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Utah v. Hammond : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

BRAD HAMMOND

Defendant/Appellant.

BRIEF OF APPELLANT

APPELLANT IN CUSTODY
PRIORITY 2

Case # 20010915-CA

BRIEF OF APPELLANT

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
CONVICTING DEFENDANT IN TWO SEPARATE CASES OF THREE
TOTAL COUNTS OF POSSESSION OF A CONTROLLED SUBSTANCE,
THIRD DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. §
58-37-8(2)(a)(i), IN AND FOR TOOELE COUNTY, STATE OF UTAH, THE
HONORABLE DAVID S. YOUNG PRESIDING.

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Paulette Stagg
Clerk of the Court

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
JURISDICTION AND NATURE OF PROCEEDINGS 1
STATEMENT OF ISSUE, PROVISIONS, STANDARD OF REVIEW 1
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES 2
STATEMENT OF CASE 2
STATEMENT OF THE FACTS 4
SUMMARY OF ARGUMENT 5
ARGUMENT 6
THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO CONSECUTIVE TIME ON HIS THREE FELONY CONVICTIONS. 6
CONCLUSION 10
ADDENDA	

PURSUANT TO RULE 24(a)(11) NO RELEVANT DOCUMENTS ARE
NECESSARY FOR INCLUSION IN THE ADDENDA

TABLE OF AUTHORITIES

Case Law:

FEDERAL:

Strickland v. Washington, 466 U.S. 668, 104 SA. Ct. 2052 (1984). 2,8

STATE:

State v. Gerrard, 584 P.2d 885, 887 (Utah 1978). 7

State v. Houk, 906 P.2d 907, 909 (Utah Ct.App. 1995) 9

State v. Legg, ___ P.3d ___ #192 (Utah Cr. App. 2001). 2,7

State v. Pierson 274, 12 P.3d 103 (Utah Cr. App. 2000). 9

State v. Russell, 791 P.2d 188, 192-93 (Utah 1990). 7

State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990) 9

State v. Mickelson, 848 P.2d 677 (Utah App. 1992) 2

Statutes:

U.C.A. § 58-37-8(2)(a)(i) 1

U.C.A. § 76-3-401(4) 6

U.C.A. § 78-3a-909 1

Rules:

Rule 26 of the Utah Rules of Criminal Procedure 1

Rule 3(a) of the Utah Rules of Appellate Procedure 1

IN THE UTAH COURT OF APPEALS	
STATE OF UTAH, Plaintiff/Appellee, v. BRAD HAMMOND Defendant/Appellant.	BRIEF OF APPELLANT PRIORITY 2 Case # 20010915-CA

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a Final Judgement and Commitment in the Third District Court, Tooele, County, for three convictions in two separate cases before the Honorable Judge David S. Young on October 22, 2001, in which the Court found sentenced the defendant to consecutive time on each of the three counts of possession of a controlled substance, third degree felonies, in violation of Utah Code Ann. § 58-37-8(2)(a)(i).

This Court has jurisdiction over this matter pursuant to Rule 26 of the Utah Rules of Criminal Procedure, Rule 3(a) of the Utah Rules of Appellate Procedure, and Utah Code 78-3a-909 (1996).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

There are two issues for review:

1. Did the trial court error in sentencing he defendant to consecutive time on each count without putting specific supporting facts on the record for such action?

2. Was Defendants's trial counsel ineffective in his representation in that he failed to raise pertinent issues of a conflict of interest and argue for concurrent time at sentencing?

STANDARD OF REVIEW

1. This Court has stated in State v. Legg, ___ P.3d ___ #192 (Utah Cr. App. 2001),
"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. Nuttall, 861 P.2d 454, 457 (Utah Ct.App. 1993); accord State v. Schweitzer, 943 P.2d 649, 651 (Utah Ct.App. 1997)
2. To establish ineffective assistance of counsel, Defendant must show that defense counsel's representation "*fell below an objective standard of reasonableness,*" and that, but for the deficient representation, there is a "reasonable probability" that the result would have been different. . . . "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutions, statutory provisions, or rules referenced in this brief and pertinent to the issues now before the court on appeal are contained herein or attached to this brief.

STATEMENT OF THE CASE

The appellant, Brad Hammond was charged on June 22, 2001, in Case No. 011300256 with One Count of Distribution of a Controlled Substance, a Second Degree Felony in violation

of Utah Code 58-37-8, alleging that on June 4, 2001 Mr. Hammond offered to sell methamphetamine to a police informant for \$30.00 (Record on Appeal, page 2). On August 27, 2001 Mr. Hammond pled guilty to a reduced charge of Possession of a Controlled Substance, a Third Degree Felony, and his case was set for sentencing (AR 12-19).

On June 15, 2001, in Case No. 011300257, Mr. Hammond was charged with a Second Degree Felony Possession with Intent to Distribute Cocaine; Third Degree Felony, Possession with Intent to Distribute Marijuana; Possession of Paraphernalia, a Class B misdemeanor. In that case Mr. Hammond pled to a reduced charge in Count I, Possession of a Controlled Substance a Third Degree Felony and Count II Possession with Intent to Distribute Marijuana, a Third Degree Felony and Count III was dismissed. (AR, 21-20).

The guilty pleas in both cases were taken on August 27, 2001. Mr. Hammond does not challenge the legitimacy of the pleas, nor has a review of the plea procedure on that date disclosed any failure to comply with Utah Rules of Criminal Procedure, Rule 11. The two cases, involving the three felonies were set for sentencing. A pre-sentence investigation report was completed and Mr. Hammond filed objections to the report on October 10, 2001. (Ar 24-25). Apparently the report contained convictions for a "Brad Hammond" that was not the Mr. Hammond presently before the court. The report was corrected, the mistaken prior convictions were ordered to be removed from the report. The Court requested that in accordance with the request of Adult Probation and Parole that Mr. Hammond complete a 90 day diagnostic at the Utah State Prison. Mr. Hammond objected, requested to be sentenced at that time, and on October 22, 2001, the Court sentenced Mr. Hammond to prison for zero to five years, consecutively on each of his three Third Degree Felony convictions.(Ar 26-27).

On October 26, 2001, the attorney for Mr. Hammond, Douglas Hogan, filed a Motion to Review the Sentence and asked that the Court clarify its ruling and to re-sentence Mr. Hammond to concurrent time (Ar 28-30). The Court denied the motion and the Notice of Appeal was filed on November 15, 2001 (AR 36-37). Mr. Hammond now appeals his sentence and requests that this Court review the imposition of consecutive time on his prison commitments. As set forth above, Mr. Hammond does not challenge the legality of his pleas nor is it obvious from the record that there is any defect in the plea proceedings in which Mr. Hammond was convicted. At issue is the consecutive sentence and the ineffective assistance of counsel claim that Mr. Hammond raises alleging that his trial attorney failed to adequately represent him at sentencing.

STATEMENT OF THE FACTS

The facts relevant to the appeal are taken from the Findings of Fact and Conclusions of Law that were set forth in each case. Mr. Hammond was convicted of possession methamphetamine, cocaine and possessing marijuana with the intent to sell the marijuana (AR 33-35).

The original recommendation of Adult Probation and Parole was for a 90 day diagnostic evaluation at the Utah State Prison (AR. 24-25). However, that recommendation was based upon a report that contained three incorrect convictions (Transcript of Sentence, P. 5). There were two reckless driving citations and a Forcible Sexual Abuse conviction that were mistakenly attributed to Mr. Hammond in the report. Mr. Hammond declined to have the 90 day diagnostic performed on him and as a result the prosecution recommended prison. The Court imposed consecutive time on each case (AR 33-35).

At sentencing, the attorney for Mr. Hammond stated that an up-date to the pre-sentence

investigation report was completed which removed the erroneous convictions from Mr. Hammond's record and reflected Mr. Hammond's objections to being characterized as having sporadic employment (AR. 25).

Mr. Hogan, the defense counsel stated, " I've gone over the recommendations of the diagnostic with Mr. Hammond. It's my understanding that Mr. Hammond wishes to not participate in the diagnostic and he would prefer to be sentenced today your Honor, without the diagnostic." (T. 2-3).

The prosecutor provided, "Your Honor, if he's—if he's unwilling to undergo a diagnostic, it seems like it's not going to be very successful if he is put on probation; I don't think the Court has any alternative but prison." (T. 3).

The Court sentenced Mr. Hammond as follows, with no explanation as to the consecutive time implementation, "Okay. Zero to five on each of the three third-degree felonies, each to be consecutive to the other and a fine of \$500 on each and a surcharge to be applied to that on each. An the Court orders that you pay \$500 in recoupment. All right." (T. 3).

There is no factual basis in the transcript or in the written Findings of Fact for the pleas to support the imposition of consecutive time on all three convictions (T. 1-3), (AR. 34-35). Mr. Hammond appeals the sentence of consecutive time on two grounds, one the ineffective assistance of his counsel to object to the sentence or argue for concurrent time, and two, the lack of supporting factual basis for the imposition of consecutive time.

SUMMARY OF ARGUMENT

Mr. Hammond has two issues for appeal, first that the trial court improperly sentenced him to consecutive time on all three felony cases when he has no significant criminal history, does

not present a significant danger to the community, has a stable residence and the ability to work. Additionally, he was not presented with the opportunity to participate in drug treatment or counseling or engage in cognitive restructuring. Mr. Hammond submits that the Court's sentence of consecutive time on all of the charges was an abuse of discretion.

Second, Mr. Hammond submits that his trial attorney was ineffective in his representation of him during the case. Mr. Hammond alleges he negotiated his own plea agreement without the help of counsel. Although there is no ability to provide supporting evidence of this, Mr. Hammond states that he essentially represented himself up to sentencing and that his counsel failed to even argue for concurrent time. It is this last allegation that is supported by documentation. There is no record of counsel arguing to the trial court that Mr. Hammond should get counseling, treatment or probation in lieu of prison. Nor is there any record that the defense attorney argued for concurrent time rather than consecutive time on all three convictions.

ARGUMENT

POINT ONE: THE COURT COMMITTED ERROR WHEN IT IMPOSED CONSECUTIVE TIME ON ALL THREE COUNTS WITHOUT ANY SUPPORTING FACTUAL BASIS.

Defendant submits that the trial court abused its discretion in sentencing him to consecutive time on all three felony cases. Mr. Hammond does not have an extensive criminal history, he has never had the opportunity for drug rehabilitation, cognitive restructuring or any therapeutic intervention in lieu of incarceration. Additionally, alternatives such as county jail time, an ankle monitor or intensive supervision by Adult Probation & Parole was not explored as option for prison.

Mr Hammond asserts that the trial court became angered when he did not want to go to a 90 day diagnostic at the prison and the court as a punitive measure for that decision sentenced

Mr. Hammond to consecutive time in prison. Mr. Hammond asserts that this judicial action was an abuse of discretion.

In Utah Code Section 76-3-401(4), the statute states that concurrent time should be the norm and 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".

Mr. Hammond alleges that his lack of significant criminal history, the short duration of his criminal behavior, his lack of prior treatment or therapy and his rehabilitative needs indicate a sentence of either county jail or concurrent prison time. He alleges the judge was abusive in his sentence.

"An abuse of discretion may be manifest if the actions of the judge in sentencing were 'inherently unfair' or if the judge imposed a 'clearly excessive' sentence." State v. Russell, 791 P.2d 188, 192-93 (Utah 1990) (citation omitted). "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). Furthermore, "this discretion is not to be surrendered to a mathematical formula by which numbers of circumstances rather than weight of circumstances are determinative. The overriding consideration is that the sentence be just. One factor in mitigation or aggravation may weigh more than several factors on the opposite scale." Russell, 791 P.2d at 192.", Legg, above.

In Legg, the distinguishing issue was that the defense attorney raised the issues listed in the state statute governing concurrent or consecutive time and the judge did not find the issues

compelling. Additionally, Legg, had a lengthy criminal history and many other aggravating factors not present here.

Mr Hammond asserts that had his trial counsel made any argument at all to address the mitigating factors or asked for an alternative the result may well have been different. The trial court's imposition of consecutive time absent any of the aggravating factors in Legg, or the state statute clearly shows that the trial judge was angry at Mr. Hammond about the diagnostic and as a result abused his discretion in sentencing Mr. Hammond to consecutive prison time.

POINT TWO: TRIAL COUNSEL WAS INEFFECTIVE FOR NOT ARGUING FOR CONCURRENT TIME ON THE THREE FELONY CONVICTIONS.

Defendant's second claim of error is that his trial attorney was ineffective for failing to argue to the trial court that Mr. Hammond should be given an opportunity for drug rehabilitation rather than prison, counseling intensive probation, an ankle monitor or anything other than straight incarceration. When the trial court ordered consecutive time the trial attorney did not try to argue for concurrent time or ask the court for additional time in which to respond to the concurrent versus consecutive prison sentence issue.

As set forth in Legg, the trial attorney has a duty to argue for mitigating sentencing factors and the record clearly shows that the attorney did not do so in this case. In order to establish ineffective assistance of counsel, Defendant must show that defense counsel's representation "fell below an objective standard of reasonableness," and that, but for the deficient representation, there is a "reasonable probability" that the result would have been different. . . . "A reasonable probability is a probability sufficient to undermine confidence in the outcome" Strickland v.

Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984).

In Mr Hammond's argument above the trial attorney had to have raised the mitigating factors at sentencing for the court to consider the factors. Without raising the factors the court could not reach the issues. See State v. Pierson 274, 12 P.3d 103 (Utah Cr. App. 2000)" Abuse of discretion `may be manifest if the actions of the judge in sentencing were "inherently unfair" or if the judge imposed a clearly excessive sentence.'" State v. Houk, 906 P.2d 907, 909 (Utah Ct.App. 1995) (citations omitted); see also State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990) (finding abuse of discretion when court fails to consider all legally relevant factors or when sentence imposed is clearly excessive). Here, the court could not consider all of the relevant factors if the trial attorney did not raise the issues.

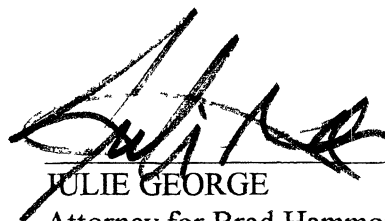
Had the trial attorney argued for mitigating factors such as the relatively minor criminal history, the lack of treatment or rehabilitation or alternatives the trial court may have sentenced Mr. Hammond to concurrent time. There is a strong likelihood that the result would have been different. Additionally, without ever raising the issues the court had no ability to put facts on the record to establish why it was not abusing its discretion in sentencing Mr. Hammond to consecutive time.

There is no way the state can argue that the trial court look at both the aggravating and mitigating factors and made its decision after weighing both sides if the defense attorney never presented any facts in mitigation for the court to consider. If the court did not weigh the factors and imposed the maximum consecutive time out of anger at Mr. Hammond for not agreeing to the diagnostic then such a decision is clearly not one that withstand an abuse of discretion standard.

CONCLUSION

Mr Hammond respectfully requests this Court to vacate his sentence, remand the case to the trial court with instructions to enter a sentence with concurrent time.

RESPECTFULLY SUBMITTED this 27 day of February 2002



JULIE GEORGE

Attorney for Brad Hammond, Appellant

MAILING CERTIFICATE

I hereby certify that I hand-delivered or mailed, first class postage prepaid, a true and correct copy of the foregoing Brief to.

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DATED THIS 27 DAY OF February 2002

