

2003

Utah v. McGuire : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

Case No. 20030418-CA

SHAWN C. MCGUIRE,

Defendant/Appellant.

BRIEF OF APPELLEE

**APPEAL FROM A DENIAL OF A MOTION TO RECONSIDER
DEFENDANT'S SENTENCE FOR OPERATING A CLANDESTINE
LABORATORY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 58-37d-4(1)(a) (2002), IN THE THIRD JUDICIAL DISTRICT
COURT, SALT LAKE COUNTY, THE HONORABLE PAUL G.
MAUGHAN PRESIDING**

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**FILED
UTAH APPELLATE COURTS**

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STATE OF UTAH,

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BRIEF OF APPELLEE

* * *

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his sentence and the trial court's order denying his motion to reconsider his sentence. Third District Court Judge Paul G. Maughn imposed sentence following defendant's guilty plea to one count of operating a clandestine laboratory, a first degree felony, pursuant to Utah Code Ann. § 58-37d-4(1)(a) (2002).¹ This Court has jurisdiction under the pour over provision of Utah Code Ann. § 78-2a-3(2)(j) (2003).

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Did defendant's post-judgment Motion to Reconsider Sentence toll the time to appeal, where the motion asserted no error in the courts ruling, but rather, only asked the court to rethink the sentence?

¹ Defendant's conviction was enhanced from a second degree felony to a first degree felony because the clandestine laboratory was located within 500 feet of a residence (R. 6-7). See Utah Code Ann. § 58-37d-5(1)(d) (2002).

This question ultimately implicates this Court's jurisdiction, which is a question of law. There is no standard of review because the issue of this court's jurisdiction was not raised below. *See Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147.

2. Should this Court assume that the sentencing court considered only the gravity of the crime in sentencing defendant to prison, even though the court stated it read the presentence report more than once and the presentence report contained all relevant mitigating and aggravating circumstances?

This Court reverses a trial court's sentencing decision only if it is an abuse of discretion. *See State v. Helms*, 2002 UT 12, ¶ 8, 40 P.3d 626.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 59(e) and rule 81(e), Utah Rules of Civil Procedure, are relevant to this appeal. They are attached as Addendum A and Addendum B, respectively.

STATEMENT OF THE CASE

Defendant pled guilty to one count of operation of a clandestine laboratory (R. 23–30; 92:7). On August 13, 2002, the court entered a final judgment and sentenced defendant to prison (R. 39–40; 82:5–6). That same day, defendant filed a Motion to Reconsider Sentence (R. 41). On April 1, 2003, after a hearing on the motion and briefing from the parties, the court determined that it lacked jurisdiction to reconsider defendant's sentence and denied the motion (R. 62, 69–71; 83:4). Defendant filed an appeal to the Utah Supreme Court on April 30, 2003 (R. 72). The Utah Supreme Court poured the case over to this Court (R. 81).

STATEMENT OF THE FACTS²

On April 24, 2002, two deputies responded to a report of a fight in progress in defendant's neighborhood (R. 85). Their investigation led them to defendant's house (R. 85). When defendant responded to the deputies' knocking on his back door, the deputies immediately detected the familiar odor of an operating methamphetamine laboratory (R. 85). Defendant agreed to let the deputies search his home (R. 86). They found an operating methamphetamine laboratory in the bathroom (R. 86).

The deputies read defendant his rights, and he agreed to answer their questions (R. 86). Defendant confessed that he was "glad it was over" (R. 86). He had been running the laboratory for about two weeks and was in the midst of his third attempt to manufacture methamphetamine (R. 86). His two prior attempts were unsuccessful (R. 86).

Defendant pled guilty to one count of operating a clandestine laboratory (R. 23–30; 92:7). As part of the plea negotiation, the prosecutor, Lana Taylor, agreed to recommend that the court put defendant on probation (R. 92:6). The court accepted defendant's plea and ordered Adult Probation and Parole (AP&P) to prepare a presentence investigation report (PSI) (R. 31).

The PSI revealed that defendant had a criminal history consisting of half a dozen convictions for drug and alcohol offenses dating back to 1980 (R. 87). Defendant began

² The facts are taken primarily from defendant's presentence investigation report (PSI). At sentencing, defendant offered no corrections to the PSI (R. 92:3). *See* Utah Code Ann. § 77-18-1(6)(b) (2003) ("If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.")

consuming alcohol at age 15 and using drugs at age 17 (R. 89). At the time of his arrest, he had been using methamphetamine daily for approximately two years (R. 89). Defendant's first wife died of a drug overdose in 1993 (R. 88). His third wife is a co-defendant in this case and admitted to jointly owning the laboratory with defendant (R. 86). During his interview for the PSI, defendant admitted that he had a serious drug habit and that he decided to try manufacturing his own methamphetamine to save money (R. 86). He also acknowledged that he had lost everything, including his house, his truck, and his kids because of his drug habit, and that he had "hit rock bottom" (R. 85). The AP&P investigator recommended that the court place defendant on probation, order him to serve a year in jail, and order him to attend substance abuse treatment (R. 84).

At sentencing, defense counsel told the court that defendant "will do whatever it is that your Honor requires him to do. If that's jail time, I know that he'll do that as well" (R. 82:4). Defense counsel also requested that the court release defendant from jail once he was enrolled in a substance abuse treatment program (R. 82:4). Ms. Taylor, the prosecutor, was not present at sentencing (R. 82:2). But another prosecutor told the court that Ms. Taylor "strongly agrees with the year in jail with no credit for good time" (R. 82:4-5).

The court stated that it found AP&P's recommendation "extremely favorable" and that "[the court] read [the PSI] more than once because of the recommendation" (R. 82:5). The court noted, however, that it was troubled that defendant set the lab up for personal use (R. 82:5). It also expressed concern over the significant risks a methamphetamine laboratory presents to the community including "exposure, fires, [and] other contamination" (R. 82:5).

Ultimately, the court decided not to follow AP&P's recommendation and imposed the statutory prison term (R. 39–40; 82:5–6).

On August 13, 2002, the day after pronouncement of sentencing, defendant filed a Motion to Reconsider Sentence (R. 41). He asserted that he had new information from Detective Evan Mallas and additional input from Ms. Taylor and requested a new sentencing hearing (R. 41). Defendant subpoenaed Detective Evan Mallas to appear at the hearing (R. 50). The court held a hearing on defendant's motion on October 23, 2002 (R. 94). At the hearing, defendant presented no evidence and made almost no argument about his sentence (R. 94). Instead, the parties responded to a question from the court about its jurisdiction to resentence defendant (R. 94:4–5). The court noted that the rules of criminal procedure did not permit it to amend a harsh judgment, only an illegal judgment (R. 94:5). Defendant asserted that his motion was proper under rule 59(e), Utah Rules of Civil Procedure, as a motion to alter or amend the judgment (R. 94:5). The State responded that rule 59(e) did not apply because the Utah Rules of Criminal Procedure already had a rule concerning the court's power to amend a sentence—rule 22(e) (R. 94:14–15). The court deferred ruling on the issue so that the parties could provide briefing (R. 94:21).

Defendant submitted a memorandum to the court in which he reiterated his argument that rule 59(e) applied to criminal proceedings and that his motion was really a rule 59(e) motion (R. 53–54). Again, defendant made no argument and proffered no evidence to support a different sentence (R. 53–54).

On November 4, 2002, the court orally denied defendant's motion (R. 62; 83:4). The court stated that it found no reason why rule 59 should apply to a criminal matter (R. 83:4). It also found that even if rule 59 applied, "the elements of Rule 59 don't fit" (R. 83:4). The court stated, "There's no question that the defense motion was filed within ten days as provided by Rule 59, but as you look to the grounds for Rule 59, for which relief could be granted, none of those, none of those reasons apply to this case" (R. 83:3). On April 1, 2003, the district court filed its Findings of Fact and Conclusions of Law and Order denying defendant's motion. The findings reiterated that no legal grounds existed for reconsidering defendant's sentence and that the district court was divested of jurisdiction upon entering a legal sentence (R. 69–71).

On April 30, 2003, defendant filed an appeal to the Utah Supreme Court (R. 72). The Utah Supreme Court poured the case over to this Court (R. 81).

SUMMARY OF ARGUMENT

POINT I. Defendant's claim that the trial court erred in refusing to consider his Motion to Reconsider Sentence is moot because the trial court did, in fact, rule on the motion. This court must nevertheless consider the merits of defendant's claim that his Motion to Reconsider Sentence was really a mis-captioned motion to alter or amend the judgment under rule 59(e), Utah Rules of Civil Procedure, because if it was not, this Court lacks jurisdiction over defendant's appeal.

A timely notice of appeal is necessary to vest this Court with jurisdiction. Defendant's notice of appeal, filed more than eight months after the final judgment, was

timely only if a post-judgment motion tolled the time to appeal under rule 4(b), Utah Rules of Appellate Procedure. Defendant's Motion to Reconsider Sentence did not toll the time to appeal because it was not, as he claims a rule 59(e) motion. Thus, his notice of appeal was late and this Court must dismiss the appeal for lack of jurisdiction.

Even if defendant had filed a true rule 59(e) motion, his notice of appeal would still have been untimely because rule 59(e) is a civil rule that does not apply in criminal proceedings. Under rule 81(e), Utah Rules of Civil Procedure, the civil rules apply to criminal proceedings only where there is no applicable criminal rule or statute. The Utah Rules of Criminal Procedure have a rule concerning amendments and alterations to sentences—rule 22(e).

POINT II. Even if this Court had jurisdiction to consider defendant's appeal, his claim that the trial court abused its discretion by not granting him probation fails on the merits. Defendant has no right to probation. Rather, the trial court is vested with the power to grant probation if it is in the best interests of justice and compatible with the public interest. The decision to grant or withhold probation is therefore in the complete discretion of the trial court, and the only legal restriction is that the trial court not exceed the bounds of discretion.

A trial court exceeds the bounds of its discretion if it fails to consider all the legally relevant factors. A trial court is not required to make a record of its consideration of the legally relevant factors. This Court has repeatedly held that it will assume that the trial court actually considered the legally relevant factors where it is reasonable to do so. There are

normally only a few instances where it is not reasonable to assume the trial court considered all the relevant factors, including where (1) an ambiguity of facts makes the assumption unreasonable, (2) a statute explicitly provides that written findings must be made, or (3) a prior case states that findings on an issue must be made. None of those circumstances apply here, thus, this Court may assume the trial court actually considered all the legally relevant factors and affirm defendant's sentence.

ARGUMENT

I. DEFENDANT'S MOTION DID NOT TOLL THE TIME TO APPEAL BECAUSE IT WAS NOT, IN SUBSTANCE, A RULE 59(e) MOTION, BUT RATHER, ONLY A MOTION TO RECONSIDER THE SENTENCE; MOREOVER, RULE 59(e) DOES NOT APPLY TO CRIMINAL PROCEEDINGS

A. The trial court did, in fact, decide the merits of defendant's motion to reconsider his sentence.

Defendant claims the trial court erred in ruling that it lacked jurisdiction to consider his post-judgment Motion to Reconsider Sentence. Aplt. Br. at 8. He also claims that the trial court abused its discretion when it denied him probation. Aplt. Br. at 15. He asks this court to vacate his sentence and remand for a new sentencing hearing. Aplt. Br. at 20.

As a threshold matter, defendant's claim that the trial court erred in ruling that it lacked jurisdiction to consider his motion is partly moot because the trial court did, in fact, consider and rule on the motion to reconsider. In a hearing on November 4, 2002, the trial court denied defendant's motion stating that the court lost jurisdiction over defendant's case once a valid sentence was imposed (R. 83:4). The court also ruled, however, that even if it had jurisdiction under rule 59(e) to resentence defendant, defendant's motion provided no

legal reason to do so (R. 8:33). The court stated, “There’s no question that the defense motion was filed within ten days as provided by Rule 59, but as you look to the grounds for Rule 59, for which relief could be granted, none of those, none of those reasons apply to this case” (R. 83:3). It continued, “Even if I wanted to find Rule 59 applicable to a criminal matter, the elements of Rule 59 don’t fit” (R. 83:3–4). Thus, the trial court ruled that even if it had jurisdiction, defendant had not presented any legal basis for the court to reconsider sentencing.

This Court must nevertheless consider the merits of defendant’s claim that his Motion to Reconsider Sentence was a proper rule 59(e) motion. Defendant filed his notice of appeal more than eight months after entry of final judgment (R. 39, 72). Therefore, his notice of appeal was timely only if his Motion to Reconsider Sentence tolled the time to appeal.

B. This Court lacks jurisdiction over defendant’s appeal of his sentence unless a timely post-judgment motion tolled the time to appeal.

A notice of appeal must be filed within thirty days of entry of final judgment. *See* Utah R. App. P. 4(a). An untimely notice of appeal deprives the appellate court of jurisdiction over the appeal. *See State v. Bowers*, 2002 UT 100, ¶ 5, 57 P.3d 1065 (noting that thirty-day period for filing notice of appeal is jurisdictional and cannot be enlarged by appellate court); *State v. Johnson*, 635 P.2d 36, 37 (Utah 1981) (same). In a criminal proceeding, the sentencing order is usually the final order that disposes of the case and starts the thirty-day window for appealing a conviction and sentence. *See Bowers*, 2002 UT 100, ¶ 4 (noting that in criminal cases the sentence is the final judgment that starts the time to

appeal). Certain timely post-judgment motions will, however, toll the time for filing a notice of appeal until the trial court disposes of the motion. *See* Utah R. App. P. 4(b).

In the instant case, the trial court entered the final judgment on August 13, 2002 (R. 39–40). Defendant did not file his notice of appeal until April 30, 2003, more than eight months after entry of the final judgment (R. 72). Thus, this Court lacks jurisdiction over defendant’s appeal unless a timely post-judgment motion listed in rule 4(b), Utah Rules of Appellate Procedure, tolled the time to appeal.

C. A “Motion to Reconsider” does not toll the time to file a notice of appeal.

Rule 4(b), Utah Rules of Appellate Procedure, tolls the time to file a notice of appeal only if a party files one of the timely post-judgment motions listed in that rule. The post-judgment motions listed under the Utah Rules of Civil Procedure include (1) a motion for judgment under rule 50(b); (2) a motion to amend or make additional findings of fact under rule 52(b); (3) a motion for a new trial under rule 59; (4) or a motion to alter or amend the judgment under rule 59. *See* Utah R. App. P. 4(b). The rule lists only two motions in criminal proceedings: (1) a motion for a new trial under rule 24, Utah Rules of Criminal Procedure, or (2) a motion to withdraw a guilty plea. *See id.*

A “Motion to Reconsider” is not a motion listed in rule 4(b) as tolling the time to file a notice of appeal. *See* Utah R. App. P. 4(b); *State v. Searle*, 2003 UT App 295, *1, 2003 WL 22020765 (unpublished per curiam memorandum decision) (“A motion to reconsider a ruling is not among the post-judgment motions that toll the time for filing a notice of

appeal.”), attached as Addendum C.³ In fact, a motion to reconsider is not even a motion recognized under the rules of civil procedure. See *Ron Shepherd Ins. v. Shields*, 882 P.2d 650, 653 n.4 (Utah 1994) (Utah courts have “consistently held that our rules of civil procedure do not provide for a motion for reconsideration of a trial court’s order or judgment”); *Bonneville Billing and Collection v. Torres*, 2000 UT App 338, ¶ 4, 15 P.3d 112 (same).

A motion not properly captioned as a motion listed in rule 4(b) may nevertheless toll the time to appeal if the substance of the motion is properly characterized as a 4(b) motion. See *Bonneville Billing and Collection*, 2000 UT App 338, ¶ 4 (“The time for appeal is extended only if the motion can be construed as a timely motion of a type enumerated in Rule 4(b) of the Utah Rules of Appellate Procedure.”); *Davis v. Grand County Service Area*, 905 P.2d 888, 891 (Utah App. 1995) (noting that court rules do not allow for reconsideration of trial court’s order or judgment, but that “courts will accord some dignity to a motion so entitled if it could properly have been brought pursuant to some rule and was merely erroneously titled”); *DeBry v. Fidelity National Title Insurance*, 828 P.2d 520, 523 (Utah App. 1992) (“The substance of a motion, not its caption, is controlling.”).

In the instant case, defendant filed his Motion to Reconsider on the same day the court entered the final judgment (R. 39–41). The caption of defendant’s motion does not purport

³ This and subsequent citations to unpublished memorandum decisions are cited pursuant to *Grand County v. Rogers*, 2002 UT 25, ¶ 16, 44 P.3d 734, and are included in the addendum.

to be one of the motions listed under 4(b) that would toll the time to file a notice of appeal. Thus, defendant's motion tolled the time to appeal only if its substance may be construed as a 4(b) motion. *See DeBry*, 828 P.2d at 523.

It was not until the trial court questioned its jurisdiction to consider defendant's motion that defendant claimed, for the first time, that his motion was not really a motion to reconsider, as he captioned it, but rather, a motion to alter or amend the judgment under rule 59(e). Defendant renews this claim on appeal. Defendant's claim fails because his motion was not, in substance, a rule 59(e) motion to alter or amend the judgment. Moreover, rule 59(e) does not apply in criminal proceedings.

D. A motion that merely asks the court to rethink its decision is not a rule 59(e) motion to amend or alter the judgment.

Rule 59(e) provides, "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(e). This Court has previously stated that any motion filed within ten days of the judgment that questions the correctness of the court's findings and conclusions is a rule 59(e) motion. *See Reeves v. Steinfeldt*, 915 P.2d 1073, 1077 (Utah App. 1996); *Brunetti v. Mascaro*, 854 P.2d 555, 557 (Utah App. 1993), *rejected on other grounds by Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1062 (Utah 1998); *DeBry v. Fidelity National Title Insurance*, 828 P.2d 520, 522–23 (Utah App. 1992). The Utah Supreme Court, however, has taken a narrower view of rule 59(e) motions. In *Hume v. Small Claims Court of Murray City*, 590 P.2d 309, 310–11 (Utah 1979), the court stated that rule 59(e) motions are used to challenge a court's findings and conclusions following a bench trial and that such motions must be based on one of the

grounds set forth for new trials in 59(a).⁴ See also *Hancock v. Planned Development Corp.*, 791 P.2d 183, 184 (Utah 1990) (holding that court may only amend findings and conclusions and enter new judgment on showing of one of the grounds listed in rule 59); *College Irrigation Co. v. Logan River & Blacksmith Fork Irrigation Co.*, 780 P.2d 1241, 1245 (Utah 1989) (same). Rule 59(e) does not permit a litigant to ask the court to merely rethink its decision. See *Ute-Cal Land Development v. Intermountain Stock Exchange*, 628 P.2d 1278, 1280 n.7 (Utah 1981) (distinguishing rule 59(e) motions from motions to reconsider, “which essentially ask[] the court to rethink its decision”). Rather, rule 59(e) motions must be grounded in some error of fact or law which would justify granting a new trial.

The Utah Supreme Court’s view is consistent with the federal courts’ construction of the nearly identical rule 59(e) in the Federal Rules of Civil Procedure. Federal courts will grant a rule 59(e) motion only where the movant shows (1) a manifest error of law or fact, (2) newly discovered evidence that was previously unavailable, (3) a manifest injustice, or (4) an intervening change in controlling law. See *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999); *F.D.I.C. v. World University Inc.*, 978 F.2d 10, 16 (1st Cir. 1992); *Rygg v. County of Maui*, 122 F. Supp.2d 1140, 1157 (D. Haw. 2000); 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1 (2d ed. 1995).

⁴ Those grounds include (1) irregularity in the proceedings of the court, (2) misconduct of the jury; (3) accident or surprise; (4) newly discovered evidence which could not, with reasonable diligence, have been discovered and produced at 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 (7) errors of law. Utah R. Civ. P. 59(a).

In the instant case, defendant's motion did not state any grounds upon which the court could alter or amend the judgment or even what alterations defendant wished the court to make (R. 41). The motion merely asked the court to provide a new sentencing hearing in which defendant could present "new information" from the arresting officer and additional input from the prosecutor (R. 41). Defendant never stated what this new information was and why it would necessitate resentencing (R. 41). Defendant also never claimed that the evidence he intended to present was "[n]ewly discovered evidence . . . which he could not, with reasonable diligence, have discovered and produced at [sentencing]." Utah R. Civ. P. 59(a)(4).

Defendant's motion was not, in fact, an incorrectly captioned rule 59(e) motion. It was just what it claimed to be: a motion to reconsider the sentence. This is clear from the fact that defendant's motion stated no reason for the court to resentence him—it merely asked for a new hearing to present more evidence in the hope that the trial court would "rethink" its sentence (R. 41–42). Then, at the hearing on the motion, defendant did not present or proffer any evidence or articulate any lawful ground for altering the judgment under rule 59(e). He only pled with the court, "[P]lease be fair," and "[P]lease reconsider what you did" (R. 94:12). As stated, a motion for the court to rethink its decision is not a rule 59(e) motion. *See Ute-Cal Land Development*, 628 P.2d at 1280 n.7.

Because defendant's motion was not captioned as a rule 59(e) motion to alter or amend the judgment, and is not in substance a rule 59(e) motion, it did not toll the time to appeal. This Court therefore lacks jurisdiction over defendant's appeal.⁵

E. Rule 59(e) does not apply to sentencing in criminal proceedings.

Even if defendant had filed a proper 59(e) motion, his appeal would nevertheless be untimely because rule 59(e) does not apply to sentencing in criminal proceedings.

"Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case." *State v. Montoya*, 825 P.2d 676, 679 (Utah App. 1991). This general rule is subject to a few narrow exceptions. Rule 24, Utah Rules of Criminal Procedure, permits a trial court to entertain a motion for a new trial within ten days of entry of the final judgment.⁶ Prior to its amendment in 2003, Utah Code Ann. § 77-13-6 (1999) permitted the trial court to decide a motion to withdraw a guilty plea within thirty days of the final judgment. *See State v. Ostler*, 2001 UT 68, ¶ 11, 31 P.3d 528. Rule 30(b), Utah Rules of Criminal Procedure, allows the court to correct clerical errors anytime after the final judgment. Similarly, rule 22(e), Utah

⁵ Tellingly, defendant did not characterize his motion as a rule 59(e) motion in his docketing statement; rather, he called it a motion to reconsider. *See* Docketing Statement, Case No. 20030418-CA.

⁶ Defendant correctly points out that his motion to reconsider the sentence may not be construed as a motion for new trial under rule 24, Utah Rules of Criminal Procedure. *Aplt. Br.* at 11. Although the Utah Supreme Court once construed a post-judgment motion to reconsider a suppression ruling as a rule 24 motion for a new trial, *see State v. Gardner*, 2001 UT 41, ¶ 7, 23 P.3d 1043, nothing in *Gardner* or rule 24 suggests that it might be used to obtain a reconsideration of his sentence or a new sentencing hearing.

Rules of Criminal Procedure, empowers the trial court to correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

Nothing in Utah's statutes or rules of criminal procedure creates an exception to *Montoya's* general rule for the trial court to reconsider the sentence or give a defendant a new sentencing hearing merely because the defendant believes the court's sentence was too harsh.

Defendant claims that rule 59(e), Utah Rules of Civil Procedure, vests the trial court with jurisdiction to resentence him. Aplt. Br. at 8–9. He claims this *civil* rule applies to criminal proceedings under rule 81(e), Utah Rules of Civil Procedure (“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.”).

By rule 81(e)'s express terms, the civil rules apply in criminal proceedings only when there is no other applicable statute or rule. The rules of criminal procedure already have a rule governing corrections to a sentence: rule 22(e). Rule 22(e) allows a trial court to correct an illegal sentence at any time. Defendant correctly points out that rule 22(e) is narrower than rule 59(e), and that rule 22(e) does not apply in this case, because it does not permit the court to resentence the defendant unless the sentence is illegal. Aplt. Br. at 12; *see also State v. Thorkleson*, 2004 UT App 9, ¶ 15, 84 P.3d 854 (holding that rule 22(e) only permits the defendant to challenge a sentence that is patently illegal). He concludes that rule 59(e) must therefore apply. Aplt. Br. at 14.

Defendant misconstrues rule 81(e). The test under rule 81(e) is not whether any civil rule might govern a particular circumstance in a criminal case, but rather, whether there is already an applicable rule of criminal procedure that governs an aspect of a case. *See* Utah R. Civ. P. 81(e). Here, the criminal rules already provide the procedure for challenging a sentence. That the procedure does not provide as broad a challenge as a civil rule does not mean that the defendant may apply the civil counterpart to create a right where none existed under the criminal rules.

Defendant points to *State v. Samora*, 2002 UT App 384, ¶ 6, 59 P.3d 604, *cert. granted* by 65 P.3d 1190, and *Salt Lake City v. Guffey*, 2001 UT App 17, *1, 2001 WL297603 (unpublished per curiam memorandum decision), to demonstrate that this Court has sanctioned the use of rule 59(e) motions in criminal proceedings.⁷ *Aplt. Br.* at 9–10. In *Samora*, the trial court imposed a jail sentence but refused to grant credit for time served. 2002 UT App 384, ¶ 5. *Samora* filed a motion to reconsider the sentence, asking the trial court to grant credit for time served, and the court granted the motion. *Id.* at ¶ 6. *Samora* then filed an appeal on other grounds. *Id.* at ¶ 7.

Unlike this case, the timing of the notice of appeal was not an issue in *Samora*, or the court would have mentioned it in its opinion. Additionally, neither party asserted any impropriety in the court granting *Samora*’s motion to reconsider. This Court could not, therefore, have “tacitly approved” motions to reconsider the sentence in *Samora* because the

⁷ For the Court’s convenience, *State v. Guffey*, is attached as Addendum D.

Court had no opportunity to affirm or reverse the trial court's decision to consider and rule on the motion. Aplt. Br. at 10.

Guffey, an unpublished memorandum decision, is also distinguishable from the present case. Guffey filed a motion to arrest judgment, on which the trial court deferred ruling until after sentencing. 2001 UT App 17, *1. The court sentenced Guffey on April 21, 2000. *Id.* It held a hearing on his motion to arrest judgment on May 1, 2000, and subsequently denied his motion in an oral ruling from the bench. *Id.* On May 25, 2000, Guffey filed a notice of appeal from both his conviction and the ruling on his motion to arrest judgment. *Id.* The trial court entered its findings and conclusions and order denying Guffey's motion to arrest judgment on June 7, 2000. *Id.* The following day, defendant filed an objection to the court's findings and conclusions.

This Court held that Guffey's notice of appeal was untimely from his conviction. *Id.* This Court further ruled that Guffey's objection to the court's findings was a post-judgment motion under rule 52(b) or 59(e) that tolled the time to appeal, making his notice of appeal premature as to the court's order denying his motion to arrest judgment. *Id.* The purported rule 59(e) motion in *Guffey* did not challenge the sentence, but rather, the order denying the motion to arrest judgment. Rule 22(e), did not therefore preclude rule 81(e) from applying a civil judgment motion in *Guffey* because rule 22(e) only concerns challenges, like the one defendant makes, to sentences.

Because defendant's motion to reconsider did not toll the time to appeal, his notice of appeal was untimely. This court therefore lacks jurisdiction and must dismiss defendant's

appeal. *See State v. Palmer*, 777 P.2d 521, 522 (Utah App. 1989) (noting that court rules specifically prohibit this Court from expanding time to appeal and stating that determination as to whether an untimely criminal appeal may proceed is reserved for trial court in post-conviction proceeding).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO GRANT DEFENDANT PROBATION

Defendant asserts that the trial court abused its discretion by refusing to grant him probation. Aplt. Br. at 7. He claims the court failed to “personalize” the sentence and sent him to prison solely because of the nature of the crime to which he pled guilty. Aplt. Br. at 7–8. To prove that the trial court considered only the nature of the crime in sentencing him, defendant points out that court mentioned the gravity of the crime during sentencing. Aplt. Br. at 18–19. Defendant concludes that, “[g]iven the judge’s statement, it is not reasonable to assume that he considered all of the mitigating factors relevant to sentencing.” Aplt. Br. at 19.

As explained in Point I of this brief, the Court lacks jurisdiction over this claim because defendant’s notice of appeal was untimely. However, even if this Court had jurisdiction, defendant’s claim would fail on the merits because the trial court did not abuse its discretion.

A. The trial court has complete discretion over granting or denying probation.

District courts have “wide latitude and discretion in sentencing.” *State v. Helms*, 2002 UT 12, ¶ 8, 40 P.3d 626 (quoting *State v. Woodland*, 945 P.2d 665, 671 (Utah 1997)).

“Generally, [appellate courts] will reverse a trial court’s sentencing decision only if it is an abuse of the judge’s discretion.” *Id.* “An abuse of discretion results when the judge fails to consider all legally relevant factors or if the sentence imposed is clearly excessive.” *State v. Valdovinos*, 2003 UT App 432, ¶ 14, 82 P.3d 1167 (internal quotations and citations omitted). Defendant has not argued that his sentence is clearly excessive. Aplt. Br. at 7–8, 15–20. Thus the only question before this court is whether the trial court abused its discretion by failing to consider all the legally relevant factors.

The discretion of the trial court in sentencing is perhaps at its greatest when deciding whether to grant or withhold probation. “The defendant is not entitled to probation, but rather, the court is empowered to place the defendant on probation if it thinks that will best serve the ends of justice and is compatible with the public interest.” *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991). Thus, “[t]he decision whether to grant probation is within the complete discretion of the trial court.” *Id.* at 1049. This is because “[t]he granting or withholding of probation involves considering intangibles of character, personality and attitude, of which the cold record gives little inkling.” *Id.* In fact, “[t]he only legal restriction [in granting or withholding probation] is that the trial court not exceed the bounds of discretion.” *Id.*

This Court may not assume that the trial court failed to consider the legally relevant factors merely because the court did not explain on the record or in the sentencing order why it withheld probation or how it considered each mitigating and aggravating circumstance. *See State v. Helms*, 2002 UT 12, ¶ 11, 40 P.3d 626. “[A]s a general rule this court upholds

the trial court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings.” *Id.* (quotations and citations omitted); *see also State v. Robertson*, 932 P.2d 1219, 1234 (Utah 1997); *State v. Ramirez*, 817 P.2d 774, 778 (Utah 1991). There are normally only a few instances where it is not reasonable to assume the trial court considered all the relevant factors, including where “(1) an ambiguity of facts makes the assumption unreasonable, (2) a statute explicitly provides that written findings must be made, or (3) a prior case states that findings on an issue must be made” *Helms*, 2002 UT 12, ¶ 11.

B. This Court may assume that the trial court considered the legally relevant factors.

In the instant case, defendant did not dispute the contents of the PSI, thus no factual ambiguity exists (R. 92:3). There is also no statute or case requiring the trial court to make a record of its consideration of the aggravating and mitigating circumstances when deciding whether to grant or withhold probation. *See State v. Sotolongo*, 2003 UT App 214, ¶ 8 n.2, 73 P.3d 991 (noting that no statute or case requires sentencing judge to make specific findings of fact in a sentencing order). This Court may therefore assume the trial court considered all the relevant factors and affirm defendant’s sentence on that ground.

It is entirely reasonable to assume that the court considered all the relevant mitigating and aggravating circumstances. The PSI contained details about the offense, defendant’s criminal history, his personal history and current living arrangements, his education, employment, and financial information, and his substance abuse history (R. 84–89). The court stated that because the AP&P investigator recommended probation, it read the PSI

“more than once” (R. 82:5). Where the court has before it all the information it needs to decide defendant’s punishment, and where the court states that it read that information more than once, the logical conclusion is that the judge carefully considered all the information before it. *See Helms*, 2002 UT 12, ¶ 13 (presuming that trial court considered all legally relevant factors where court read presentence report “rather carefully” and presentence report contained Helms’ history, character, and rehabilitative needs).

Defendant asserts that the trial court must “personalize” the sentence to defendant and that it failed to do so. Aplt. Br. at 17–19. While it is true that “the punishment should not only fit the crime but the defendant as well,” there is no evidence that the court did not do so here. *Sotolongo*, 2003 UT App 214, ¶ 9. The court stated that it read the PSI “more than once,” but did not otherwise provide an account of its consideration of each mitigating and aggravating circumstance. This Court “will not assume that the trial court’s silence, by itself, presupposes that the court did not consider the proper factors as required by law.” *Helms*, 2002 UT 12, ¶ 11.

Defendant claims that the court’s statements regarding the dangers of cooking methamphetamine and defendant’s multiple attempts to cook methamphetamine prove that the court imposed sentence based solely the gravity of the crime. Aplt. Br. at 18. He complains that the trial court did not, therefore, “personalize” the sentence because “[t]he sentencing in this case could apply to any defendant convicted of operating a clandestine laboratory.” Aplt. Br. at 18. The trial court’s statements at sentencing are not, however, a complete account of its consideration of the mitigating and aggravating factors. Absent a

complete a recitation of its consideration of all the relevant factors, this Court may assume the trial court actually considered the factors and did not abuse its discretion. *See Helms*, 2002 UT 12, ¶ 11. The court's statements at sentencing show, at most, that it may have weighed the gravity of the crime more than other factors. The court is, of course, entitled to do so. *See State v. Russell*, 791 P.2d 188, 192 (Utah 1990) (sentencing courts have discretion to accord one factor in mitigation or aggravation more weight than it does to several factors on opposite scale); *State v. Gibbons*, 779 P.2d 1133, 1137 (Utah 1989) (no abuse of discretion where trial court gave more weight to circumstances of offense, than to defendant's desire to change and post-arrest good behavior); *State v. Kelly*, 784 P.2d 144, 145 (Utah 1989) (no abuse of discretion to give little weight to defendant's lack of similar criminal history, cooperation with law enforcement, or candidacy for a recognized treatment program).

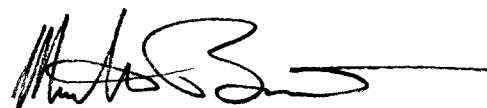
Thus, defendant's claim fails.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's sentence and conviction.

Respectfully submitted April 9, 2004.

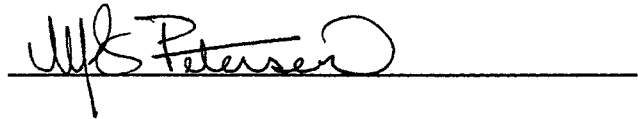
MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Matthew D. Bates', with a long horizontal flourish extending to the right.

MATTHEW D. BATES
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2004, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Shawn C. McGuire, by causing them to be delivered by first class mail to Joan C. Watt and Nisa J. Sisneros, his counsel of record, at Salt Lake Legal Defender Ass'n, 424 East 500 South, Ste. 300, Salt Lake City, UT 84111.

A handwritten signature in black ink, appearing to read "J. S. Petersen", is written over a horizontal line.

Addenda

Addendum A

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:

(a)(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.

(a)(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.

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

(a)(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.

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

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

(a)(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.

Addendum B

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) *Application to small claims.* These rules shall not apply to small proceedings except as expressly incorporated in the Small Claims Rules.

(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.

Addendum C

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Carey SEARLE, Defendant and Appellant.

No. 20030531-CA.

Aug. 28, 2003.

Fourth District, Provo Department; The Honorable
Fred D. Howard.

Shelden R. Carter, Provo, for Appellant.

Mark L. Shurtleff and Karen A. Klucznik, Salt
Lake City, for Appellee.

Before Judges JACKSON, GREENWOOD, and
THORNE.

MEMORANDUM DECISION (Not For Official
Publication)

PER CURIAM:

*1 This case is before the court on its own motion
for consideration of summary dismissal due to an
untimely notice of appeal. See Utah R.App. P. 4(a).
Both parties filed a response to this court's motion.
[FN1]

FN1. Appellant Carey Searle, however,
was apparently operating on the incorrect
presumption that the court was considering
summary reversal of the trial court on the
basis of manifest error, pursuant to rule
10(a)(3) of the Utah Rules of Appellate

Procedure, rather than summary
affirmance, pursuant to rule 10(a)(2).
However, the notice sent to the parties
cited rule 10(a)(2) and informed the parties
specifically that the issue under
consideration was an untimely notice of
appeal. Searle's memorandum is, therefore,
not responsive to the court's expressed
concern.

Searle pleaded guilty and mentally ill on October
22, 2001 to Sexual Abuse of a Child, a second
degree felony. On May 30, 2002 Searle was
sentenced to a prison term. He filed a timely motion
to withdraw his plea, which the trial court denied.
Searle then filed a motion to reconsider the ruling
on the motion to withdraw the plea. That motion
was granted, but the trial court again denied the
motion to withdraw the plea. Searle filed his notice
of appeal on February 24, 2003, within thirty days
of denial of the motion to reconsider, but beyond
thirty days after denial of the motion to withdraw
the plea.

Under rule 4(b) of the Utah Rules of Appellate
Procedure, a timely motion to withdraw a plea tolls
the time for filing a notice of appeal until thirty days
after ruling on the motion. [FN2] A motion to
reconsider a ruling is not among the post-judgment
motions that toll the time for filing a notice of
appeal. Because the notice of appeal was filed
within thirty days of ruling on the motion to
reconsider and not within thirty days of ruling on
the motion to withdraw the plea, the notice of
appeal is untimely.

FN2. This provision was amended,
effective November 1, 2002, to add a
motion to withdraw a plea among those
that toll the time for filing a notice of
appeal. We do not address whether the
amended provision applies to this appeal
because the notice of appeal was untimely
regardless of whether the provision applies.

(Cite as: 2003 WL 22020765 (Utah App.))

Because the notice of appeal was untimely, this court is deprived of jurisdiction of the appeal. Once this court has concluded that it lacks jurisdiction, it "retains only the authority to dismiss the action." *Varian- Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah Ct.App.1998). Accordingly, we dismiss this appeal.

2003 WL 22020765 (Utah App.), 2003 UT App 295

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Addendum D

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Utah.

SALT LAKE CITY, Plaintiff and Appellee,
v.
Carrie Lynn GUFFEY, Defendant and Appellant.

No. 20000453-CA.

Jan. 19, 2001.

Preston S. Howell, Sandy, for appellant.

Simarjit S. Gill, Salt Lake City, for appellee.

Before GREENWOOD, ORME, and THORNE, JJ.

MEMORANDUM DECISION

PER CURIAM.

*1 The city moves for summary disposition under Utah Rule of Appellate Procedure 10(a)(1), arguing that defendant's notice of appeal was untimely filed. We agree.

At the conclusion of trial, defendant was found guilty of three offenses. Defendant subsequently filed a motion to arrest judgment. The trial court imposed sentence on April 21, 2000. At the same time, the trial court deferred consideration of the motion and scheduled it for a hearing on May 1. After the hearing, the trial court announced that it would deny the motion. On May 25, defendant filed a notice of appeal from both the judgment of conviction and the bench ruling. The trial court entered its findings, conclusions, and order denying the motion on June 7. The following day, defendant filed an objection taking issue with several of the findings and conclusions. The trial court has not ruled on the objection.

While defendant's notice of appeal was untimely as to her conviction because it was not filed within 30 days of the entry of the conviction as required by with Utah Rule of Appellate Procedure 4(a), the notice was timely as to the trial court's order denying defendant's motion for arrest of judgment. Under rule 4(c), "a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof." However, the day after the court entered its order denying the motion, defendant filed an objection to the court's findings and conclusions. Though 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)). Under Utah Rule of Appellate Procedure 4(b), the objection to the trial court's order suspends the running of the time for appeal until the trial court rules on the motion. *See also Regan v. Blount*, 1999 UT App 154, ¶ 4, 978 P.2d 1051. Since the trial court has not ruled on the objection, the time for appeal has not begun.

Accordingly, it is hereby ordered that the appeal is dismissed without prejudice. Defendant may file a new notice of appeal within 30 days after the trial court enters its order ruling on the objection.

2001 WL 297603 (Utah App.), 2001 UT App 17

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