

2001

# Utah v. Manuel Ernesto Samora : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, :  
 : Case No. 20010988-CA  
vs. :  
 :  
MANUEL ERNESTO SAMORA, :  
Defendant/Appellant. :

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BRIEF OF APPELLEE

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APPEAL FROM A SENTENCE FOR ATTEMPTED JOYRIDING WITH  
INTENT TO TEMPORARILY DEPRIVE OWNER, A CLASS A  
MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 41-1a-1314  
(1997) AND UTAH CODE ANN. § 76-4-101 (1973), IN THE THIRD  
JUDICIAL DISTRICT, SALT LAKE COUNTY, THE HONORABLE J.  
DENNIS FREDERICK PRESIDING

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
	:	Case No. 20010988-CA
vs.	:	
	:	
MANUEL ERNESTO SAMORA,	:	
Defendant/Appellant.	:	

---

BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a sentence for attempted joyriding with intent to temporarily deprive owner, a class A misdemeanor, in violation of UTAH CODE ANN. § 41-1a-1314 (1997) and UTAH CODE ANN. § 76-4-101 (1973), in the Third Judicial District, Salt Lake County, the Honorable J. Dennis Frederick presiding.

This Court has jurisdiction pursuant to UTAH CODE ANN. § 78-2a-3(2)(e) (2001).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. Did defendant invite any error when he voluntarily declared his obligation and agreement to pay restitution?



Review does not lie when a party, through counsel, has led the trial court into error. *State v. Bullock*, 791 P.2d 155, 158 (Utah 1989). Therefore, no standard of review applies.

2. At resentencing, may a trial court order restitution not included in the original sentence where (a) the original sentence was illegal and therefore void and (b) the restitution is based on facts not known to the trial court when the original sentence was imposed?

This is a legal question, reviewable for correctness. *See State v. Babbel*, 813 P.2d 86, 87-88 (Utah 1991); *State v. Maestas*, 2000 UT App 22, ¶ 11, 997 P.2d 314, *cert. denied*, 4 P.3d 1289 (Utah 2000).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant constitutional provisions, statutes, and rules are included in Addendum A:

UTAH CODE ANN. § 76-3-405 (1997), and  
Utah R. Crim. P. 22(e).

## STATEMENT OF THE CASE

On April 18, 2000, defendant was charged with unlawful control over a motor vehicle with the intent to temporarily deprive the owner of possession, a third degree felony, in violation of Utah Code Ann. § 41-1a-1314 (1997). R. 2-3. On August 8 defendant pled guilty to attempted unlawful control over a motor vehicle, a class A misdemeanor. R. 63:5. The trial judge accepted defendant's plea,

released him to pretrial services, told him to make an appointment with Adult Probation and Parole for preparation of a presentence report (PSI), and notified him of his September 22, 2000 sentencing hearing. R. 63:5, 7-8.

Defendant failed to appear for either preparation of his PSI or sentencing. R. 41, 64:2. At sentencing, the court found that defendant had voluntarily failed to appear and sentenced him in absentia to the statutory one-year indeterminate term. R. 64:2. The court also imposed a \$2500 fine, a surcharge, and attorneys' fees. R. 43. The court did not order restitution. *See* R. 42-43, 64.

Defense counsel timely appealed defendant's conviction. R. 47. Despite defendant's status as a fugitive when the appeal was briefed and argued, this Court vacated his sentence, holding that defendant's sentence was an illegal sentence under rule 22(e), subject to correction at any time. R. 92 (*State v. Samora*, 2001 UT App 266) (addendum B).

Pursuant to the this Court's mandate, the trial court resentenced defendant. R. 94-95. Defendant, who had been booked on his outstanding warrant in May, 2001, was present. R. 65, 94. Defendant, defense counsel, and the prosecutor all agreed that defendant owed restitution and had agreed to pay it as part of the negotiations in this case. R. 122:3-4. The victim stated that her losses were \$744.80, but defense counsel and defendant both indicated that defendant had agreed to a higher amount R. 122:4, 6.

The trial court imposed a new sentence. R. 94-95. The court sentenced defendant to a one-year jail term and gave him good-time credit for the time he had served awaiting the original disposition.<sup>1</sup> *Id.* The court also imposed a \$2500 fine, a surcharge, and attorneys' fees. *Id.* The court further ordered that defendant pay \$744.80 in restitution. *Id.*

### STATEMENT OF FACTS

According to the probable cause statement, defendant was drinking at his girlfriend's home, became angry, and drove away in her car without her permission. R. 3. Defendant's relative telephoned the following day and gave the girlfriend the vehicle's location. *Id.* She then retrieved the vehicle. *Id.*

According to testimony given at re-sentencing, defendant destroyed a fence while driving the vehicle. R. 122:6. Collection proceedings for the value of the fence had been initiated against defendant's girlfriend, affecting her credit rating. *Id.*

### SUMMARY OF ARGUMENT

Defendant claims that the trial court improperly imposed restitution at re-sentencing where restitution was not imposed as part of the sentence defendant

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<sup>1</sup>Defendant was not given credit for time spent in jail following his arrest on the warrant that issued when he failed to appear for his original sentencing. R. 122:8-9. The trial court subsequently filed an "order granting credit for time served nunc pro tunc," ordering that defendant receive credit for all time served prior to re-sentencing (unpaginated record entry filed February 4, 2002).

successfully challenged on appeal. Although a sentence imposed following the appeal of a prior sentence may generally be no more severe than the original sentence, defendant's challenge in the instant case fails for three reasons:

(1) Defendant invited any error. Defendant raised the issue of restitution at resentencing and voluntarily declared his restitution obligations.

(2) Defendant's original sentence was declared illegal. An illegal sentence is void and provides no legal rights. A new sentence imposed following the vacation of an illegal sentence may therefore be harsher than the original sentence.

(3) Defendant's new sentence was based on facts not known to the court at the time of the original sentence.

## **ARGUMENT**

### **I.**

#### **DEFENDANT INVITED ANY ERROR WHEN HE VOLUNTARILY DECLARED HIS OBLIGATION TO PAY RESTITUTION**

Defendant argues that the trial court committed plain error by imposing a harsher sentence after defendant's original sentence was vacated on appeal. Br. Aplt. at 2. Plain error, however, does not lie where defendant has led the trial court into error.

The plain error doctrine permits an appellant to claim error on appeal when he did not timely object below. *State v. Brown*, 948 P.2d 337, 343 (Utah 1997); *State v. Eldredge*, 773 P.2d 29, 35 (Utah 1989). The plain error doctrine "exists to

permit review of trial court rulings as a way of protecting a defendant from harm that can be caused by less-than-perfect counsel.” *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989).

Plain error review, however, does not lie when a party, through counsel, consciously refrains from objecting or has led the trial court into error. *Id.* at 158; *Brown*, 948 P.2d at 343. Review does not lie where counsel, “rather than merely remain[ing] silent,” makes “active represent[at]ions to the court,” suggesting that he has no objection and “leading the trial court to believe that nothing [i]s wrong” with its disposition of a matter. *State v. Perdue*, 813 P.2d 1201, 1206 (Utah App. 1991) (rejecting manifest injustice exception where counsel led court to believe jury instructions were proper). “[W]here invited error butts up against manifest injustice [or plain error], the invited error rule prevails.” *Id.* Otherwise, a criminal defendant could “invite” prejudicial error and “implant it in the record as a form of appellate insurance . . . .” *State v. Parsons*, 781 P.2d 1275, 1285 (Utah 1989).

Here, defendant and defense counsel participated in discussions regarding restitution. Defendant and defense counsel not only failed to object to restitution, but raised the issue and agreed that restitution was owing. *See* R. 122:3-4. Defense counsel raised the issue, volunteering that “[t]here is some restitution owing that was part of the negotiation in this case to the victim.” *Id.* Defense counsel suggested that defendant and the victim had “arrive[d] at a restitution figure” of

“[a]bout \$900.” R. 122:4. Defendant then stated that it “[m]ight be a little higher.”

*Id.* The victim later declared that she only wanted defendant to pay a \$744.80 bill for the damaged fence. *Id.* at 6.

While defendant also asked that the court reduce his fine, he did not indicate that his agreement to pay restitution was conditioned on a reduction of his fine. *Id.* at 4. Defendant suggests in his brief that defense counsel requested “that the fine be waived and that instead, the trial judge impose restitution which Mr. Samora had agreed to pay as part of the plea negotiations.” Br. Aplt. at 5. Defendant reads the “instead” language into the record. While defendant may have hoped for a reduction in his fine, nothing in the record suggests that defendant insisted on any *quid pro quo* when he voluntarily acknowledged his restitution obligation. Defense counsel merely stated:

[I]t would be my request on behalf of Mr. Samora that the Court do a couple of things. One, that the Court would waive the fine. There is some restitution owing that was part of the negotiation in this case to the victim. They’ve—Mr. Samora and the victim in this case had a fairly long-term relationship before this all happened and there was, as a part of the negotiation, he’s to pay some restitution with respect to that.

We’d ask the Court to—to waive or at least to reduce the fine substantially and—and ask that the Court give him credit for time served on this case.

R. 122:3-4. Further, defendant did not object when the court fixed his sentence, both reimposing his original fine and ordering restitution. *Id.* at 8.

Defendant thus led the court into the error he alleges on appeal. He cannot now claim that the trial court plainly erred by imposing restitution that defendant, both personally and through counsel, indicated was due.

## II.

### **A TRIAL COURT MAY PROPERLY ORDER RESTITUTION NOT INCLUDED IN THE ORIGINAL SENTENCE WHERE (A) THE ORIGINAL SENTENCE WAS ILLEGAL AND THEREFORE VOID AND (B) THE RESTITUTION IS BASED ON FACTS NOT KNOWN TO THE TRIAL COURT WHEN THE ORIGINAL SENTENCE WAS IMPOSED**

#### **A. Because an illegal sentence is void, subsequent imposition of a more severe sentence is permissible.**

Defendant claims that the trial judge erred by imposing a harsher sentence following reversal on appeal. As a general rule, a new sentence, imposed following vacation of an original sentence on direct review, may not be more severe than the prior sentence. *See* UTAH CODE ANN. § 76-3-405 (1997); *State v. Bakalov*, 1999 UT 45, ¶ 73, 979 P.2d 799; *State v. Sorenson*, 639 P.2d 179, 180 (Utah 1981).

This rule is inapplicable, however, where a court rules that the original sentence was an illegal sentence under rule 22(e), Utah Rules of Criminal Procedure. An illegal sentence is void. *State v. Babbel*, 813 P.2d 86, 88 (1991) (correcting sentence where trial court imposed indeterminate prison terms potentially shorter than minimum mandatory terms required by statute). Because it is void, “it create[s] no rights and neither impair[s] nor affect[s] any right.” *Id.* Although a reviewing court may vacate an illegal sentence in the context of an

appeal, vacation of the sentence in that context does not invoke the “no harsher sentence” rule. *Id.* Rather, the reviewing court “simply recognize[s] in effect the clear power of the trial court to correct an illegal sentence, irrespective of the appeal.” *Id.* It recognizes the trial court’s power to vacate an illegal sentence “whether before or after an appeal, and even if there is no appeal.” *Id.*

Utah law follows the rule of most jurisdictions “that an unlawful sentence is of no legal effect, allowing the court to correct the sentence by imposing lawful terms at any time the illegality is discovered, regardless of whether the correction involves an increase . . . .” *Id.* Because “[t]he correction of an illegal sentence stands on a different footing from the correction of an error in a conviction,” “the principles underlying *Sorenson* . . . and § 76-3-405 have no application.” *Id.*

Defendant argued in the context of his first appeal that his sentence was illegal.<sup>2</sup> This Court agreed, determining that defendant’s sentence was an illegal sentence under rule 22(e), Utah Rules of Criminal Procedure. *Samora*, 2001 UT App 266, text and n.1. This determination is res judicata. *See State v. Clark*, 913

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<sup>2</sup>*See* Br. Aplt at 4 (*State v. Samora*, Case No. 20000884-CA); Defendant’s Motion to Submit for Decision and Vacate Sentence, filed September 6, 2001 (*Samora*, Case No. 20000884-CA).

The State requests that this Court take judicial notice of the cited documents. *See Riche v. Riche*, 784 P.2d 465, 468 (Ut. App. 1989) (court “may take judicial notice of the records and prior proceedings in the same case”); *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 & n.4 (Ut. App. 1988) (appellate court may take judicial notice to affirm).



P.2d 360, 362-363 (Utah App. 1996) (resolution of appeal regarding illegality of a sentence “is res judicata with respect to a subsequent appeal on the same issue”).

In sum, because an illegal sentence is void and confers no rights, a corrected sentence may be imposed even if it is harsher than a previously imposed illegal sentence. A prior adjudication by this court holds that defendant’s previous sentence was illegal. The trial court therefore did not violate defendant’s rights when it imposed a valid sentence, even though the valid sentence was harsher than defendant’s previous illegal sentence.

**B. In any event, the “no harsher sentence” rule does not apply where the increased sentence is based on facts not known to the court at the time of the original sentence.**

UTAH CODE ANN. § 76-3-405 (1997) provides:

(1) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

(2) This section does not apply when:

(a) the increased sentence is based on facts which were not known to the court at the time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence; or . . . .

In other words, where new information relevant to sentencing comes to the attention of the trial court prior to re-sentencing and where that information is made part of

the record, a trial court can properly base its sentence on such information, even if the resulting sentence is more severe than a sentence set aside on appeal.

The exception codified in subsection (2)(a) comports with the demands of due process. “[D]ue process of law requires that a defendant be freed from the apprehension that if he appeals his conviction successfully and is then convicted at a second trial the trial judge can retaliate by giving him an increased sentence.” *State v. Sorensen*, 639 P.2d 179, 180 (Utah 1981) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)). Where “the record contains no reason for the increased sentence, it is . . . contrary to the due process requirement articulated in *North Carolina v. Pearce*.” *Id.* at 181. Where, however, the record contains the reasons for an increased sentence and the reasons are not retaliatory, no due process violation occurs.

Assuming arguendo that the sentence in this case is subject to the “no harsher sentence” rule, it nonetheless falls within the exception articulated in subsection (2)(a). When the trial court sentenced defendant in absentia, the court did not know that defendant had damaged a fence, did not know the extent of the damages, and did not know that defendant had agreed to make restitution of \$900 or more.<sup>3</sup>

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<sup>3</sup>Some discussion of defendant’s obligation to pay restitution did occur at his change of plea hearing. *See* R. 63:3. Defendant apparently agreed, as part of his plea, that he would pay some restitution. *See id.* at 2-6. Following the plea hearing, the case was transferred to a different judge for sentencing. *See id.* at 8. No PSI had been prepared, neither counsel referred to defendant’s earlier agreement to pay restitution, and  
(continued...)

R. 122:4, 6. After defendant raised the issue of restitution and declared his obligation, the trial court affirmatively solicited testimony about the restitution negotiations and the appropriate restitution figure. *Id.* at 4. The trial court thus met its obligation to “place[] on the record the facts which provide the basis for the increased sentence.” UTAH CODE ANN. § 76-3-405(2)(a).

Further, because the increased sentence was based on facts that were not known to the court at the time of the original sentence, the increase had a permissible, non-retaliatory basis. The increase therefore did not violate due process.

In sum, the restitution order here was based on facts not known to the trial court at the time of sentencing. The court placed on the record the facts that provided the basis for the increased sentence. The restitution order, while not part of the original sentence, was therefore proper.

#### CONCLUSION

This Court should affirm the trial court’s sentence imposed at re-sentencing, including its restitution order.

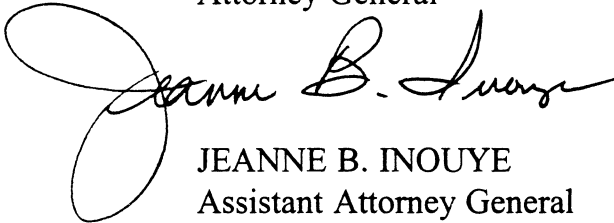
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<sup>3</sup>(...continued)

no transcript of the plea hearing was available when sentencing was held. *See* R. 64. The sentencing judge therefore imposed sentence without knowledge that the defendant had caused damages or agreed to make restitution for them, much less that he had agreed to a figure of \$900 or more.

RESPECTFULLY submitted on May 8, 2002.

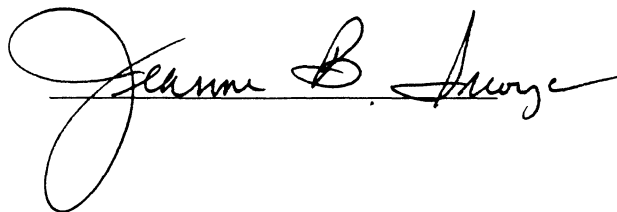
MARK L. SHURTLEFF  
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Assistant Attorney General

#### CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were hand-delivered on May 8, 2002 to Joan C. Watt and John K. West, Attorneys for Appellant, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, Utah 84111.



## ADDENDA

## Addendum A

**76-3-405. Limitation on sentence where conviction or prior sentence set aside.**

(1) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

(2) This section does not apply when:

(a) the increased sentence is based on facts which were not known to the court at the time of the original sentence, and the court affirmatively places on the record the facts which provide the basis for the increased sentence; or

(b) a defendant enters into a plea agreement with the prosecution and later successfully moves to invalidate his conviction, in which case the defendant and the prosecution stand in the same position as though the plea bargain, conviction, and sentence had never occurred.

Amended by Chapter 291, 1997 General Session

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*Last revised: Thursday, July 12, 2001*

## **Rule 22. Sentence, judgment and commitment.**

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.



## Addendum B

IN THE UTAH COURT OF APPEALS

---ooOoo---

State of Utah,  
Plaintiff and Appellee,

v.

Manuel Ernesto Samora,  
Defendant and Appellant.

MEMORANDUM DECISION  
(Not For Official Publication)

Case No. 20000884-CA

FILED  
September 7, 2001

2001 UT App 266

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Third District, Salt Lake Department  
The Honorable J. Dennis Frederick

Attorneys:

Joan C. Watt and John K. West, Salt Lake City, for Appellant

Mark L. Shurtleff, Jeanne B. Inouye, and Kevin Murphy, Salt Lake City, for Appellee

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Before Judges Greenwood, Billings, and Orme.

PER CURIAM:

Appellant Manuel Ernesto Samora appeals the sentence on his conviction of Attempted Joyriding, a class A misdemeanor.

The issues raised in Samora's appeal are the same issues determined in State v. Wanosik, 2001 UT App 241, 428 Utah Adv. Rep. 10, regarding sentencing in absentia and a criminal defendant's Utah Rule of Criminal Procedure 22(a) and Due Process rights. Accordingly, Samora is entitled to be resentenced under Wanosik because the district court did not (1) make an adequate inquiry into the actual voluntariness of Samora's absence before proceeding to sentence him in absentia; (2) provide Samora the opportunity to present information through counsel in mitigation of punishment and also provide the prosecutor an opportunity to present information relevant to sentencing; and (3) base the sentencing decision on relevant and reliable information regarding the crime, defendant's background, and the interests of society. See id. at ¶¶36-38.

The State seeks dismissal of this appeal, relying upon cases concluding that an appeal taken by a criminal defendant who is a fugitive may be dismissed, subject to reinstatement if the defendant returns to the jurisdiction and if the State cannot demonstrate that it will be prejudiced by reinstatement. See, e.g., State v.

Tuttle, 713 P.2d 703, 705 (Utah 1985). Because Wanosik is dispositive of Samora's appeal and requires a remand for resentencing, we decline to dismiss this appeal.<sup>(1)</sup> However, if Samora appeals the sentence imposed after remand, the State may raise the dismissal argument in the subsequent appeal.

We vacate the sentence and remand for resentencing in accordance with Wanosik.

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Pamela T. Greenwood,  
Presiding Judge

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Judith M. Billings, Judge

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Gregory K. Orme, Judge

1. Even if we were to dismiss this appeal, Samora could challenge the sentence in the trial court under Rule 22(e) of the Utah Rules of Criminal Procedure. See Utah R. Crim. P. 22(e) ("The court may correct . . . a sentence imposed in an illegal manner, at any time."); see also Wanosik, 241 UT App 241 at n.11 (stating issues regarding illegality of the sentence under Rule 22(a) can be considered for the first time on appeal under Rule 22(e)). Judicial economy suggests that we resolve the appeal from the sentence and preserve the State's ability to seek dismissal in any appeal taken after resentencing.

## Addendum C

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IN THE THIRD DISTRICT COURT OF SALT LAKE CITY  
SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT  
Third Judicial District

NOV 29 2001

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SALT LAKE COUNTY  
By Buray Neuenack  
Deputy

STATE OF UTAH,

Plaintiff,

vs.

MANUEL ERNESTO SAMORA,

Defendant.

Case No. 001906887

SENTENCING

(Videotape Proceedings)

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BE IT REMEMBERED that on the 16th day of  
November, 2001, commencing at the hour of 9:54 a.m., the  
above-entitled matter came on for hearing before the  
HONORABLE J. DENNIS FREDERICK, sitting as Judge in the  
above-named Court for the purpose of this cause, and that  
the following videotape proceedings were had.

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A P P E A R A N C E S

For the State:

CARLOS A. ESQUEDA  
Deputy Salt Lake County  
District Attorney  
231 East 400 South, #300  
Salt Lake City, Utah 84111

For the Defendant:

JOHN K. WEST  
Attorney at Law  
Salt Lake Legal Defender  
Association  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

FILED  
Utah Court of Appeals

JAN 14 2002

ORIGINAL

ALAN P. SMITH, CSR  
385 BRAHMA DRIVE (801) 266-0300  
SALT LAKE CITY, UTAH 84107  
Paulette Stagg  
Clerk of the Court



P R O C E E D I N G S

MR. WEST: Good morning, your Honor.

THE COURT: Good morning.

MR. WEST: Can we do the sentencing on Manuel Samora? That's No. 18.

THE COURT: Very well. .

Mr. West, you are appearing on behalf of Mr. Samora?

MR. WEST: Yes, your Honor.

THE COURT: This is Case No.--State vs. Manuel Ernesto Samora, Case No. CR00887.

And for the State, Mr. Esqueda?

MR. ESQUEDA: Yes, your Honor.

THE COURT: And are you Manuel Ernest Samora?

MR. SAMORA: Yes, sir.

THE COURT: And your lawyer is Mr. West; is that correct?

MR. SAMORA: Yes, sir.

THE COURT: For the record, this matter's on the calendar for a re-sentencing. I had sentenced Mr. Samora in absentia and that was on the 22nd of September. We now have Mr. Samora back with us and I'm bound to inquire, Mr. West, before we proceed with the sentencing if you have anything to say in his behalf.

1 MR. WEST: Yes, your Honor, I--

2 THE COURT: Okay.

3 MR. WEST: --I do.

4 Mr. Samora has had some time to reflect and--  
5 and it's going to be his request today that the Court go  
6 ahead and impose the year. He would like to have a clean  
7 break, get this done, get a new start on life. He would,  
8 however, if I may approach?

9 THE COURT: Uh huh.

10 MR. WEST: He would like the Court to be aware  
11 of some of the things that he's been doing while he's  
12 been incarcerated. He served two months in jail before  
13 he was sentenced originally on this case and then he  
14 served an additional approximately four months, I think,  
15 since--

16 MR. SAMORA: Six. Six months.

17 MR. WEST: Six months. And it would be--

18 THE COURT: While you were pursuing the appeal?

19 MR. WEST: Yes, your Honor.

20 THE COURT: Yeah. Well, I mean, the point is,  
21 I guess, made.

22 MR. WEST: It--it would be a--it would be my  
23 request on behalf of Mr. Samora that the Court do a  
24 couple of things. One, that the Court would waive the  
25 fine. There is some restitution owing that was part of

1 the negotiation in this case to the victim. They've--Mr.  
2 Samora and the victim in the case had a fairly long-term  
3 relationship before this all happened and there was, as a  
4 part of the negotiation, he's to pay some restitution  
5 with respect to that.

6 We'd ask the Court to--to waive or at least to  
7 reduce the fine substantially and--and ask that the Court  
8 give him credit for time served on this case.

9 THE COURT: All right. Thank you, Mr. West.

10 And did Mr. Samora and the victim arrive at a  
11 restitution figure that they've agreed upon, keeping in  
12 mind that I don't have a pre-sentence report or have any  
13 input into this.

14 MR. WEST: Your Honor, I think the State has  
15 that figure. I can't remember exactly what it was.

16 (Inaudible)

17 MR. WEST: About \$900, I think.

18 MR. SAMORA: Might be a little higher.

19 THE COURT: Mr. Samora, before I decide what's  
20 to be done here, do you have anything to say?

21 MR. SAMORA: Yeah, your Honor. I've had a lot  
22 of time to think of what has happened and what I've done,  
23 I do have remorse for what I've done. I just want to say  
24 I'm sorry to the Court for taking their time and to  
25 Kelly, I'm sorry, you know, I just want to get back on



1 the right track and get started with my life again, your  
2 Honor.

3 THE COURT: And you opted, though, not to  
4 participate in the pre-sentence report.

5 MR. WEST: Your Honor, I think the reason for  
6 that was when--when they came out, they gave him a packet  
7 and I had told him that I would come out and help him,  
8 you know, fill out the questionnaire. And it was some  
9 time before I got out there and they--they came back and  
10 he had indicated to the agent from Adult Probation &  
11 Parole that since he had already done a large chunk of  
12 time on this, that it was his preference just to serve  
13 the remaining portion of that year. Hopefully he'll be  
14 able to get some good time credit for that and then just  
15 have a fresh start so that he can get out, get to work,  
16 pay off the restitution and--and get on with his life.

17 THE COURT: Does the State have a  
18 recommendation, Mr. Esqueda?

19 MR. ESQUEDA: Before we get to our  
20 recommendation, the victim, Kelly Johnson, wishes to  
21 address the Court.

22 THE COURT: Oh.

23 Mr. West, you and Mr. Samora stand over here.

24 Yes, ma'am. Come forward. If you wish to say  
25 something, you're certainly entitled to.

1 MS. JOHNSON: The only thing I'm asking for is  
2 that he pay for the fence that he destroyed when he was  
3 driving my vehicle, 'cause they're coming after me, it's  
4 gone to collections, it's affecting my credit and he had  
5 agreed to pay it last year, in October, that was a  
6 condition of his release. And I have that in the  
7 transcripts right here.

8 He has--we've been unable to come to an  
9 understanding. The--the amount is 744.80 and that's all  
10 I want, I just want him to pay the bill. I--I don't want  
11 anything more than that because they're coming after me.  
12 They're saying that they're coming after me because it  
13 was my vehicle. He had it at the time, I wasn't even in  
14 town when the accident happened. I just want the bill  
15 paid because they're coming after me.

16 THE COURT: All right. Thank you, ma'am.

17 MS. JOHNSON: That's all. Thank you.

18 THE COURT: You bet.

19 MR. WEST: And your Honor, just as  
20 clarification, I think that is the amount we're talking  
21 about because there wasn't any restitution really  
22 involved with this particular incident, but we agreed as  
23 part of the plea that he would make that restitution.

24 MR. ESQUEDA: Your Honor, considering we don't  
25 have a pre-sentence report and that strikes me as odd,

1 and looking at his history, at least from the rap sheet,  
2 he has a history that begins back in 1979 and--and goes  
3 through the history of his case; several intoxications,  
4 batteries, protective order violations, DUIs, his  
5 history's atrocious.

6 THE COURT: That may be why we don't have a  
7 report, Counsel.

8 MR. ESQUEDA: Could be. Could be, Judge.

9 In any event, I think just to grant him credit  
10 for time served and close this case out is inappropriate.

11 MR. WEST: That's not what we're asking for.

12 MR. ESQUEDA: (Inaudible)

13 MR. WEST: Mr. Samora is willing to do the year  
14 in time but I think he's entitled to the credit for the  
15 time that he has done.

16 MR. ESQUEDA: In essence, that's exactly what's  
17 happening. If I--if I could speak without being  
18 interrupted.

19 In essence, if you give him the time served  
20 that he has, he--he has little time to serve at all on  
21 this case. And he's kind of avoided responsibility.  
22 He's put the victim in a situation where her--her credit  
23 is ruined, she has people suing her for his acts. Now,  
24 how that's happening and I've talked to Ms. Johnson about  
25 that, what kind of things she can do to protect herself;

1 but he is yet to take responsibility for affecting her  
2 life the way he has.

3 So, I'm not sure he's entitled to any credit  
4 for time served and that's our position, Judge.

5 THE COURT: All right. There being no legal  
6 reason why I should not impose sentence, I will do so at  
7 this time, Mr. Samora.

8 It is the judgment and sentence of this Court  
9 that you serve the term provided by law in the Adult  
10 Detention Center of one year for the Class A misdemeanor  
11 crime to which you have pled guilty.

12 I will order that you pay a restitution amount  
13 in--of 744.80. That you pay a recoupment fee for the use  
14 of your publicly-provided lawyer of \$500, which ought to  
15 cover the costs of the appeal while you were sitting in  
16 jail.

17 I will order, moreover, you pay a fine in the  
18 amount of \$2,500 plus an 85 percent surcharge on that  
19 fine.

20 I will grant you credit for any time served  
21 prior to the disposition in this matter, that is, prior  
22 to the arrest on the most recent warrant for failing to  
23 appear. The time you've served on the warrant that was  
24 issued for your arrest based upon failure to appear, in  
25 my judgment, is not good time, and therefore, you're not

1 entitled to credit for it. The time you served awaiting  
2 disposition originally, whatever that may be, I will  
3 grant you credit for.

4 Commitment is forthwith.

5 MR. WEST: So--so he doesn't get credit for any  
6 of the time that he's served since he was picked up on  
7 the warrant, your Honor?

8 THE COURT: Right. That's my order.

9 Good luck to you.

10 MR. SAMORA: Could I speak, your Honor?

11 Could I speak?

12 THE COURT: Yeah. I think you probably ought  
13 to talk to your lawyer first.

14 (Whereupon, this hearing was concluded.)

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16 \* \* \*