

2003

Utah v. Olsen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. : Case No. 20030902CA
ROBERT HAL OLSEN, JR., :
Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION ON ONE COUNT OF
POSSESSION OF A CONTROLLED SUBSTANCE
(METHAMPHETAMINE), A THIRD DEGREE FELONY IN
VIOLATION OF UTAH CODE ANN. § 58-37-
8(1)(a)(iii) (1999), IN THE SECOND JUDICIAL
DISTRICT COURT IN AND FOR WEBER COUNTY, THE
HONORABLE ROGER S. DUTSON, PRESIDING

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NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED

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BRIEF OF APPELLEE
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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction on one count of possession of a controlled substance (methamphetamine), a third degree felony (R. 1-2). This court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2001).

STATEMENT OF THE ISSUE ON APPEAL AND

STANDARD OF APPELLATE REVIEW

Did the trial court abuse its discretion by sentencing defendant to the statutory prison term on a third degree felony conviction?

A sentence will not be overturned on appeal unless the trial court has abused its discretion, failed to consider all legally relevant factors, or imposed a sentence that exceeds legally prescribed limits. State v. Gibbons, 779 P.2d 1133, 1135 (Utah 1989) (citations omitted). The Utah Supreme Court has noted that

"[T]he exercise of discretion in sentencing necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if it can be said that no reasonable [person] would take the view adopted by the trial court." State v. Corbitt, 2003 UT App. 417, ¶6, 82 P.3d 211 (quoting State v. Gerrard, 584 P.2d 885, 887 (Utah 1978) (quotations omitted; alternations in original)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-3-203, governing indeterminate terms of imprisonment for felony convictions, states:

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, unless the statute provides otherwise, for a term not to exceed five years.

Utah Code Ann. § 76-3-203 (2002).

STATEMENT OF THE CASE

Defendant was originally charged with one count of possession of a controlled substance (methamphetamine) with intent to distribute, a second degree felony (R. 1-2). The charge was later amended to possession of a controlled substance, a third degree felony (Id.). Defendant entered a no contest plea to the reduced charge (R. 19-24). The court decreased defendant's bail from \$10,000 to \$5000 and referred defendant to Adult Probation and Parole for a presentence investigation report

(R. 16, 19-24). Defendant subsequently failed to appear for sentencing, and the court issued a no bail arrest warrant (R. 26, 30). Two weeks later, defendant appeared in court and was sentenced to zero to five years in prison, with credit for time served (R. 31-32). This timely appeal followed (R. 34).

STATEMENT OF THE FACTS

Because defendant waived his preliminary hearing and the case did not go to trial, the record facts are necessarily limited. The responding officer provided the following factual account in his probable cause affidavit:

Called to a D[omestic] V[iolence] in progress at 29th and Jefferson. Suspect reported to be leaving east on 29th. Noticed [defendant] walking fast at 29th & Jackson. Asked him to stop and asked him his name. He ran and threw a quarter ounce of methamphetamine and had individual baggies consistent w/selling.

R. 9. At the plea hearing, the State provided the following undisputed factual basis for defendant's no contest plea:

The police were called to a domestic disturbance. When they got there, the defendant was leaving the scene. And they tried to stop him to talk to him about what happened, and he ran and threw something that they retrieved and discovered [it] was a quarter ounce of methamphetamine.

R. 43 at 5.

SUMMARY OF ARGUMENT

Defendant argues that the sentencing court abused its discretion by failing to consider all legally relevant sentencing factors and, consequently, imposing an excessive sentence. For

this argument, defendant relies on State v. Galli, 967 P.2d 930 (Utah 1998).

Defendant's reliance is misplaced. Galli is a consecutive sentencing case, governed by the statute regulating imposition of consecutive sentences. This case involves a single charge and a single sentence. Galli does not apply.

The court here sentenced defendant within the statutory limits for the crime to which he entered his plea. Moreover, even considering the factors defendant highlights, the court still retained the discretion to send him to prison rather than order probation. A trial court has no obligation to favor rehabilitation over punishment. Where the trial court followed the law, it cannot be said that "no reasonable [person] would take the view adopted by the trial court." State v. Gerrard, 584 P.2d 885, 887 (Utah 1978). Consequently, the trial court did not abuse its discretion.

ARGUMENT

DEFENDANT HAS FAILED TO DEMONSTRATE
THAT THE TRIAL COURT ABUSED ITS
DISCRETION BY SENTENCING HIM TO THE
STATUTORY SENTENCE ON A THIRD
DEGREE FELONY

Defendant argues that the trial court abused its discretion by failing to consider "all the legally relevant factors" and, consequently, by imposing an "excessive sentence" of zero to five years in prison on a third degree felony conviction. Br. of Aplt. at 11. Specifically, defendant contends that the trial

court did not consider either his rehabilitative needs or his criminal history. See id. at 12-13. According to defendant, had the trial court properly weighed these factors, it would not have sentenced him to prison. Id. at 15. For this proposition, defendant relies wholly on State v. Galli, 967 P.2d 930 (Utah 1998).

Defendant's argument fails because he is applying the wrong law to the facts of his case. State v. Galli is a consecutive sentencing case, governed by Utah Code Ann. § 76-3-401. In that case, the supreme court reversed the trial court's imposition of consecutive sentences because the court did not properly consider certain statutory factors before imposing consecutive sentences. Id. at 938-39. This case, however, does not involve consecutive sentencing. Defendant here was convicted of a single felony and received a single sentence. The law applicable to consecutive sentencing does not apply to this case.

Defendant's case is governed by Utah Code Ann. § 76-3-203, governing indeterminate terms of imprisonment for felony convictions. It provides:

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, unless the statute provides otherwise, for a term not to exceed five years.

Utah Code Ann. § 76-3-203.

Here, the trial court sentenced defendant to the statutory term for a third degree felony. Such a sentence, on its face, does not constitute an abuse of discretion. See Gerrard, 584 P.2d at 887-88.

Moreover, defendant has not included the presentence investigation report as part of the record on appeal. See Utah R. Crim. P. 21.5(b) (burdening defendant with responsibility of notifying court clerk that presentence investigation report should be made part of the record on appeal). Under such circumstances, this Court must presume the correctness of the disposition below. State v. Rawlings, 829 P.2d 150, 152-53 (Utah App. 1992). This presumption includes the trial court's consideration of both defendant's rehabilitative needs and his criminal history, typically included within the presentence investigation report.

In any event, even considering defendant's rehabilitative needs and his criminal history, the court retained the discretion to send defendant to prison rather than to follow the recommendation of Adult Probation and Parole. See State v. Houk, 906 P.2d 907, 909 (Utah App. 1995) (trial court not bound by AP&P recommendations); State v. Sibert, 310 P.2d 388, 393 (Utah 1957) ("Probation is not a matter of right, and this is so no matter how unsullied a reputation one convicted of a crime may be able to demonstrate to the trial judge"). 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) (citation omitted).

Here, the trial court knew not only that defendant had been convicted of possession of methamphetamine, but also that he had in his possession a quantity of baggies consistent with distribution of the drug. See R. 9, R. 43: 6; State v. Lipsky, 639 P.2d 174, 176 (Utah 1981) (sentencing court may rely on information from varied sources). With undisputed information before it, the trial court determined that imposing a prison term represented a more just disposition than probation. See, e.g., State v. Nuttall, 861 P.2d 454, 458 (Utah App. 1993) (no abuse of discretion where trial court emphasized punishing defendant rather than rehabilitating him); State v. Howell, 707 P.2d 115, 117-19 (Utah 1985) (recognizing that sentencing judges generally give considerable weight to circumstances of crime). Such a disposition is well within the discretion of a sentencing court.

On appeal, this Court should exercise great restraint in overturning the trial court's determination. The trial court was in the most advantaged position to make the highly individualistic assessment required to fashion a just sentence. See State v. Woodland, 945 P.2d 665, 671 (Utah 1997) (sentencing "necessarily reflects the personal judgment of the court" (quotations and citation omitted)). Certainly, the sentencing court's assessment of defendant's character may have been based

at least partially on its personal observation of defendant's body language, demeanor, and tone of voice, none of which are reflected in the record on appeal. See State v. Pena, 869 P.2d 932, 939 (Utah 1994).

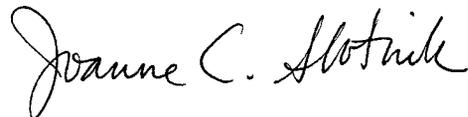
In this case, the trial court evaluated the evidence, exercised its discretion within the bounds of the law, and imposed a proper statutory penalty for the offense to which defendant entered his plea. Because it cannot be said that "no reasonable [person] would take the view adopted by the trial court," the court did not abuse its discretion. Gerrard, 584 P.2d at 887.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction for one count of possession of a controlled substance, a third degree felony.

RESPECTFULLY submitted this 10th day of June, 2004.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Dee W. Smith, attorney for appellant, Public Defender Association of Weber County, #200, Ogden, Utah 84401, this 10th day of June, 2004.

Joanne C. Slotnick