

2018

**The State of Utah, Plaintiff/Appellee v. Todd Mulliner, Defendant/
Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee,

vs.

TODD MULLINER,

Defendant / Appellant.

Case No: 20170552-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF
UTAH, FROM A CONVICTION OF SALE OF UNREGISTERED SECURITY,
THIRD DEGREE FELONY, AND SECURITIES FRAUD, THIRD DEGREE
FELONY, BEFORE THE HONORABLE JUDGE THOMAS LOW

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ORAL ARGUMENT REQUESTED

Appellant is currently incarcerated on this case

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ARGUMENT

I. THE DISTRICT COURT ERRED IN CORRECTING AN ILLEGAL SENTENCE

A. The State concedes the sentence is illegal

In the first substantive sentence of its argument, the State concedes that Mulliner's "sentence is ambiguous or, at best, internally contradictory." State's Brief at 10. The State admits, "[t]he sentence needs to be corrected." State's Brief at 10. But, from the State's perspective, that correction is a resentencing performed by the district court, untethered from the restrictions of any of the other sentences, unbound by the any of orders of the original sentencing court. Mulliner disagrees with some of the State's position, but to be clear, both parties agree, Judge Low's sentencing order issued on June 26, 2017 is illegal and must be corrected. The only question for this Court to decide is how that correction will occur and what the corrected sentence can be. Mulliner asserts that there is no need for a remand, and in fact, the trial court's discretion to issue a new sentence is limited by the doctrine of double jeopardy and Utah law.

B. Mulliner should not be *resentenced* by the district court, the illegal sentence should be *corrected* by this Court

1. Rule 22 allows *this* Court to correct the sentence

The State's brief argues that because the sentence is illegal it is void, and because it is void it has no legal effect, and because it has no legal effect it does not and cannot create, impair, or affect any rights. State's Brief at 10-11. What any of this has to do with this Court's ability to correct the sentence is unclear.

What is clear from the case law is that this Court need not remand this case to correct an illegal sentence. "When a sentence is patently illegal, an appellate court can vacate the illegal sentence without first remanding the case to the trial court..." *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995). "When the pertinent facts are undisputed and a purely legal question with respect to which the trial court has no discretion remains to be decided, nothing is to be gained by remanding the case to the trial court." *Brooks*, 908 P.2d 856, 860 (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)).

This is not a case like *State v. Wanosik*, 2001 UT App 241, ¶27, 31 P.3d 615, where the defendant failed to appear for sentencing, was sentenced in absentia, and appealed because his attorney was not allowed to argue "relevant and reliable information" in mitigation of punishment. There, after having found the defendant's right to allocution was denied where the sentencing court did not comply with rule 22, this Court "vacate[d] [the] sentences and remand[ed] for resentencing." *Wanosik*, 2001 UT App 241, ¶33. But that resolution, a remand for resentencing, was tailored specifically to the requested remedy in that case. The

defendant had been sentenced to the maximum allowable term after he had failed to appear at his sentencing hearing and the court had not allowed his attorney to present any argument about what sentence should be imposed. The defendant wanted the opportunity to present to the district court, the court specifically granted authority to receive sentencing arguments and decide (at least in the case of misdemeanors) how much of the maximum allowable sentence will be imposed, details about his life, his history, his plans for the future, his attempts to make amends, etc. That is what was denied, and that is what he was seeking to be restored on appeal.

This case is not like *Wanosik* at all. Mulliner had his chance to present his best case at a sentencing hearing. See R.044-46. Mulliner is not asking that any court exercise its discretion in deciding what his punishment *should* be, Mulliner's hope for a sentencing court to exercise leniency in sentencing evaporated long ago. The only question raised in this appeal is what his punishment *can* be. The only thing to be decided is what the law allows. Mulliner does not intend that his sentence will be reduced because of any mitigating fact. There are no witnesses to present, no letters of recommendation to consider, no pleas for mercy. There is only the record, the convictions, and the law. This Court is certainly capable of examining these things and creating a legal sentence. And to be fair, given the history of this case, the district court's record of trying to impose a legal sentence in this case does not give Mulliner any confidence that the district court's fourth attempt will be any better than the last three.

As will be explained below, at this point there are only two possible ways the sentence in this case can legally be imposed, and Mulliner would stipulate to either iteration. This Court can and should correct the illegalities in the current sentence. To simply accept the State's concession, find the sentence illegal and remand for resentencing would not only subject Mulliner to the threat of yet another illegal sentence, given the reality of how long these things often take, it would potentially expose him to serving beyond the maximum penalty for his crimes.

2. There are only two legal and constitutional outcomes, Mulliner will stipulate to either

i. Mulliner has a legitimate expectation of finality in his original sentence for Count 1, to change Count 1 would violate Double Jeopardy

The State has claimed that the trial court should “exercise its discretion to determine whether Counts 1 and 2 should run concurrent or consecutive to each other and whether they should run concurrent or consecutive to the St. George Sentence by considering ‘the gravity and circumstances of Mulliner’s offenses, the number of victims, and his history, character, and rehabilitative needs...’” State’s Brief at 11 (citing UTAH CODE §76-3-401(2)). According to the State, there is discretion in that decision, such that it must be performed by the district court in isolation from any of the earlier sentences. State’s Brief at 11.

The State also argues that, “even if the prior sentences have some effect on resentencing, they do not support Mulliner’s proposal” because of the “modicum of accountability” language used by Judge Schofield in 2004. State’s Brief at 11-

12. Mulliner stands by his arguments, made both to this court and to Judge Low; his proposal accounts for all the language used in the initial order and his proposal is the only *legal* way to do so. But for the sake of argument, Mulliner asks the Court to consider what the proposal offered by the State, or any other possible configuration, would mean for Mulliner who has been in prison or on parole since 2003. If this Court were to allow the district court to consider the sentence proposed by the State, that sentence would violate Double Jeopardy.

“The constitutional guarantee against double jeopardy ‘has been said to consist of three separate constitutional protections.’” *State v. Prion*, 2012 UT 15, ¶30, 274 P.3d 919. The first two protections do not apply to this case.¹ The third is that “it protects against multiple punishments for the same offense.” *Prion*, 2012 UT 15, ¶30 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). See also *Bernat v. Allphin*, 2005 UT 1, ¶11, 106 P.3d 707. This protection has been interpreted to prevent a resentencing when a person has a legitimate expectation of finality in the original sentence.²

In the St. George case, Mulliner was sentenced on July 2, 2003. That 1-15 years sentence began running that day and Mulliner began getting credit against that 1-15 years that day. In this case, Mulliner was sentenced on March 17, 2004.

¹ “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction.” *Prion*, ¶30 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717).

² See *State v. Perkins*, 2014 UT App 60, ¶¶17-18, 322 P.3d 1184 (where sentencing judge said concurrent at sentencing but corrected that to consecutive within a day, defendant did not have a legitimate expectation of finality).

There is no doubt, not in the initial order, not in Judge Laycock's amended order, not in Judge Low's second amended order, that Count 1 was to run concurrent with the St. George case.

And as explained in Mulliner's initial brief, and accepted by the State in its brief, concurrent means Count 1 began running immediately and Mulliner began getting credit against that 0-5 years that day. The moment Judge Schofield announced that Count 1 would run concurrent with the St. George case, Mulliner's legitimate expectation of finality in that portion of the order began. Unlike the defendant in *Perkins*, Mulliner had a legitimate expectation that Count 1 was running concurrent with the St. George case and any attempt to change that now, 14 years after Judge Schofield ordered concurrent sentences, would conflict with that expectation. Mulliner legitimately believed that each day he served counted against the St. George time and against Count 1.

After serving 5 years,³ the sentence in Count 1 was completed. Now, nearly 14 years later, there is no doubt that each day required by the concurrent 0-5 years in Count 1 has been served and cannot be ordered to be served again. If this Court were to grant the district court authority to resentence Mulliner on Count 1

³ Of course, the exact details of what days counted against that five years can take some precision. Obviously, every day in prison counts and, according to UTAH CODE §76-3-202(7)(a), each day on parole without a violation counts. But days after a violation but prior to revocation do not. See UTAH CODE §76-3-202(7)(b). Determining exactly which days of Mulliner's parole count, and which days do not, is outside the scope of this appeal and will be left to the Board of Pardons. The point, however, is that after March 17, 2004, Mulliner was serving and getting credit, both in prison and on parole, for serving his 0-5 year sentence in Count 1.

and 2, and the court decided, as the State suggests it should, that Count 1 will run concurrent with Count 2 and that both should run consecutive to the St. George case, Mulliner's freedom from Double Jeopardy would be violated because he would be ordered to serve that 5 years twice. That cannot happen. The State concedes that Count 2 cannot run twice. State's Brief at 10. That the State fails to acknowledge that Count 1 cannot run twice must be an oversight.

The sentence on Count 1 is served, it is finished, and no Court can order Mulliner to serve it again without violating the constitution. And herein lies the problem with the State's position. The State believes that the district court should start over and decide what the relationship between Count 1 and Count 2 is, and what the relationship between this case and the St. George is. But the relationship between Count 1 and the St. George case is already set in stone, because it has already been served. This indisputable fact, combined with the passage of time, makes the traditional discretion afforded to trial courts in sentencing irrelevant.

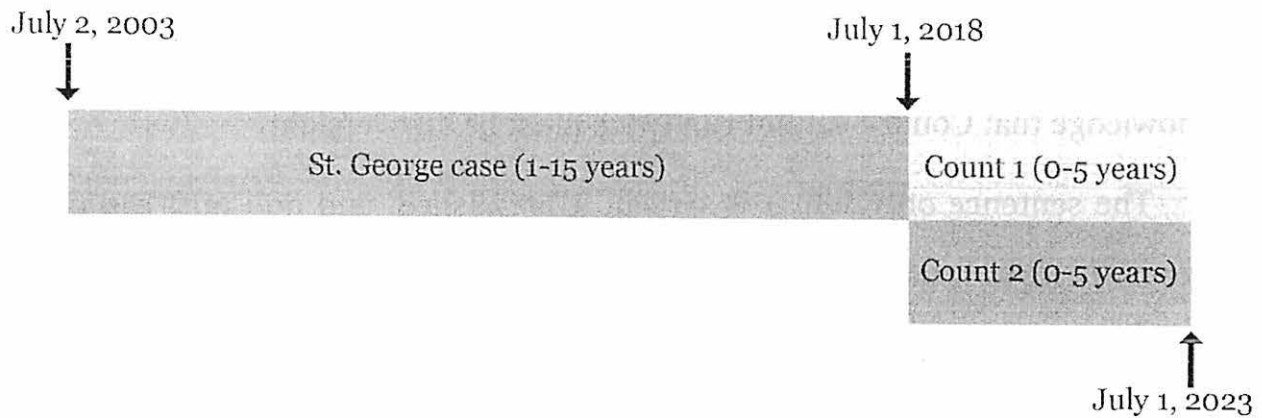
ii. There are only two constitutional outcomes

With these three charges (two 0-5 counts in this case and the 1-15 in the St. George case), there are only 4 possible scenarios that comply with UTAH CODE §76-3-401(1)⁴. For the sake of argument, Mulliner describes each of the possible

⁴ UTAH CODE §76-3-401(1) requires the sentencing court to determine whether multiple sentences are imposed concurrent or consecutive and specifically must state on the record "if the sentences imposed are to run concurrently or consecutively to each other; and... if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is already serving."

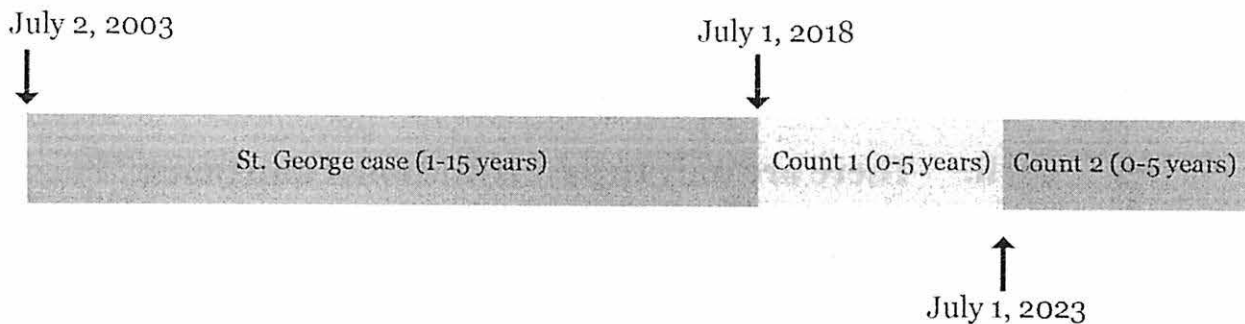
sentences a sentencing judge could reach at the State's proposed resentencing hearing.

Scenario A: the court orders Count 1 to run concurrent with Count 2 and orders this case to run consecutive to the St. George case.⁵



Scenario A

Scenario B: the court orders Count 1 to run consecutive with Count 2 and orders this case to run consecutive to the St. George case.⁶

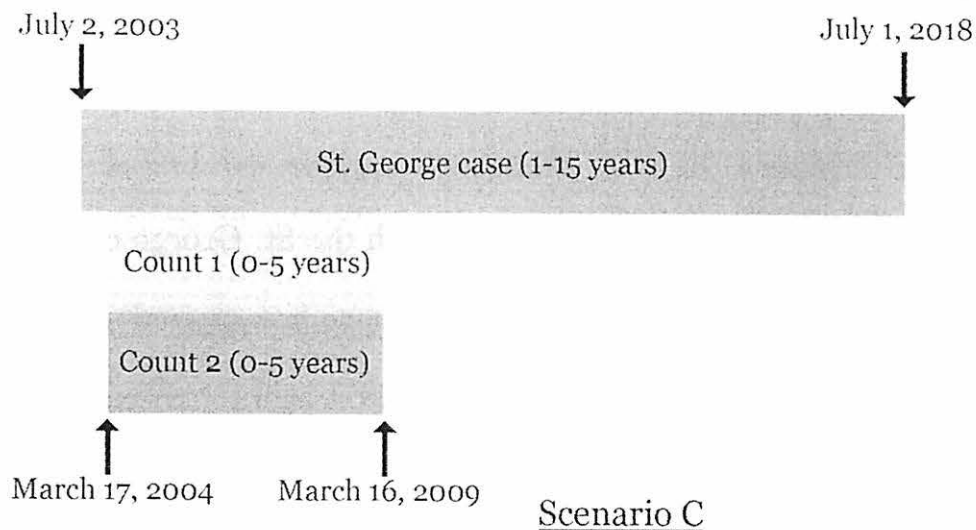


Scenario B

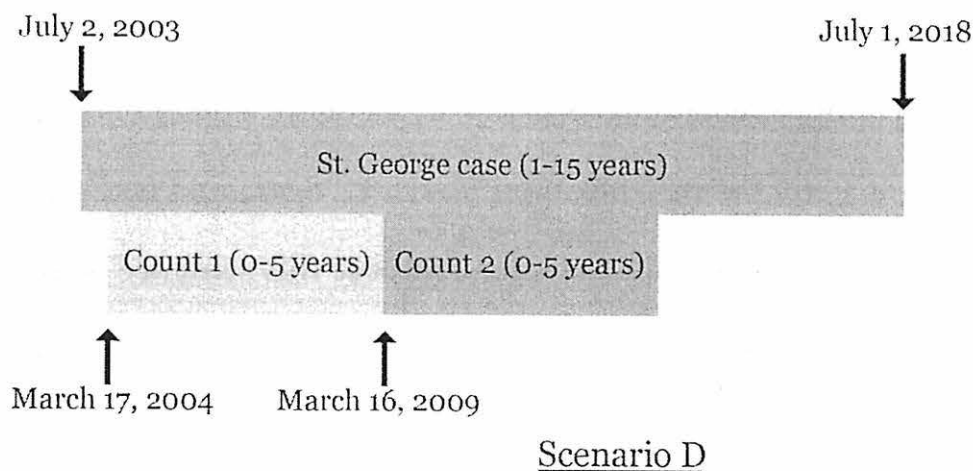
⁵ This is the State's new proposal on appeal. See State's Brief at 13.

⁶ Neither party, nor any of the sentencing courts, have suggested this iteration. It is only offered here to show possible iterations of legal sentence according to the statutes.

Scenario C: the court orders Count 1 to run concurrent with Count 2 and orders this case to run concurrent with the St. George case.⁷



Scenario D: the court orders Count 1 to run consecutive to Count 2 and orders this case to run concurrent with the St. George case.⁸



⁷ Neither party, nor any of the sentencing courts, have suggested this iteration. It is only offered here to show possible iterations of legal sentence according to the statutes.

⁸ This is Mulliner's proposal and he maintains it is consistent with the language of the original order and it complies with the statutory requirements. See R.148-49, R.259, Appellant's Brief 17-18.

Each of these four scenarios is 'legal' in the sense that they properly account for the relationship between Count 1 and 2, and the relationship between this case and the St. George case, so they each satisfy the requirements of UTAH CODE §76-3-401(1). However, Scenarios A and B have a constitutional problem. As explained above, Mulliner has already served all 5 years on Count 1. His legitimate expectation that Count 1 ran concurrent with the St. George case was reaffirmed by each of the sentencing judges. That sentence has expired. Because Scenarios A and B would order Mulliner to serve Count 1 again, consecutive to the St. George case, they would violate Double Jeopardy. It would subject Mulliner to multiple punishments for the same crime. Scenarios A and B are not available to any court; not to this Court, nor to the district court in the State's proposed resentencing.

That leaves two possible sentences. Mulliner would stipulate to either of the two constitutional options remaining. Scenario C, the more lenient of the two, would have both Count 1 and Count 2 begin on March 17, 2004 and end 5 years later. The only reason any court should hesitate to impose this sentence is that it would not account for the "consecutive" language in the original sentencing order and the court's stated intent to impose "some modicum of separate accountability." R.046.

Scenario D, Mulliner's proposal, would have Count 1 begin on March 17, 2004 and end 5 years later, and have Count 2 begin immediately thereafter, both counts running concurrent with the St. George case. As Mulliner has consistently

maintained, this sentence accounts for the statutory requirements, accounts for Judge Schofield's language, and does not violate the constitution.⁹

Scenarios C and D are the only two sentencing options available to any court tasked with correcting Mulliner's sentence. Whether it is this Court, or the district court on remand, there are only two ways this correction can go. Given the lack of any controversy about what sentences can be imposed, and given Mulliner's concession that either would satisfy him, is there any purpose in remanding the case to the district court for resentencing? Mulliner can think of no reason, at least none that can have any meaningful impact on the case, to remand the case to the district court for resentencing.

There is, however, a threat of prejudice to Mulliner if this Court declines to correct the sentence and merely remands for resentencing, as the State proposes. Although the record does not include the exact number of days Mulliner has been given credit for serving (both in prison and on parole), the statutory maximum for the St. George case is 15 years. As the diagrams in each of the briefs have

⁹ The State has argued that Mulliner's proposal does not account for the "modicum of separate accountability" language in Judge Schofield's initial order. State's Brief at 12. The State believes Judge Schofield must have intended Count to 2 to have separate accountability from the St. George case, so the consecutive language must have meant consecutive to St. George. But it is reasonable to assume that the "modicum of separate accountability" the judge wanted was from Count 1 and the consecutive language meant Count 1 and Count 2 must be served separately. To assume, as the State does, that Judge Schofield intended a sentence that violated UTAH CODE §76-3-401(1) (by not establishing a concurrent or consecutive relationship between Count 1 and Count 2) violates the appellate principle of regularity. Because there is a legal way to interpret that unclear language, we should apply that legal interpretation.

suggested, that time is set to expire sometime after July 1, 2018 (depending upon how many days Mulliner was held after he violated parole).¹⁰ If Mulliner is correct, and the sentences for Count 1 and 2 must run concurrent with the St. George case, then the total time for those counts expired approximately 4 years and 3 months before the St. George sentence expires. That means when the St. George case expires, Mulliner has no more time to serve on these cases and holding him after that time (sometime after July 1, 2018) would be illegal. This brief is being filed in February of 2018. It is unlikely that this Court will hear oral argument and issue a decision prior to July of 2018, let alone have the case remanded to the district court and perform the State's proposed resentencing. Everyday Mulliner serves in prison after that time is beyond the time the law allows for his sentence. This is significant prejudice. Instead of jumping through these hoops at the risk of holding Mulliner in prison beyond the legal maximum, especially where the State has agreed the sentence must be corrected, this Court should correct the sentence itself by imposing Mulliner's proposed sentence.

iii. Resentencing would violate Utah law

In addition to the constitutional problems, the State's proposal for a resentencing before the district court, where the court would not be bound by the earlier sentences (State's Brief at 11), would run afoul of a controlling Utah statute. "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

¹⁰ See fn. 3 above.

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.” UTAH CODE §76-3-405(1).

Both parties agree, the sentence imposed by Judge Low is illegal and must be set aside. No new offenses or conduct are at issue. When the corrected sentence is imposed, it cannot be more severe than the prior sentence. If, as the State suggests, the district court were to order Count 1 to run concurrent with Count 2 with both running consecutive to the St. George case (see State’s Brief at 13), it would be imposing a new sentence for Count 1 which is more severe than the prior sentence. Count 1 was originally ordered to run concurrent with St. George. To later order it to run consecutive to St. George would be more severe and would violate §76-3-405(1). If the corrected sentence is going to follow §76-3-405(1), and the constitution, then there is no reason to have the district court involved at all. This Court can and should simply impose Mulliner’s proposal (Scenario D).

CONCLUSION AND SPECIFIC RELIEF SOUGHT

The parties agree that the sentencing order must be corrected. It would violate double jeopardy and Utah law to issue any sentence where Count 1 does not run concurrent with the St. George case. Because there are only two legal and constitutional ways to correct the sentence, either of which Mulliner would stipulate to, there is no need for the case to be remanded to the district court for

resentencing. This Court can and should correct the sentence as described in Mulliner's proposal.

RESPECTFULLY SUBMITTED this 15th day of February, 2018.

/s/ Douglas Thompson
Appointed Appellate Counsel

CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(11)

I certify that this brief complies with the following requirements of Rule 24(a)(11) of the Utah Rules of Appellate Procedure:

- A. The total word count of this brief is 3,827. It was prepared in Microsoft Word.
- B. Neither this brief, nor its addendum, contains any non-public information as described in Rule 21(g).

/s/ Douglas Thompson

CERTIFICATE OF MAILING

I certify that I emailed a copy of the foregoing brief and mailed two paper copies, postage prepaid, to the Utah State Attorney General, Appeals Division, criminalappeals@agutah.gov, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 15th day of February, 2018.

/s/ Douglas Thompson