

2003

Utah v. Shawn C. McGuire : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

J. Frederic Voros Jr.; assistant attorney general; Mark L. Shurtleff; attorney general; attorneys for appellee.

Joan C. Watt, Nisa J. Sisneros; Salt Lake Legal Defender Assoc.; attorneys for appellant.

Recommended Citation

Brief of Appellant, *Utah v. Shawn C. McGuire*, No. 20030418 (Utah Court of Appeals, 2003).
https://digitalcommons.law.byu.edu/byu_ca2/4356

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
SHAWN C. MCGUIRE, : Case No. 20030418-CA
Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Operation of a Clandestine Laboratory,
a first degree felony in violation of Utah Code Ann. § 58-37d-4(1)(a) (Supp. 2003), in
the Third Judicial District Court in and for Salt Lake County, State of Utah, the
Honorable Paul G. Maughan, Judge, presiding.

JOAN C. WATT (3967)
NISA J. SISNEROS (6654)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellant

J. FREDERIC VOROS, JR. (3340)
ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff/Appellee

FILED
Utah Court of Appeals
DEC 23 2003
Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 SHAWN C. MCGUIRE, : Case No. 20030418-CA
 :
 Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Operation of a Clandestine Laboratory,
a first degree felony in violation of Utah Code Ann. § 58-37d-4(1)(a) (Supp. 2003), in
the Third Judicial District Court in and for Salt Lake County, State of Utah, the
Honorable Paul G. Maughan, Judge, presiding.

JOAN C. WATT (3967)
NISA J. SISNEROS (6654)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellant

J. FREDERIC VOROS, JR. (3340)
ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff/Appellee

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES, STANDARDS OF REVIEW AND PRESERVATION OF THE ARGUMENTS	1
TEXT OF RELEVANT RULES AND STATUTES	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	4
SUMMARY OF THE ARGUMENT	7
ARGUMENT	
POINT I. THE TRIAL COURT HAD JURISDICTION TO RECONSIDER THE SENTENCE AND ALTER THE JUDGMENT IMPOSED IN THIS CASE.	8
POINT II. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING MCGUIRE TO PRISON.	15
CONCLUSION	20
Addendum A: Judgment	
Addendum B: Text of Relevant Rules and Statutes	
Addendum C: Transcript of Sentencing Hearing	
Addendum D: Text of Utah Code Ann. § 77-27-5 (1999)	

TABLE OF AUTHORITIES

Page

CASES

<u>Browder v. Dep’t of Corrections</u> , 434 U.S. 257 (1978)	9, 12
<u>Cameron v. State</u> , 2002 UT App 301	10
<u>Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.</u> , 674 F.2d 1252 (9th Cir. 1980)	12
<u>Commonwealth v. Plasterer</u> , 529 A.2d 37 (Pa. Super. 1987)	17
<u>DeBry v. Fidelity Nat’l Title Ins. Co.</u> , 828 P.2d 520 (Utah Ct. App. 1992)	10
<u>Reeves v. Steinfeldt</u> , 915 P.2d 1073 (Utah Ct. App. 1996)	10
<u>Regan v. Blount</u> , 1999 UT App 154, 978 P.2d 1051	12, 13
<u>Salt Lake City v. Guffey</u> , 2001 UT App 17	8, 9, 10, 13
<u>State v. Cesarez</u> , 656 P.2d 1005 (Utah 1982)	17
<u>State v. Helms</u> , 2002 UT 12, 40 P.3d 626	2, 16, 18
<u>State v. Howell</u> , 707 P.2d 115 (Utah 1985)	17
<u>State v. Johnson</u> , 856 P.2d 1064 (Utah 1993), <i>superceded by</i> <i>statute on other grounds</i> , <u>State v. Tryba</u> , 2000 UT App 230	17
<u>State v. McClendon</u> , 611 P.2d 728 (Utah 1980)	17
<u>State v. McCovey</u> , 803 P.2d 1234 (Utah 1990)	17
<u>State v. Montoya</u> , 825 P.2d 676 (Utah Ct. App. 1991)	14

	<u>Page</u>
<u>State v. Parker</u> , 872 P.2d 1041 (Utah Ct. App. 1994)	8
<u>State v. Rhodes</u> , 818 P.2d 1048 (Utah Ct. App. 1991)	16
<u>State v. Samora</u> , 2002 UT App 384, 59 P.3d 604	10
<u>State v. Schofield</u> , 2002 UT 132, 63 P.3d 667	2
<u>State v. Sixteen Thousand Dollars</u> , 914 P.2d 1176 (Utah App. 1996)	14, 15
<u>State v. Wanosik</u> , 2003 UT 46, 485 Utah Adv. Rep. 35	17
<u>State v. Wright</u> , 2003 UT App 435 (unpublished)	18, 19
<u>United States v. Walker</u> , 601 F.2d 1051 (9 th Cir. 1979)	12
<u>Watkiss & Campbell v. Foa & Son</u> , 808 P.2d 1061 (Utah 1991)	8

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 58-37-8(1)(a)(iii) (Supp. 2003)	3
Utah Code Ann. § 58-37d-4(1) (Supp. 2004)	3
Utah Code Ann. § 77-27-5 (1999)	13, 14
Utah Code Ann. § 78-2a-3(2)(j) (2002)	1
Utah R. App. P. 4	16
Utah R. Civ. P. 52	10
Utah R. Civ. P. 59	2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

	<u>Page</u>
Utah R. Civ. P. 81	2, 10, 11
Utah R. Crim. P. 22	2, 7, 11, 12, 13, 14, 17
Utah R. Crim. P. 24	2, 11, 13

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
SHAWN C. MCGUIRE, : Case No. 20030418-CA
Defendant/Appellant. :

JURISDICTIONAL STATEMENT

Appellant/Defendant Shawn C. McGuire ("Appellant" or "McGuire") appeals from a conviction for Operation of a Clandestine Laboratory, a first degree felony. R. 39-40. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002) which creates jurisdiction in the Court of Appeals over cases transferred by the Utah Supreme Court. A copy of the judgment is in Addendum A.

**STATEMENT OF THE ISSUES, STANDARDS OF REVIEW
AND PRESERVATION OF THE ARGUMENTS**

Issue #1. Although the prosecutor and presentence investigation report ("PSI") recommended probation, the trial judge sentenced McGuire to prison. Within ten days of judgment, McGuire filed a "Motion to Reconsider Sentence." Does a trial court have jurisdiction over a "motion to reconsider sentence" filed within ten days of judgment?

Preservation. McGuire preserved this issue by filing a motion to reconsider sentence within ten days of sentencing and arguing that the trial court had jurisdiction to

reconsider his sentence. R. 41-42, 52-54, 94.

Standard of Review. This issue involves the construction of the Rules of Civil and Criminal Procedure and therefore presents a question of law which is reviewed for correctness. See State v. Schofield, 2002 UT 132, ¶6, 63 P.3d 667 (reviewing statutes delineating district and juvenile court jurisdiction as a question of law).

Issue #2. The prosecutor recommended probation as part of the plea bargain and the PSI recommended probation based on, among other things, McGuire's minimal criminal history, remorse, and cooperation with authorities. The trial court sent McGuire to prison because the nature of McGuire's crime puts society at risk. Did the trial court abuse its discretion in failing to personalize the sentence and by instead sentencing McGuire to prison based solely on the nature of the crime charged?

Preservation. This issue was preserved. R. 82:3-4.

Standard of review. Sentencing decisions are reviewed for an abuse of discretion. State v. Helms, 2002 UT 12, ¶8, 40 P.3d 626.

TEXT OF RELEVANT RULES AND STATUTES

The texts of the following court rules are in Addendum B:

Rule 59, Utah Rules of Civil Procedure;

Rule 81, Utah Rules of Civil Procedure;

Rule 22(e), Utah Rules of Criminal Procedure;

Rule 24, Utah Rules of Criminal Procedure.

STATEMENT OF THE CASE

In an Information dated May 7, 2002, the state charged Appellant/Defendant Shawn C. McGuire with "Clandestine Laboratory Precursors and/or Equipment," enhanced to a first degree felony in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b); Unlawful Possession of a Controlled Substance with Intent to Distribute, a second degree felony in violation of Utah Code Ann. § 58-37-8(1)(a)(iii); and "Clandestine Laboratory Precursors and/or Equipment," a second degree felony in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or (b). R. 05-07.

On June 24, 2002, McGuire pled guilty to Operation of a Clandestine Laboratory with one enhancement, a first degree felony. R. 23-30. As part of that plea bargain, the state agreed to dismiss the remaining counts and enhancements and recommend probation. R. 23. The PSI likewise recommended probation. PSI.

Third District Judge Paul G. Maughan sentenced McGuire to prison on August 12, 2002. R. 39. The judgment was signed on August 13, 2003. R. 40. On that same day, August 13, 2002, McGuire filed a motion to reconsider sentence. R. 41-42. Thereafter, the parties briefed the issue of whether the judge had jurisdiction to reconsider the sentence and a hearing was held on the motion to reconsider sentence on November 4, 2002. R. 41-2, 52-4, 63-7, 79. The trial court denied the motion on April 1, 2003, concluding that it did not have jurisdiction to consider the motion to reconsider sentence filed within ten days after judgment was entered. R. 69-71.

McGuire filed a notice of appeal on April 30, 2003. R. 72-3.

STATEMENT OF THE FACTS

After McGuire pled guilty to a first degree felony Operation of a Clandestine Laboratory, Adult Probation and Parole ("AP&P") prepared a PSI. The PSI recommended that the prison sentence be suspended and that McGuire be placed on probation, with conditions that included serving one year in jail and completing substance abuse and parenting treatment and counseling. R. 84. This recommendation was based on McGuire's minimal criminal history, his cooperation with authorities, and the facts of the crime, among other things. R. 84-89.

According to the PSI, while McGuire's "criminal history is very minimal," his "biggest problem was alcohol until two years ago [he] went from a drug user to thinking that cooking methamphetamine [would solve his financial problems]." R. 85. He was without work and had two young sons to support. R. 88-89. McGuire was cooperative with authorities and the PSI investigator and recognized that he had lost everything due to his drug usage. R. 85. The PSI investigator noted that McGuire had been honest and was taking responsibility for his actions, but that if McGuire did not change his life and friends, "it will be a matter of time before he is sentenced to the Utah State Prison, but at this time, I believe that the defendant should be given the opportunity of probation to show that he can make those changes." R. 85.

The incident in this case involved detection of a methamphetamine laboratory at McGuire's residence. R. 86. Officers went to the residence after responding to a call by going to a home nearby, then being directed to McGuire's address. R. 85. Officers smelled a chemical smell when McGuire opened the door. R. 85. McGuire then consented to a search. R. 86. Officers found a laboratory in the bathroom and arrested McGuire and his common-law wife, Lisa Heaney, both of whom were present. R. 86.

After being Mirandized, McGuire spoke openly with officers. R. 86. He told them "he was glad it was over." R. 86. "He stated that the lab was running for about two weeks," and told the officers where he had purchased materials. R. 86. He also told the officers that this was the third time he had tried to cook methamphetamine in his home, but that "the two prior times the product did not turn out right." R. 86. Finally, McGuire told officers "he was cooking methamphetamine to save his house." R. 86.

At sentencing, defense counsel reiterated that McGuire had "made some really bad choices and bad decisions about how to handle a financial situation," but pointed out that he was extremely cooperative and remorseful, and was willing to follow terms of probation. R. 82:3-4. Defense counsel suggested that if the court were to give McGuire the recommended one year in jail, perhaps the court would consider an early release so that McGuire could complete an in-patient drug treatment program. R. 82:4. As part of the plea bargain, the state agreed to recommend probation. R. 23. At sentencing, the state "agree[d] with the year in jail with no credit for good time." R. 82:5. The

prosecutor, who was standing in for the prosecutor assigned to the case, then added, without elaboration, that the prosecutor assigned to the case "feels that the defendant is fortunate it's not a prison recommendation." R. 82:5.

The trial judge refused to follow the probation recommendation. R. 82:5. The judge's reason for refusing to follow the recommendation was the nature of the crime. R. 82:5. According to the judge, prison was warranted because McGuire had cooked methamphetamine and that crime causes risk to the community. R. 82:5. The judge stated:

. . . this is the third time you tried to do it, and were having a hard time complying. In my opinion, there's a bigger issue besides just your personal use and your involvement in the operation of a lab, and that's it's very concerning to the rest of the community and the rest of this society. And I believe it's a plague on our community.

Once we start manufacturing, once we start trying to cook this kind of material, methamphetamine, it affects children's lives. It affects your life. It puts at risk your life or anybody involved in the process, those around you. You're subject to possible exposure, fires, other contamination.

R. 82:5. Without mentioning anything else, the judge sentenced McGuire to prison because his crime of operating a clandestine laboratory created a risk to the community.

R. 82:5-6; see transcript of sentencing hearing in Addendum C.

The day after sentencing, McGuire filed a motion to reconsider sentence. R. 41. In that motion, McGuire indicated that he had new information from the arresting officer. R. 41. In addition, the motion indicates that input from the prosecutor assigned to the case, who was not present at sentencing, was relevant. R. 41.

The parties filed memoranda and the judge held a hearing on whether he had jurisdiction to reconsider the sentence. R. 94. The trial court ultimately ruled that it did not have jurisdiction to reconsider the sentence and denied the motion to reconsider sentence. R. 69-71.

SUMMARY OF THE ARGUMENT

A trial court has jurisdiction under Rule 59(e), Utah Rules of Civil Procedure to reconsider a sentence when a criminal defendant files a motion requesting reconsideration of sentence within ten days of judgment. The Rules of Civil Procedure apply in criminal cases where there is no other applicable rule or statute and application of the civil procedure rule does not conflict with a statute or constitutional provision. The Rules of Criminal Procedure do not contain an applicable rule and there is no statute that applies or conflicts with the application of Rule 59(e). In case law, this Court has recognized the application of Rule 59(e) to criminal cases. And, application of Rule 59(e) to criminal cases promotes judicial economy, orderly procedure, efficiency, and fairness. The trial court in this case erred in concluding that it did not have jurisdiction to reconsider McGuire's sentence where McGuire filed a motion to reconsider sentence within ten days of judgment.

The trial court abused its discretion in sentencing McGuire to prison based solely on the nature of the charge to which he pled guilty. Due process and Rule 22(a) require that a sentence be personalized to a defendant. The judge in this case ignored McGuire's

minimal criminal history, amenability to treatment and probation, remorse, cooperation, and other positive attributes, and sentenced McGuire to prison based solely on the fact that the operation of methamphetamine laboratories is a "plague" and danger to society. By failing to personalize this sentence, the trial court abused its discretion.

ARGUMENT

POINT I. THE TRIAL COURT HAD JURISDICTION TO RECONSIDER THE SENTENCE AND ALTER THE JUDGMENT IMPOSED IN THIS CASE.

The trial court sentenced McGuire on August 12, 2002 and signed and entered judgment the next day. On August 13, 2002, McGuire filed a "Motion to Reconsider Sentence." R. 41. The trial court had jurisdiction to hear this motion under Rule 59(e) of the Utah Rules of Civil Procedure. The trial court's denial of the motion based on its conclusion that it did not have jurisdiction must therefore be reversed.

While neither the Rules of Criminal Procedure nor the Rules of Civil Procedure refer to a "motion to reconsider sentence," the caption does not control the characterization of a motion. See Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1064 (Utah 1991); State v. Parker, 872 P.2d 1041, 1043 (Utah Ct. App. 1994); Salt Lake City v. Guffey, 2001 UT App 17 (unpublished). Instead, courts consider the substance of the motion in determining whether a motion is cognizable under the Rules of Civil or Criminal Procedure. See Parker, 872 P.2d at 1044 ("In determining the character of a motion, the substance of the motion, not its caption, is controlling."). The substance of

McGuire's motion requesting that the trial court reconsider the sentence it had imposed fits squarely within post-judgment motions authorized by Rule 59(e), Utah Rules of Civil Procedure. See generally Browder v. Dep't of Corrections, 434 U.S. 257, 261 (1978) (recognizing that a motion for reconsideration falls under Rule 59, Federal Rules of Civil Procedure).

Rule 59, Utah Rules of Civil Procedure allows a party to file a motion for new trial or to alter or amend judgment within ten days of judgment. That rule states in part:

Rule 59. New trials; amendment of judgment.

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

...

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

...

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Utah R. Civ. P. 59.

Rule 59(e), which gives the trial court jurisdiction to alter or amend any judgment if a party files a motion within ten days of judgment, is applicable to criminal cases since there is no applicable criminal rule or statute. See Guffey, 2001 UT App 17 (recognizing that Rule 59(e) applies in criminal cases and grants trial courts jurisdiction over timely

post-trial motions that can be characterized as motions to alter or amend judgment). In Guffey, the defendant filed an objection to the trial court's findings and conclusions a day after the order was entered. Id. ¶2. This Court recognized that the objection qualified as a motion to alter or amend judgment under Rule 59(e), stating:

[t]hough not captioned as such, the objection was in substance a post-judgment motion to amend the judgment. "[A] motion filed within ten days of the entry of judgment that questions the correctness of the court's findings and conclusions is properly treated as a post-judgment motion under either Rules 52(b) or 59(e)." DeBry v. Fidelity National Title Insurance Co., 828 P.2d 520, 522-23 (Utah Ct. App. 1992).

Id. ¶3. Additionally, "this court has stated 'that regardless of its caption, "a motion filed within ten days of the entry of judgment that questions the correctness of the court's findings and conclusions is properly treated as a post-judgment motion under either Rules 52(b) or 59(e).'" Cameron v. State, 2002 UT App 301, ¶3 (unpublished) (quoting Reeves v. Steinfeldt, 915 P.2d 1073, 1075 (Utah Ct. App. 1996) (quoting DeBry, 828 P.2d at 522)). Moreover, motions for reconsideration of sentence have been tacitly approved in cases such as State v. Samora, 2002 UT App 384, ¶6, 59 P.3d 604, where this Court noted that the trial court had reconsidered and altered the sentence after the defendant filed a motion for reconsideration of sentence. Id.

Rule 81(e), Utah Rules of Civil Procedure further demonstrates that Rule 59(e) of the Utah Rules of Civil Procedure applies in criminal cases. Rule 81(e) dictates that the Utah Rules of Civil Procedure apply in circumstances "where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or

constitutional requirement." Utah R. Civ. P. 81(e). Because there is no applicable statute or criminal procedure rule and application of Rule 59(e) to criminal cases does not conflict with statutory or constitutional requirements, Rule 81(e) mandates that Rule 59(e) applies in criminal cases.

Although Rule 24, Utah Rules of Criminal Procedure allows a trial judge to disturb a verdict and grant a motion for new trial that is filed within ten days of judgment, that rule does not expressly address circumstances such as those in the present case where the defendant has pled guilty and does not seek to disturb a verdict but instead is asking for reconsideration of the sentence. Rule 24 states in part:

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

...

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

Utah R. Crim P. 24. Because Rule 24 is silent as to post-judgment motions other than motions for new trial, it is not applicable to circumstances where a defendant seeks to alter or amend the judgment by reconsidering the sentence and does not conflict with the grant of Rule 59(e) allowing motions to alter or amend judgment.

Moreover, no other criminal rule or statute is applicable to these circumstances or conflicts with the grant of Rule 59(e). The state argued below that Rule 22(e), Utah

Rules of Criminal Procedure, which allows an illegal sentence or a sentence imposed in an illegal manner to be corrected at any time, governs circumstances where the defendant seeks resentencing. R. 64. While Rule 22(e) does allow a trial court jurisdiction to correct an illegal sentence at any time, it does not apply to circumstances such as this where, within ten days of judgment, the defendant asks the trial court to reconsider sentence and alter or amend the judgment prior to its becoming final.

A motion to alter or amend judgment affects the finality of the judgments and necessarily delays the finality of the original judgment. See Regan v. Blount, 1999 UT App 154, ¶4, 978 P.2d 1051 (a timely motion under Rule 59(e), Utah Rules of Civil Procedure suspends the finality of the judgment). A motion under Rule 59(e) allows "“speedy disposition and finality”" (Browder, 434 U.S. 257, 271 (1978) (further citations omitted), providing an efficient means for a trial judge to amend a judgment without requiring further use of resources in a time consuming appeal. See generally Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F. 2d 1252, 1260 (9th Cir. 1980) (citing United States v. Walker, 601 F.2d 1051, 1058 (9th Cir. 1979)) ("Rule 59(e) provides an efficient mechanism by which a trial court judge can correct an otherwise erroneous judgment without implicating the appellate process").

By contrast, a motion to correct an illegal sentence under Rule 22(e) allows a defendant unlimited time to return to the trial court and correct a sentence that was imposed in an illegal manner or that was illegal. See Utah R. Crim. P. 22(e). Rule 22(e)

does not suspend the finality of the judgment and does not provide a means for speedy resolution without invoking the appellate process. Instead, Rule 22(e) is a mechanism that allows a trial court to correct an illegally imposed sentence, no matter how much time has passed. Because Rule 22(e) does not suspend the finality of the judgment, it does not apply to requests to amend a criminal judgment that are made within ten days of sentencing; it therefore does not pre-empt the Rule 59(e)'s grant of jurisdiction to the trial court to alter or amend a sentence when the motion is filed within ten days.

The state also argued below that since the Board of Pardons has authority pursuant to Utah Code Ann. § 77-27-5(1) (1999) to determine a defendant's actual release date, the trial court loses jurisdiction the moment judgment is entered and a motion to alter and amend judgment cannot be heard by the trial court. R. 66; see Addendum D containing text of Utah Code Ann. § 77-27-5 (1999). The fallacy of this argument is evident in the fact that the trial court has jurisdiction to entertain motions for new trial without conflicting with the Board of Pardons' authority. The trial court likewise has jurisdiction to alter or amend judgment when a timely motion is filed without interfering with the Board's authority. Guffey, 2001 UT App 17. This is so because timely post-judgment motions under Rule 24, Utah Rules of Criminal Procedure and Rule 59, Utah Rules of Civil Procedure suspend the finality of the judgment. See Regan, 1999 UT App 154, ¶4. Section 77-27-5(1) contains nothing that conflicts with a trial court's exercise of its authority to alter or correct a judgment and instead simply clarifies that the Board of

Pardons has the authority to set parole dates and to otherwise determine whether a sentence is commuted or terminated after a judgment becomes final. See Utah Code Ann. § 77-27-5 (1999).

The state also argued below that this Court's decision in State v. Montoya, 825 P.2d 676, 679 (Utah Ct. App. 1991) precludes a motion for reconsideration. R. 65. Montoya, however, did not involve a motion for reconsideration filed within ten days of judgment. Instead, Montoya involved an attempt to resentence a defendant long after the thirty days for filing a notice of appeal had passed. This Court's determination that the trial court did not have subject matter jurisdiction to resentence Montoya because the initial sentence was valid was based on the fact that the judgment had become final well before the request for resentencing and Montoya did not have a basis for resentencing under Rule 22(e) because the sentence was not illegal or imposed in an illegal manner. Since a timely motion under Rule 59(e) suspends the finality of a judgment, Montoya's holding that the trial court could not resentence the defendant after the judgment became final does not resolve the issue in this case of whether a criminal defendant can file a motion for resentencing within ten days of judgment.

The purpose of allowing the trial court jurisdiction over timely post-judgment motions is to give the trial court the opportunity to correct any errors that might exist and thereby "end controversies before an appeal becomes necessary" State v. Sixteen Thousand Dollars, 914 P.2d 1176, 1179 (Utah App. 1996). In addition, allowing the trial

court the opportunity to resolve the claim prior to appeal "require[s] the parties to crystallize the issues prior to appeal" and otherwise "serve[s] the interests of judicial economy and orderly procedure." Id. at 1179. This purpose is served by treating motions for reconsideration of sentence as motions to alter or amend judgment under Rule 59(e) and allowing trial courts to reconsider the sentence imposed if a motion is filed within ten days of judgment. The trial court in this case seemed to recognize the fairness and efficiency in allowing a motion for reconsideration when it asked the prosecutor, "isn't it in everyone's best interest to be able to handle that [request for reconsideration] quickly and efficiently [in the trial court?]" R. 94:18.

Allowing trial courts to reconsider sentence or otherwise alter or amend judgment when a defendant makes a timely motion provides an efficient means by which trial courts can alter their sentences without invoking the appellate process. Where McGuire's motion for reconsideration was timely under Rule 59(e), the trial court incorrectly concluded that it did not have jurisdiction to reconsider McGuire's sentence.

POINT II. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING MCGUIRE TO PRISON.

Despite the recommendation of both AP&P and the prosecutor and facts demonstrating that McGuire was a good candidate for probation, the trial judge sentenced McGuire to prison. R. 82:4-6. The trial court's decision to send McGuire to prison was based entirely on the nature of the crime and the fact that manufacturing methamphetamine subjects members of society to danger. R. 82:5. The judge stated:

- - this is the third time you tried to do it, and were having a hard time complying. In my opinion, there's a bigger issue besides just your personal use and your involvement in the operation of a lab, and that's it's very concerning to the rest of the community and the rest of this society. And I believe it's a plague on the community.

Once we start manufacturing, once we start trying to cook this kind of material, methamphetamine, it affects children's lives. It affects your life. It puts at risk your life or anybody involved in the process, those around you. You're subject to possible exposure, fires, and other contamination.

So, I'm going against the recommendation in this case, and I'm going to sentence you to five years to life in the state penitentiary. And I'm not trying to send that message to anybody, I'm just telling you my opinion. Methamphetamine labs are something that will not be tolerated.

R. 82:5-6. The trial judge abused his discretion in sentencing by failing to personalize the sentence and by instead sending McGuire to prison based solely on the fact that he was convicted of operating a methamphetamine laboratory.¹

Although "[t]he decision whether to grant probation is within the complete discretion of the trial court," sentencing decisions are overturned when a trial court "exceed[s] the bounds of discretion." (State v. Rhodes, 818 P.2d 1048, 1049 (Utah Ct. App. 1991)). "A trial court abuses its discretion in sentencing when, among other things, "it fails to consider all legally relevant factors."" State v. Helms, 2002 UT 12, ¶8, 40

¹ This Court has jurisdiction to consider this issue pursuant to Rule 4(b), Utah Rules of Appellate Procedure. Pursuant to that rule, the time for filing a notice of appeal from the judgment is suspended until after the trial court rules on a timely motion under Rule 59(e). In this case, McGuire filed his notice of appeal within thirty days of the denial of his motion for reconsideration. Assuming that motion is characterized as a Rule 59(e) motion, as argued in Point I of this brief, McGuire's notice of appeal encompassed the ruling on the motion for reconsideration as well as the judgment itself.

P.3d 626 (quoting State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990) (further citations omitted)). "A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." State v. McClendon, 611 P.2d 728, 729 (Utah 1980). A trial court abuses its discretion in sentencing when it "focus[es] on the nature of the crime to the exclusion of any other factor relevant to sentencing." Commonwealth v. Plasterer, 529 A.2d 37, 39 (Pa. Super. 1987).

Due process and Rule 22(a), Utah Rules of Criminal Procedure implicitly require that a sentence imposed on a criminal defendant be personalized. Rule 22(a) mandates that trial courts afford both the defendant and the prosecutor the opportunity to present information relevant to sentence. Utah R. Crim. P. 22(a); see also State v. Wanosik, 2003 UT 46, ¶¶18-23, 485 Utah Adv. Rep. 35. Due process requires that a sentence be based on reliable and relevant information. Wanosik, 2003 UT 46, ¶¶18-23; State v. Howell, 707 P.2d 115, 118 (Utah 1985); State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) (*superceded by statute on other grounds*, State v. Tryba, 2000 UT App 230). Moreover, due process requires that a presentence investigation report be disclosed to a defendant prior to sentencing. State v. Cesarez, 656 P.2d 1005, 1007 (Utah 1982). Implicit in these due process and Rule 22(a) requirements is the recognition that information other than the nature of the charge is pertinent to sentencing since the due

process and Rule 22(a) requirements would be meaningless and unnecessary if a judge could impose sentence based solely on the nature of the charge.

In this case, the trial court abused its discretion in imposing sentence based solely on the fact that McGuire was convicted of operating a methamphetamine laboratory and had acknowledged that he attempted to cook methamphetamine in that lab three times. R. 82:5-6. The judge's statement clearly indicates that his concern was that the manufacturing of methamphetamine puts the community at risk by subjecting others to the possibility of contamination and exposure and that methamphetamine labs are "a plague to the community." R. 82:5-6. Rather than personalizing the sentence by considering McGuire's amenability to treatment and probation, desire to change, minimal criminal record, and other factors that led the state to agree to recommend probation and caused the AP&P agent to recommend probation, the judge focused solely on the danger caused by methamphetamine manufacturing. The sentencing in this case could apply to any defendant convicted of operating a clandestine laboratory, with the only alteration being how many times the defendant admitted to trying to cook methamphetamine.

While "the trial court's silence, by itself, [does not] presuppose[] that the court did not consider the proper factors as required by law" (State v. Wright, 2003 UT App 435 (unpublished) (quoting Helms, 2002 UT 12, ¶11)), the trial judge's statements in this case indicate that he did not consider the proper factors and instead imposed prison based solely on one factor—the nature of the crime. This case is unlike Wright and Helms

where the trial court's failure to expressly acknowledge various mitigating factors did not require resentencing because it could not be assumed that the judge did not consider those factors. See Wright, 2003 UT App 435, ¶¶5-6. By contrast, in this case the judge expressly stated that he was going against the recommendation for probation and imposing prison because McGuire was convicted of operating a methamphetamine laboratory and methamphetamine laboratories are dangerous and a plague on society. Given the judge's statement, it is not reasonable to assume that he considered all of the mitigating factors relevant to sentencing or personalized McGuire's sentence, as required by Rule 22(a) and due process.

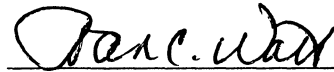
The specifics of this case showed that McGuire was a good candidate for probation. McGuire had a minimal criminal history. PSI:2. Until two years before his arrest, McGuire primarily used alcohol rather than drugs. PSI:2. McGuire began to think about cooking methamphetamine in the misguided hope that he could alleviate his financial problems and save his house. PSI:2. He had the lab in operation for only about two weeks and had tried to cook methamphetamine only three times, without much success. PSI:3. McGuire was remorseful and honest, recognized "that he has lost everything that he once had because of his drug usage," and was "glad it was over." PSI:2, 3. By ignoring this information and otherwise failing to personalize the sentence and instead sending McGuire to prison based solely on the fact that he was convicted of

operating a methamphetamine lab, the judge essentially turned this type of conviction into a mandatory prison conviction and abused his discretion in sentencing.

CONCLUSION

Defendant/Appellant Shawn C. McGuire respectfully requests that this Court vacate his sentence and remand the case for a new sentencing hearing.

SUBMITTED this 23rd day of December, 2003.

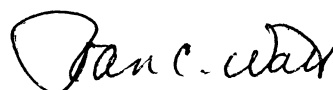
A handwritten signature in cursive script, appearing to read "Joan C. Watt", is written over a horizontal line.

JOAN C. WATT

Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 23rd day of December, 2003.



JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of December, 2003.

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	POST SENTENCING
	:	JUDGMENT/COMMITMENT
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
vs.	:	Case No: 021906198 FS
	:	
SHAWN CARTER MCGUIRE,	:	Judge: PAUL G. MAUGHAN
Defendant.	:	Date: August 12, 2002

PRESENT

Clerk: cheril

Reporter: MIDGLEY, ED

Defendant

Defendant's Attorney(s): GOODMAN FOR TAYLOR

Agency: Adult Probation & Parole

DEFENDANT INFORMATION

Date of birth: March 29, 1960

Video

Tape Number: Video Tape Count: 11:19 40

CHARGES

1. OPERATION OF A CLANDESTINE LABORATORY - 1st Degree Felony
Disposition: 06/24/2002 Guilty

SENTENCE PRISON

Based on the defendant's conviction of OPERATION OF A CLANDESTINE LABORATORY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

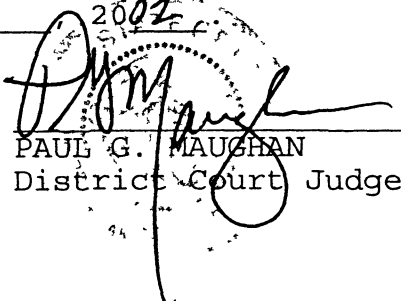
Case No: 021906198
Date: Aug 12, 2002

The defendant's probation is revoked.
The defendant is to serve the sentence as imposed in the original
Sentence, Judgment and Commitment.
Commitment is to begin immediately. To the SALT LAKE County
Sheriff: The defendant is remanded to your custody for
transportation to the Utah State Prison.

Dated this 13 day of

Aug

2002


PAUL G. MAUGHAN
District Court Judge

ADDENDUM B

UTAH RULES OF CIVIL PROCEDURE

Rule 59. New trials; amendments of judgment.

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Affidavits; time for filing.* When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 81. Applicability of rules in general.

(a) *Special statutory proceedings.* These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) *Probate and guardianship.* These rules shall not apply to proceedings in uncontested probate and guardianship matters, but shall apply to all proceedings subsequent to the joinder of issue therein, including the enforcement of any judgment or order entered.

(c) *Procedure in city courts and justice courts.* These rules shall apply to civil actions commenced in the city or justice courts, except insofar as such rules are by their nature clearly inapplicable to such courts or proceedings therein.

(d) *On appeal from or review of a ruling or order of an administrative board or agency.* These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

(e) *Application in criminal proceedings.* These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.

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.

(Amended effective January 1, 1995; January 1, 1996.)

Rule 24. Motion for new trial.

(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

(b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.

(c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.

(d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

ADDENDUM C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

SHAWN C. MCGUIRE,

Defendant.

)
)
)
) Case No. 021906198
)
) Transcript of:
)
) SENTENCING PROCEEDINGS
)
)
)

BEFORE THE HONORABLE PAUL G. MAUGHAN

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

ORIGINAL

AUGUST 12, 2002

FILED DISTRICT COURT
Third Judicial District

MAY 09 2003

FILED
Utah Court of Appeals

SALT LAKE COUNTY

JUL 03 2003

Deputy Clerk

REPORTED BY: ED MIDGLEY
238-7533

Paullette Stagg
Clerk of the Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

For the Plaintiff:

KATHERINE L. BERNARDS-GOODMAN, ESQUIRE
Deputy District Attorney
SALT LAKE COUNTY D.A.'S OFFICE
231 East 400 South, Suite 300
Salt Lake City, UT 84111

For the Defendant:

NISA SISNEROS, ESQUIRE
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, UT 84111

* * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(Whereupon, the following proceedings were had in the presence and hearing of the defendant:)

THE COURT: This is State of Utah versus Shawn McGuire, Case 021906198. It's set for sentencing. Ms. Sisneros, have you reviewed the presentence report.

MS. SISNEROS: Yes, I have.

THE COURT: Are there any errors or omissions, inaccuracies you want to bring to my attention?

MS. SISNEROS: No.

THE COURT: Do you want to address the recommendations?

MS. SISNEROS: Your Honor, Mr. McGuire has received the presentence report, has been a very cooperative client, very honest.

And, all along, with everybody, he's been very cooperative. And he's, quite frankly, been a great client to work with.

As indicated in the presentence report, and as he told the officers, this was not something that he was intending on selling. It was just for personal use.

He made some really bad choices and bad decisions about how to handle a financial situation, and he's certainly paying the price for that now.

1 I think all in all it is a very favorable
2 recommendation. The one thing I would like to address, and as
3 far as everything in here, I know that Mr. McGuire will do
4 whatever it is that your Honor requires him to do. If that's
5 jail time, I know that he'll do that as well. He is incredibly
6 remorseful about what's happened.

7 I would like to address the jail. He's done 97 days.
8 We would ask you give him credit for that time.

9 If you are going to sentence him to the year, if you
10 would consider releasing him once we can get him in to a
11 program. We've already started that process of looking in to
12 intensive -- I'm thinking looking in to an intensive inpatient
13 program. That's what we're looking at in our office.

14 If you give him a year, if you would allow him early
15 release to a program.

16 Another option would be letting him out on an ankle
17 monitor pending our ability to get him in to a program. I
18 think that's the viable option for him.

19 This is a difficult case in that I think Mr. McGuire
20 has been just very cooperative. He's very mild-mannered and
21 very concerned about what it is that he's done, and I would ask
22 that you take that in to consideration in this sentencing.

23 THE COURT: Thank you. Ms. Bernards-Goodman?

24 MS. BERNARDS-GOODMAN: Your Honor, this is Lana
25 Taylor's case. She's reviewed the report and strongly agrees

1 with the year in jail with no credit for good time. She feels
2 that the defendant is fortunate it's not a prison
3 recommendation.

4 THE COURT: Mr. McGuire, I have reviewed the
5 presentence report. I find it an extremely favorable
6 recommendation and it's one I'm not inclined to follow; though
7 I normally do.

8 In fact, I've read it more than once because of the
9 recommendation. It's troubling in the fact that what you say
10 is the lab was set up for personal use.

11 But there was also continued -- this is the third
12 time you tried to do it, and were having a hard time complying.
13 In my opinion, there's a bigger issue besides just your
14 personal use and your involvement in the operation of a lab,
15 and that's it's very concerning to the rest of the community
16 and the rest of this society. And I believe it's a plague on
17 our community.

18 Once we start manufacturing, once we start trying to
19 cook this kind of material, methamphetamine, it affects
20 children's lives. It affects your life. It puts at risk your
21 life or anybody involved in the process, those around you.
22 You're subject to possible exposure, fires, other
23 contamination.

24 So, I'm going to go against the recommendation in
25 this case, and I'm going to sentence you to five years to life

1 in the state penitentiary. And I'm not trying to send that
2 message to anybody, I'm just telling you my opinion.
3 Methamphetamine labs are something that will not be tolerated.
4 Good luck.

5

6 (Whereupon, the instant proceedings came to a close.)

7

REPORTER'S CERTIFICATE

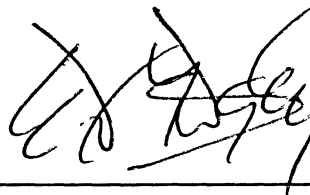
8 I, Ed Midgley, Official Court Reporter in and for the
9 State of Utah, do hereby certify that the above and foregoing
10 proceedings were, by me, stenographically reported at the times
11 and places herein set forth; that said report was, by me,
12 subsequently transcribed to printed form, constituting the
13 above and foregoing pages hereinabove enumerated; and that said
14 report so transcribed constitutes a true and correct
15 transcription of testimony given, evidence adduced and/or
16 proceedings had as at the occasion of the hearing hereinabove
17 referenced.

18 To which certification I hereby set my hand this 7th
19 day of May, 2003, at Salt Lake City.

20

21

22

A handwritten signature in black ink, appearing to read 'Ed Midgley', is written over a horizontal line.

23

Ed Midgley, Official Court Reporter

24

25

ADDENDUM D

77-27-5. Board of Pardons and Parole authority.

(1) (a) The Board of Pardons and Parole shall determine by majority decision when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, restitution ordered, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated.

(b) The board may sit together or in panels to conduct hearings. The chair shall appoint members to the panels in any combination and in accordance with rules promulgated by the board, except in hearings involving commutation and pardons. The chair may participate on any panel and when doing so is chair of the panel. The chair of the board may designate the chair for any other panel.

(c) No restitution may be ordered, no fine, forfeiture, or restitution remitted, no parole, pardon, or commutation granted or sentence terminated, except after a full hearing before the board or the board's appointed examiner in open session. Any action taken under this subsection other than by a majority of the board shall be affirmed by a majority of the board.

(d) A commutation or pardon may be granted only after a full hearing before the board.

(e) The board shall determine restitution in an amount that does not exceed complete restitution if determined by the court in accordance with Section 76-3-201.

(2) (a) In the case of original parole grant hearings, rehearings, and parole revocation hearings, timely prior notice of the time and place of the hearing shall be given to the defendant, the county or district attorney's office responsible for prosecution of the case, the sentencing court, law enforcement officials responsible for the defendant's arrest and conviction, and whenever possible, the victim or the victim's family.

(b) Notice to the victim, his representative, or his family shall include information provided in Section 77-27-9.5, and any related rules made by the board under that section. This information shall be provided in terms that are reasonable for the lay person to understand.

(3) Decisions of the board in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment, including restitution as provided in Section 77-27-6.

(4) This chapter may not be construed as a denial of or limitation of the governor's power to grant respite or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment. However, respites or reprieves may not extend beyond the next session of the Board of Pardons and Parole and the board, at that session, shall continue or terminate the respite or reprieve, or it may commute the punishment, or pardon the offense as provided. In the case of conviction for treason, the governor may suspend execution of the sentence until the case is reported to the Legislature at its next session. The Legislature shall then either pardon or commute the sentence, or direct its execution.

(5) In determining when, where, and under what conditions offenders serving sentences may be paroled, pardoned, have restitution ordered, or have their fines or forfeitures remitted, or their sentences commuted or terminated, the board shall consider whether the persons have made or are prepared to make restitution as ascertained in accordance with the standards and procedures of Section 76-3-201, as a condition of any parole, pardon, remission of fines or forfeitures, or commutation or termination of sentence.

(6) In determining whether parole may be terminated, the board shall consider the offense committed by the parolee, the parole period as provided in