviewing court armed only with a "cold record." See, e.g., Woodland, 945 P.2d at 671; Sibert, 310 P.2d at 393.


Under the circumstances of this case, while defendant did not agree with the court's sentence, it cannot be said that "no reasonable [person] would take the view adopted by the trial court." State v. Gerrard, 584 P.2d 885, 887 (Utah 1978). Consequently, the court did not abuse its discretion in imposing consecutive prison terms.

CONCLUSION

For the reasons stated, this Court should affirm defendant's consecutive sentences for three counts of possession or use of a controlled substance, all third degree felonies.

RESPECTFULLY submitted this 31st day of June, 2002.

MARK L. SHURTLEFF
Attorney General


JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Julie George, attorney for appellant, 32 Exchange Place, Suite 101, Salt Lake City, Utah 84111, this 3rd day of June, 2002.

Joanne C. Slotnick

ADDENDA

ADDENDUM A

FILED DISTRICT COURT
Third Judicial District

NOV 13 2001
TOOELE COUNTY

By _____ Deputy Clerk

2. A second guilty plea of Possession with Intent to Distribute a Controlled Substance, a third degree Felony has been entered in case number 0011300257 on August 27, 2001.

3. A third guilty plea of Illegal Possession or Use of a Controlled Substance, a third degree felony has been entered in case number 0011300256 on August 27, 2001.

4. On October 10, 2001, the defendant objected to the Presentence Investigation Report as having errors.

5. On October 17, 2001, the Court accepted Defendant's objections to the PSI and noted that defendant was instrumental in enabling his son to become involved in the drug culture.

6. The Court further noted that the defendant has a significant drug problem and did not appear amenable to probation.

7. The Court, having heard from the defendant and the defendant's demeanor concluded that the defendant should not be placed upon probation and the defendant was likely to continue violating the law and was a danger to the community.

8. The recommendation of Adult Probation and Parole suggested that a diagnostic evaluation would be appropriate.

9. Defendant refused to participate in a sixty day diagnostic evaluation at the Utah State Prison

CONCLUSIONS OF LAW

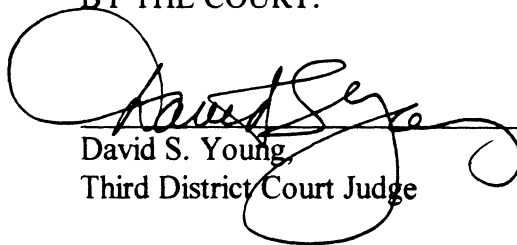
Based upon the foregoing Findings of Fact, the defendant is hereby sentenced 0 - 5 years at the Utah State Prison on each of the third degree felonies. Said convictions are to run consecutively, one after the other.

Defendant is ordered to pay a fine of \$500 on each of the third degree felonies for a total fine of \$1500.

Defendant is further ordered to pay a surcharge in the amount of \$425 on each of the third degree felonies for a total surcharge of \$1,275.

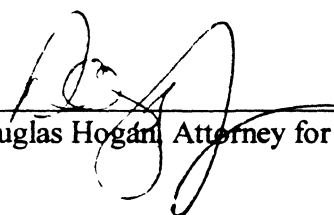
Dated this 13 day of November, 2001.

BY THE COURT:



David S. Young,
Third District Court Judge

APPROVED AS TO FORM:



L. Douglas Hogan, Attorney for Defendant

ADDENDUM B

1 question, Mr. Hogan?

2 MR. HOGAN: I don't, your Honor. I believe my
3 client would like to address the Court.

4 THE COURT: Yes.

5 MR. HOGAN: I'd--I'd just like to state that the
6 purpose for the filing of this motion, your Honor, I was
7 contacted by my client after--after sentencing and he wished
8 some further information with regards to imposition of
9 consecutive sentences;--

10 THE COURT: Uh huh.

11 MR. HOGAN: --therefore, the motion was filed. And
12 he's had a chance just now to review the--the findings, I had
13 a chance to review them and I believe that he'd like to ask
14 your Honor--

15 THE COURT: Yes, Mr. Hammond?

16 MR. HAMMOND: Your Honor, I would just request that
17 I possibly have my sentence be changed to concurrent.

18 THE COURT: I--I decline to do that. I've already
19 sentenced you. Is there anything that I didn't know then that
20 you think I should know?

21 MR. HAMMOND: I just--I don't know if you have
22 reviewed the--the amended P.S.I. or--

23 THE COURT: I had, at that time. If you're talking
24 about today, is it your impression that there is a second
25 amended P.S.I.?

1 MR. HAMMOND: Oh, no. No.

2 THE COURT: Okay. Yeah. I had reviewed it at that
3 time. I'll tell you, really, what my thinking was at the
4 time. I have had your son in this Court and I believe that
5 you have had a corrupting influence on him and others around
6 you. Your age and circumstance tell me you ought to have a
7 little more maturity than what you were doing in the criminal
8 effort here. And I thought that consecutive sentences were
9 appropriate to you because of your circumstances and your
10 willingness to be involved in crime. So, that's the deal.

11 MR. HAMMOND: All right.

12 THE COURT: Exactly what I felt. Okay? Do you
13 understand?

14 MR. HAMMOND: Yeah. I just--I went for an extended
15 period, you know, with no criminal conduct or no arrests, I
16 don't know if any of that had been considered or--

17 THE COURT: That was all considered. That was all
18 part of--I had--I had a copy, in fact, let me go to it and
19 tell you what I have in terms of the P.S.I. I had the--the
20 P.S.I., I had the--an updated memorandum that was dated
21 October 17th, supplemented to it. I'm fully aware that--if I
22 recall, it was not recommended--it was--A P & P did--did not
23 necessarily recommend consecutive sentences, if my
24 recollection is correct, but I did it.

25 It's respectfully recommended by Adult Probation &

1 Parole that Mr. Hammond be referred to the custody of the
2 Department of Corrections for a diagnostic. And you declined
3 the diagnostic, you'll recall that. You said you didn't feel
4 that would be beneficial and you know what your circumstances
5 are.

6 And so--and I knew that your--I knew there were
7 errors in the original report, because I have written, "not
8 this defendant", "not this defendant", "not this defendant",
9 on the registration violation, the reckless driving and the
10 forcible sexual abuse, those were not yours; so I knew those
11 were being excluded.

12 And that took out a period of time from 1990 to '91
13 and '96, actually, and your criminal involvement was in '79
14 and '82 and '86 and then again in this present offense.

15 MR. HAMMOND: Uh huh.

16 THE COURT: But it was my view that you decided to
17 get pretty actively involved in the drug business and that the
18 circumstances of this case justified a consecutive sentence.

19 You do know that the Board of Pardons has the right
20 to change any of that sentence based upon your institutional
21 performance. You know that?

22 MR. HAMMOND: No, I didn't know that.

23 THE COURT: Do you know what that means?

24 MR. HAMMOND: I wasn't aware of that.

25 THE COURT: Yeah. The Board of Pardons--the Board

1 of Pardons can--I mean, the Board of Pardons could determine
2 that you can be released tomorrow, if they felt that that was
3 justified, that's the power they have; now, I'm sure they
4 won't do that and you know that as well as I do. But the--the
5 Board can do that, I'm just going to initial that I opened
6 this. And--and they have regulations which, the recent ones
7 I'm not familiar with, but frequently, if you have no write-
8 ups in the institution in a period of one year, you can
9 petition the Board for reconsideration of your status and--and
10 they can make decisions about that.

11 You have the benefit of working your way out of
12 prison sooner than a consecutive sentence would otherwise make
13 it. That's up to you.

14 MR. HAMMOND: All right.

15 THE COURT: It's up to you.

16 MR. HAMMOND: Thank you.

17 THE COURT: Any questions?

18 MR. HAMMOND: Thank you for your time.

19 THE COURT: All right. Thank you.

20 MR. CUNDICK: Thank you, your Honor.

21 THE COURT: All right. You're welcome.

22 (Whereupon, this hearing was concluded.)

23

24

* * *

25