

2004

# State of Utah v. Justin Warren Bass, (incarcerated) : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

PLAINTIFF/APPELLEE,

v.

JUSTIN WARREN BASS, (incarcerated)

DEFENDANT/APPELLANT.

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Case No. 20040861-CA

**ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF APPELLANT

This is an appeal from a final judgment, sentence and conviction for attempted sodomy on a child, a first degree felony, in violation of Utah Code Ann. § 76-5-403.1, entered in the Third District Court in and for Salt Lake County, State of Utah, the Honorable Deno Himonas, Judge, presiding.

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UTAH APPELLATE COURT  
OCT 11 2005

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :  
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 : Case No. 20040861-CA  
 PLAINTIFF/APPELLEE, :  
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 v. :  
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TABLE OF CONTENTS

ARGUMENT ..... 1

TABLE OF AUTHORITIES

Bass’s opening brief at 15-16 ..... 3

Bass’s opening brief at 16-20 ..... 3

(R. 89 at 6, 12) ..... 3

(R. 89 at 6-7) ..... 4

(R. 98 at 11) ..... 2

R. 89 at 4, 9 ..... 5, 6

Rampton v. Barlow, 464 P.2d 378 (Utah 1970) ..... 7

Skokos v. Corradini, 900 P.2d 539, 541-43 (Utah App. 1995) ..... 6

State v. Bullock, 791 P.2d 155, 158-59 (Utah 1989) ..... 1, 2

State v. Gerrard, 584 P.2d 885, 887 (Utah 1978) ..... 7

State v. Hammond, 2001 UT 92, ¶¶ 22-25, 34 P.3d 773 ..... 3, 8

State’s brief at 7-8 ..... 1

State’s brief at 8 ..... 2

State’s brief at 9 ..... 3

State’s brief at 11 n.4 ..... 4

State’s brief at 13 ..... 5

State’s brief at 13-14 & 15 ..... 5

(CONTINUED)

State’s brief at 15 ..... 6

State’s brief at 15-16 ..... 7

Title 77, Chapter 16a, except as provided in Utah Code Ann. § 76-5-406.5 ..... 4

Utah Code Ann. § 76-3-201..... 4

Utah Code Ann. § 76-3-406 ..... 4

Utah Code Ann. § 76-5-202, aggravated murder ..... 4

Utah Code Ann. § 76-5-203, murder ..... 4

Utah Code Ann. § 76-5-301.1, child kidnapping ..... 4

Utah Code Ann. § 76-5-302, aggravated kidnapping ..... 4

Utah Code Ann. § 76-5-402.1, rape of a child ..... 4

Utah Code Ann. § 76-5-402.3, object rape of a child ..... 4

Utah Code Ann. § 76-5-403.1, sodomy on a child ..... 4

Utah Code Ann. Subsections 76-5-404.1(4) and (5),  
aggravated sexual abuse of a child ..... 4

Utah Code Ann. § 76-5-405, aggravated sexual assault  
Subsections (5), (6), and (7) ..... 4

Utah Code Ann. § 76-5-406.5 ..... 3

Utah Code Ann. § 76-5-406.5 (R. 89 at 4, 6) ..... 2

Utah Code Ann. § 76-5-406.5(j) ..... 5

(CONTINUED)

Utah Code Ann. § 76-5-406.5(2) .....	6, 8
Utah Code Ann. § 77-18-1 .....	4
Utah Constitution, Article V § 1 .....	7

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ARGUMENT

The State argues that trial counsel for Bass invited the trial court's error in sending Bass to prison, because trial counsel initially conceded that the trial court had no authority to do otherwise if Bass were not accepted into a treatment program. State's brief at 7-8.

The doctrine of invited error is designed to stop parties from taking one strategically advantageous position at trial, and then reversing that position on appeal in the event that the first strategy failed at trial. See, e.g., State v. Bullock, 791 P.2d 155, 158-59 (Utah 1989).

As a factual matter, the doctrine of invited error has no application here. While trial counsel initially erroneously conceded that the trial court would have no

discretion to sentence Bass to prison if he were not accepted into a treatment facility (R. 98 at 11), he later argued that the trial court should hold Bass in jail until a bed became available in a treatment center, in order to effectuate the legislative intent of the probation statute, Utah Code Ann. § 76-5-406.5 (R. 89 at 4, 6). In his initial erroneous concession, trial counsel was not trying to obtain a favorable ruling from the trial court, but was making an erroneous and harmful concession. Once he recognized the proper favorable position for his client, he asked the trial court to adopt it prior to the ultimate ruling. He did not attempt to lead the court into error.

As a legal matter, the invited error doctrine does not apply to block plain error analysis when there is no conceivable strategic basis for the party's error at trial, or when there is ineffective assistance of counsel. See id.

The State cites the concurring opinion of Justice Zimmerman in Bullock for the proposition that parties should generally be bound by the conscious choices of their lawyers. State's brief at 8. The controlling majority opinion, in which Justice Zimmerman "fully concur [red]," id. at 160, clearly recognizes that even strategic choices of lawyers are reviewed for ineffective assistance. See Bullock, 791 P.2d at 158-59.

There was no strategic reason for trial counsel's initial erroneous concession, and Bass has asserted and justified the application for the plain error and ineffective

assistance of counsel doctrines in his opening brief. See Bass's opening brief at 16-20. Accordingly, this Court should reject the State's invited error argument.

The State attempts to refute the claim of ineffective assistance, arguing that Bass cannot show a reasonable probability of a different result, because the PSR did not contain a full analysis of the statutory prerequisites to probation, and because Bass cannot prove that the trial court would have granted him probation. State's brief at 9.

As a legal matter, the shortcomings in the PSR analysis are an independent basis for reconsideration of Bass's sentence, see Bass's opening brief at 15-16, discussing State v. Hammond, 2001 UT 92, ¶¶ 22-25, 34 P.3d 773 (reversing and remanding for resentencing for, inter alia, failure of evaluator to consider central issues defined by § 76-5-406.5, the probation statute). The shortcomings in the evaluation do not decrease the possibility that the trial court would have granted and will grant Bass probation once the trial court understands its authority to do so.

As a factual matter, Bass has established a reasonable probability that the trial court would have granted him probation in the absence of the errors, where the trial court expressly recognized that he did not have the power to sentence Bass to probation (R. 89 at 6, 12), and indicated that while he had to enforce the legislature's will in applying the plain terms of the statute, "it does appear to be a

topsy turvy world [.]” (R. 89 at 6-7). Particularly where the trial court was so appropriately intent on following the will of the legislature (R. 89 at 6-7), once the trial court is informed that sentencing Bass to probation and requiring the Fremont program to accept him is entirely consistent with the legislature’s intent, there is a reasonable probability that the trial court would have granted, and will grant Bass probation.

The State cites but does not quote or include in its addendum Utah Code Ann. § 76-3-406, and indicates that this statute emphasizes the narrowness of the probation statute. State’s brief at 11 n.4. § 76-3-406 does not emphasize the narrowness of the probation statute, but defers to that statute.<sup>1</sup>

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<sup>1</sup>76-3-406 provides:

Notwithstanding Sections 76-3-201 and 77-18-1 and Title 77, Chapter 16a, except as provided in Section 76-5-406.5, probation shall not be granted, the execution or imposition of sentence shall not be suspended, the court shall not enter a judgment for a lower category of offense, and hospitalization shall not be ordered, the effect of which would in any way shorten the prison sentence for any person who commits a capital felony or a first degree felony involving:(1) Section 76-5-202, aggravated murder;(2) Section 76-5-203, murder;(3) Section 76-5-301.1, child kidnapping;(4) Section 76-5-302, aggravated kidnapping;(5) Section 76-5-402.1, rape of a child;(6) Section 76-5-402.3, object rape of a child;(7) Section 76-5-403.1, sodomy on a child;(8) Subsections 76-5-404.1(4) and (5), aggravated sexual abuse of a child;(9) Section 76-5-405, aggravated sexual assault; or(10) any attempt to commit a felony listed in Subsections (5), (6), and (7).

The State argues that interpreting the probation statute, this Court should consider the legislature's intent, as expressed by its plain language. State's brief at 14-15. The State argues that interpreting the probation statute, this Court should consider the statute in its entirety. State's brief at 13.

Mr. Bass could not agree more. Accordingly, in assessing the sentencing appeal, this Court should recognize that Mr. Bass's being sent to prison and being denied probation because he is not dangerous enough (e.g. R. 89 at 4, 9), violates the clearly expressed intentions of the legislature that those who do not present an immediate danger to the community if placed in a residential treatment program are among the very few sex offenders who receive probation. Utah Code Ann. § 76-5-406.5(j).

The State argues that the intent of the probation statute is to protect children from convicted sex offenders. State's brief at 13-14.

Mr. Bass could not agree more. Accordingly, in assessing the sentencing appeal, this Court should recognize that Mr. Bass's being sent to prison and being denied probation because he is not dangerous enough, and because Fremont wishes to reserve the residential treatment beds for more dangerous offenders being

paroled from the prison (e.g. R. 89 at 4, 9) flies in the face of the legislature's intent to protect children from convicted sex offenders.

The State argues that the trial court has no jurisdiction to grant Bass probation and order him held in the jail until a bed becomes available at a residential treatment facility. State's brief at 15. The probation statute expressly recognizes the trial courts' authority to do just this. See Utah Code Ann. § 76-5-406.5(2) ("A term of incarceration of at least 90 days is to be served prior to treatment and continue until the time when bed space is available at a residential sexual abuse treatment center as provided under Subsection (3) and probation is to be imposed for up to a maximum of ten years.").

The State argues that the judicial branch is barred by the doctrine of separation of powers from interfering with Corrections' allocation of its resources. State's brief at 15.

It is an innate and appropriate function of a court to insure that government actors, regardless of their branch of origination, comply with the law in all contexts, including their use and allocation of our government resources. See, e.g., Skokos v. Corradini, 900 P.2d 539, 541-43 (Utah App. 1995) (discussing judicial duty to review the lawfulness of policies promulgated by legislative or executive branch

officers; reversing trial court ruling that complaint challenging city's handling of golf course revenues presented non-justifiable political questions).

The State's authority, Rampton v. Barlow, 464 P.2d 378 (Utah 1970), does not support the State's separation of powers argument. In Rampton, the court struck a statute under the separation of powers provision of the Utah Constitution, Article V § 1, because the statute granted members of the senate and house of representatives the power to appoint people to the board of education, and required legislative approval of people appointed to the board of education, and thus effectively gave the legislative branch control of the board, which performs an executive branch function. See id. at 383.

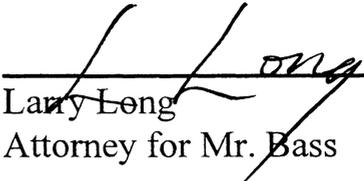
Rampton thus exemplifies, and does nothing to limit, the courts' authority to insure that all government actors comply with the law.

The State cites State v. Gerrard, 584 P.2d 885, 887 (Utah 1978), in support of its argument that Bass should be denied relief on appeal, because Bass did not prove that "no reasonable [person]" would have sentenced Bass as the trial court did. State's brief at 15-16.

Gerrard is one of many Utah cases recognizing the trial court's significant discretion in sentencing criminal defendants. It is because the trial court underestimated its sentencing authority due to his misunderstanding the law which

governed his sentencing decision that this Court should reverse the trial court's sentence and remand this matter to the trial court in an opinion informing that court that it does have the authority to grant Bass probation. Compare, e.g., Hammond, 2001 UT 92, ¶¶ 16-20, 34 P.3d 773 (remanding for resentencing in part because trial court apparently misunderstood the governing law). Particularly where the evaluation which should have informed the trial court's sentencing decision failed to assess all of the necessary criteria, this Court should remand for resentencing, so that all proper procedures are complied with in the imposition of Bass's sentence. See id. at ¶¶ 22-25 (reversing and remanding for resentencing for, inter alia, failure of evaluator to consider central issues defined by § 76-5-406.5, the probation statute).

Respectfully submitted this 11<sup>th</sup> day of October, 2005.

  
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Larry Long  
Attorney for Mr. Bass

CERTIFICATE OF DELIVERY

I hereby certify that I HAND DELIVERED two true and correct copies of the foregoing to Assistant Attorney General Joanne C. Slotnik, 160 East 300 South, 6<sup>th</sup> Floor, and P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 14<sup>th</sup> day of October, 2005.

A handwritten signature in cursive script, appearing to read "Karen R. Smith". The signature is written in black ink on a white background.