

1992

Utah v. Thomas Monroe Gray : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920462 IN THE UTAH COURT OF APPEALS

STATE OF UTAH	*	
Plaintiff/Respondent,	*	BRIEF OF
vs.	*	DEFENDANT-APPELLANT
THOMAS MONROE GRAY	*	92-0462-CA
Defendant-Appellant.		Case No. 920200-CA
		Priority No. 2

BRIEF OF APPELLANT, THOMAS MONROE GRAY

ON APPEAL FROM A SENTENCE IMPOSED BY THE HONORABLE RODNEY S. PAGE,
DISTRICT JUDGE, DAVIS COUNTY, STATE OF UTAH.

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Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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STATEMENT OF ISSUE PRESENTED FOR APPEAL

POINT ONE

The issue in this appeal is whether Defendants' sentence of 0-5 years for possession of a controlled substance, ordered to run consecutive with defendants' previously imposed sentence of 0-5 years for forcible sexual abuse, was an abuse of the trial courts' discretion.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH
Plaintiff-Respondent,

*

vs.

*

Case No. 920200 CA

THOMAS MONROE GRAY
Defendant-Appellant.

*

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF JURISDICTION

This appeal is taken pursuant to the provision of Rule 3, Title II, Utah Rules of Appellate Procedure in which Defendant-Appellant appeals his conviction from the Second Judicial District Court, Davis County, State of Utah.

NATURE OF PROCEEDINGS

This is an appeal, taken pursuant to State v. Clayton, 639 P2d 168 (Ut. 1981), from a plea of guilty to possession of a controlled substance (58-37-8 (2) (a) (i) UCA), a felony of the second degree, which was entered in the Second Judicial District Court, Davis County, State of Utah.

STATEMENT OF ISSUE PRESENTED FOR APPEAL

1. The issue in this appeal is whether Defendants' sentence of 0-5 years for possession of a controlled substance, ordered to run consecutive with defendants' previously imposed sentence of 0-5 years for forcible sexual abuse, was an abuse of the trial courts' discretion.

DETERMINATIVE AUTHORITY

The following authority is determinative in this case.

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:....

(3) In the case of a felony of the third degree, for a term not to exceed five years... U.C.A. 76-3-203 (3).

A criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes. *State v. Amicone*, 689 P2d 1341, 1343 (Ut. 1984); *State v. Kinsey*, 797 P2d 428 (Ut. 1990); *Solem v. Helm* 463 U.S. 277 (1983).

STATEMENT OF THE CASE

Mr. Gray was convicted of Forcible Sexual Abuse, a third degree felony and was committed to the Utah State Prison. Gray was released on parole and while on parole was charged with possession of a controlled substance, a felony of the third degree, in violation of UCA 58-37-8 (2)(a)(i). On January 21, 1992 Defendant, entered a plea of guilty to the possession charge. The Honorable Rodney S. Page, District Court Judge, sentenced the defendant to serve 0-5 years in the Utah State Prison; the sentence to run consecutive to his previous felony conviction.

STATEMENT OF THE FACTS

On or about November 7, 1991, Thomas Gray was arrested in Salt Lake County and taken to the Davis County Jail for allegedly violating the terms of his probation (R.9). At the jail, a Deputy Sheriff, performing a routine pat-down search, discovered a six inch piece of red rubber tubing with a glass and a white substance

in the pocket of Thomas Gray (R.10). The white material tested positive as cocaine (R.10).

Because cocaine was found on Thomas Grays' presence in violation of his probation agreement, Gray was charged with possession of a controlled substance (R.2).

On December 17, 1991, Gray plead not guilty to the possession charge (R.12). On January 21, 1992 at Grays' regularly scheduled pre-trial, the defendant changed his plea to guilty and he was referred by the court to Adult Probation and Parole (A.P. & P.) for a pre-sentence report (R.17).

At Defendants' February 18, 1992 sentencing hearing, *defendants' counsel presented arguments against A.P. & P's* recommended imposition of consecutive sentences (T.3 and 4). Mr. Gray also spoke against Adult Probation and Parole recommendations (T.5). After hearing argument, the court concluded that the defendant had "long standing problems that are going to take significant time under basically custodial circumstances in order for you to work these problems out." (T.5).

The court then sentenced Mr. Gray to 0-5 years in the state prison and that the sentence run consecutive with any sentence he was already serving (T.5). The court ordered that he be give credit for the 104 days that he had been incarcerated in this matter (T.5).

SUMMARY OF ARGUMENT

The Trial Court abused its discretion by imposing a consecutive sentence.

ARGUMENT

Defendant has asked his counsel to argue that the trial court abused its discretion by imposing a consecutive sentence.

U.C.A. 76-3-203 (3) entitled Felony conviction-Indeterminate term of imprisonment-Increase of sentence if firearm used, provides in pertinent part, as follows:

"A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

....(3) In the case of a felony of the third degree, for a term not to exceed five years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission of furtherance of the felony, the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

Utah Courts of Appeal as well as the U.S. Supreme Court have noted that punishment must fit the crime and that courts should give broad discretion to legislative authority in determining the punishment for particular crimes.

As noted in State v. Amicone, 689 P2d 1341, (Ut. 1984).

A criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislature necessarily possess in determining the types and limits of punishments for crimes. Amicone, at 1343 (Ut. 1984); State v. Kinsey, 797 P2d 428 (Ut. 1990); Solem v. Helm 463 U.S. 277 (1983).

Thomas Gray served approximately twenty-two months on his forcible sexual abuse charge (T.3).

In all likelihood, if the court sentenced the defendant to serve his time concurrent, he would have served out the remainder of his original prison term or approximately three years. Those three years would have been given Mr. Gray ample time to deal with

alcohol, drug and other problems that were presented in his pre-sentence report. The Court thereby abused its discretion when it imposed the consecutive sentence.

CONCLUSION

It is therefore respectfully requested that this Court set aside Mr. Grays' sentence as an abuse of the trial courts' discretion.

Respectfully submitted this _____ day of August, 1992.

Michael D. Murphy
Attorney for
Defendant-Respondent

CERTIFICATE OF HAND DELIVERY

I, Michael D. Murphy, hereby certify that I hand delivered four true and correct copies of the foregoing Brief of Defendant-Appellant to the:

Criminal Appeals Division
Utah Attorney General
236 State Capitol
Salt Lake City, Utah

this _____ day of August, 1992.

Michael D. Murphy

CERTIFICATE OF MAILING

I certify that I have thoroughly reviewed the file and have read the transcripts and that I have raised the points/issues requested by the defendant in this brief and that on the _____ day of August, 1992, I mailed a true and correct copy of the transcript to Thomas Gray at the following address:

Michael D. Murphy