2004

State of Utah v. John L. Legg : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20041035-CA
vs.	:	
JOHN L. LEGG,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR THEFT BY RECEIVING STOLEN PROPERTY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-408 (WEST SUPP. 2005), AND ARSON, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-102 (1)(b) (WEST 2004), IN THE THIRD JUDICIAL DISTRICT COURT, TOOELE COUNTY, THE HONORABLE RANDALL SKANCHY PRESIDING

KENNETH A. BRONSTON (4470)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Fl.
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

ALAN J. BUIVIDAS
7321 South State St., Ste. A
Midvale, Utah 84047

Attorney for Appellant

GARY SEARLE
Deputy Tooele County Attorney

Attorneys for Appellee

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20041035-CA
vs.	:	
JOHN L. LEGG,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - - -

APPEAL FROM A CONVICTION FOR THEFT BY RECEIVING STOLEN PROPERTY, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-408 (WEST SUPP. 2005), AND ARSON, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-102 (1)(b) (WEST 2004), IN THE THIRD JUDICIAL DISTRICT COURT, TOOELE COUNTY, THE HONORABLE RANDALL SKANCHY PRESIDING

KENNETH A. BRONSTON (4470)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Fl.
PO BOX 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180

ALAN J. BUIVIDAS
7321 South State St., Ste. A
Midvale, Utah 84047

Attorney for Appellant

GARY SEARLE
Deputy Tooele County Attorney

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20041035-CA
vs.	:	
JOHN L. LEGG,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a conviction for theft by receiving stolen property, a second degree felony, in violation of UTAH CODE ANN. § 76-6-408 (West Supp. 2005), and arson, a third degree felony, in violation of UTAH CODE ANN. § 76-6-102 (1)(b) (West 2004), in the Third Judicial District Court, Tooele County, the Honorable Randall Skanchy presiding. This Court has jurisdiction of this appeal pursuant to UTAH CODE ANN. § 78-2-3 (2)(e) (West 2004).[1]

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the trial court abuse its discretion in denying defendant's motion to dismiss where defendant's 120-day disposition request was prematurely filed?

---

[1] Because no changes to code sections relevant to the issues in this case have been made since the time the offenses were committed, the State cites to the latest edition of the code.

"[The appellate court] review[s] a trial court's determination that a defendant's charges should be dismissed pursuant to the Speedy Trial Statute for abuse of discretion." *State v. Coleman*, 2001 UT App 281,¶ 3, 34 P.3d 790 , *cert. denied*, 42 P.3d 951 (Utah 2002). "An appellate court will find abuse of discretion only where there is no 'reasonable basis in the record to support' the trial court's Speedy Trial Statute determination of 'good cause.'" *Id.* (citations omitted).

2. Did the trial court violate defendant's right to allocution, to counsel, and to presentation of all material information at his sentencing?

The State confesses error as to the first claim, necessitating a remand for resentencing.

STATUTES AND RULE

The following statutes are attached at Addendum A:

UTAH CODE ANN. §§ 77-29-1 - 2 (West 2004);
Utah Rules of Criminal Procedure, Rule 22.

STATEMENT OF THE CASE

120-day disposition

On November 30, 2003, defendant was arrested for possession of a stolen vehicle and arson. R1. On December 9, 2003, defendant signed a "Notice and Request for Disposition of Pending charges" (120-day disposition request), which referred to "arson and auto theft" charges, assertedly pending against him in Tooele County. R7. The 120-day notice was stamped, "received," on January 5, 2004. *Id.* The notice also bore a hand-written certification that indicated that the 120-day notice had been received on January 8, 2004. *Id.*

The same day, the authorized agent who certified receipt of the 120-day disposition request mailed it to the Tooele County Attorney's Office. R6. Six days later, on January 14, 2004, an information charging defendant with theft by receiving stolen property (Count I) and arson (Count II) was filed in the Third District Court, Tooele County. R3-2.

On March 8, a two-day trial was set for May 19 and May 20. R28. On April 26, however, that setting was vacated and the trial set to May 6, based on defendant's asserted conflict with his counsel, Scott Broadhead, and to ensure that defendant was tried within the 120-day period (R28-26, 42-41; 271:40-41);

On May 4, 2004, defendant, represented by counsel, moved to dismiss the information with prejudice because defendant had not been tried within 120 days of either December 9, 2003 or January 5, 2004. R52-50. Two days later, on May 6, the trial court heard defendant's motion and denied it. R54, 271:26-37. The trial court found that January 8, 2004 marked the beginning of the 120-day period. R271:35. Based on that date, the court concluded that the 120-day period expired on May 10. *Id.* The court then granted defendant's stipulated request to set trial for May 25, and his request to engage a defense expert to review the State's arson expert's report. R36-29, 54; 271:36-37.

On May 24, the May 25 trial setting was vacated and a scheduling hearing set for June 6, 2004, at which time this Court denied defendant's request for an interlocutory appeal. R56. The district court set trial for July 20. R58.

On July 19, the trial court granted Mr. Broadhead's request to withdraw, appointed Wayne Freestone as substitute counsel, struck the July 20 trial setting, and set defendant's

new motion to dismiss for hearing at a new pretrial conference. R70-68.

On August 16, the trial court granted Mr. Freestone's request to withdraw. It then appointed L. Douglas Hogan as standby counsel, with which defendant agreed. R93-92; 271:38-39.

On August 23, defendant, pro se, with Mr. Hogan acting as standby counsel, renewed his motion to dismiss, arguing that the Department of Institutional Operations had improperly retained his 120-day notice for 30 days—December 9 to January 8—before processing it, and that the120-day period had expired. R103-100; 271:47, 49-53. The prosecutor noted that the State would have tried defendant within the 120-day period on May 6, but for defendant's repeated requests for continuances—first to locate an expert to counter the State's arson expert, then for defendant to prepare after firing his attorneys, and finally because defendant suffered physical injuries in a prison altercation. R62; 271:54-55. The trial court again denied defendant's motion to dismiss, concluding that the 120-day disposition period began to run from the date the information was filed—January 12, 2004—and expired 120 days later—May 29. R271:58.

Trial was held November 3. Defendant represented himself with standby counsel from approximately June 30 through November 3. During that period, defendant sought repeated hearings or continuances for a variety of reasons: conflicts with his various counsel (R66, 74-71, 83-81, 90-89, 93-92, 107-104, 137-136, 143-142; 271:60, 63-71); challenges to denials of his repeated motions to dismiss based on the expiration of the 120-day disposition period (R70-68, 93, 103-100, 112-109; 271:40-41, 49-53); injuries incurred in

a prison assault (R62); petition for interlocutory appeal (R67, 86, 93, 271:41-42); challenge to jurisdiction (R74-71; 271:58-60); request to proceed pro se (R88; 271:60); requests for transcripts and discovery (R95-93; 115-114; 271:45); and preparation for trial (R151-149, 153).[2]

Trial and judgment[3]

At trial, defendant continued to represent himself, with Mr. Jon D. Williams acting as standby counsel. R143-142; 269:1-262; 271:63-71. A jury convicted defendant on both charges. R189.

Sentencing

Defendant also represented himself at his sentencing on January 24, 2005, with Mr. Williams again acting as standby counsel. R223-222; 271:287. The trial court began by asking defendant if there was anything in the presentence investigation report (PSI) that needed to be addressed before sentencing. R271:76. Defendant asserted that the PSI contained inaccuracies as to his criminal and social history, mitigating circumstances, and victim the impact statement. R271:76-78. When defendant engaged in a meandering attack on the Utah sentencing scheme, the trial court cut defendant off and again asked defendant to specifically identify the inaccuracies in the PSI. R271:79. For the remainder of his colloquy with the court, defendant was only able to state that the PSI mistakenly attributed 40 arrests to him and placed his 1987 business burglary in West Valley instead of Salt Lake

---

[2] The substance and chronology of the entire proceedings is set out at Appendix B.

[3] The facts of the offenses are unnecessary to the disposition of the case.

City. R271:79-84. Frustrated with his inability to articulate himself, defendant had the following colloquy with the court:

> Defendant: You won't let me even conduct myself as an attorney.
>
> The Court: Well, you're not an attorney and I've already advised you that you'd be foolish to represent yourself, but you've gone ahead and chosen to do that anyway.
>
> Defendant: Okay, then why don't you appoint counsel and we'll get all this straightened out?
>
> The Court: Because you've chosen to go the other route.
>
> Defendant: Make up your mind.
>
> The Court: Make up my mind? Okay. I sentence you on these charges to theft by receiving stolen property, a second degree felony, 1 to 15 years in the Utah State Prison. On arson, zero to five years at the Utah State Prison. I'll run them consecutive to each other. I'll do so based upon the aggravating circumstances that your adult record is [legion] and as a result of its being [legion]—
>
> Defendant: There ain't even a victim. Where's your victim.
>
> The Court: We're done now because sentencing is over. Please take him to the Utah State Prison.

R271:84-85.[4]

The signed minutes of the sentencing hearing and the sentencing order reflect that defendant was sentenced to a statutory one-to-fifteen-year term on his conviction for theft by receiving stolen property and to a statutory zero-to-five-year term on his conviction for arson. R225-222; 271:85. They also show that the sentences were ordered to run

---

[4] The transcript of the sentencing is attached at Addendum C.

consecutively to one another and to the sentence that defendant was currently serving. R225-222.

Consolidation of appellate cases

On November 22, 2004, after the jury rendered its verdict, but before the court sentenced him on January 24, 2005, defendant filed a "Notice for a New Trial." R199. On November 26, the trial court denied the motion as untimely. R203. Defendant filed a notice of appeal on November 28, 2004 from the "final judgment and verdict," and this Court assigned an official case number to the appeal—No. 20041035-CA. R209-208. After he was sentenced, defendant filed another notice of appeal on February 2, 2005, now appealing from the "order, judgment, and commitment entered on January 24." R230. The Court assigned another official case number to the appeal—No. 20050114-CA. R231. The Court consolidated both cases under the initial case number. R239.

Defendant requested appointment of appellate counsel, and following remand by this Court, the trial court appointed defendant's current counsel. R255-254.

SUMMARY OF ARGUMENT

POINT I

The trial court properly denied defendant's repeated motions to dismiss the case based on the prosecutor's alleged failure to try his case within the time period specified under Utah's speedy trial statute. Defendant delivered his 120-day disposition request to prison authorities before the information was filed. Consequently, defendant's premature request was a legal nullity, having no effect on triggering the 120-day disposition period.

Defendant's arguments that due process requires that his disposition request be held to have "kicked in" on the date the information was filed are unpreserved, unsupported by the record, and without merit.

POINT II

The State confesses harmful error in that the trial court sentenced defendant before it afforded him the opportunity for allocution. The State neither concedes nor resists defendant's claim that the prosecutor was not given an opportunity to present information material to the imposition of sentence or that the trial court violated his rights by refusing to grant defendant's request for counsel at sentencing. The State suggests, however, that since the case must be remanded for the trial court to resentence defendant, the prudent course would be for this Court to direct that counsel for defendant be appointed for sentencing.

ARGUMENT

POINT I

DEFENDANT'S PREMATURE FILING RENDERED HIS 120-DAY DISPOSITION REQUEST A NULLITY, AND HIS ARGUMENTS THAT IT SHOULD AUTOMATICALLY "KICK IN" AT THE FILING OF THE INFORMATION ARE UNPRESERVED AND MERITLESS

Defendant claims that "the trial court abused its discretion in finding that good cause existed not to dismiss the charges against [him] because [he was not tried] within 120 days after receiving notice of [his] written demand as required under UTAH CODE ANN. § 77-29-1." Aplt. Br. at 24.[5] Recognizing for the first time on appeal that his 120-day notice was filed

[5] Defendant also claims that his rights were similarly violated under the United States and Utah constitutions. Aplt. Br. at 24. He does not, however, apply any federal or state constitutional analysis to his claim. Therefore, the State declines to address

prematurely, and was thus a nullity, defendant argues that his request should nevertheless have "kick[ed] in" when the information was ultimately filed because prison authorities breached their duty to inform him of the filing of the information under Utah Code Ann. § 77-29-2 (West 2004). Aplt. Br. at 24-29. The Court should not consider the argument because it was never raised in the trial court, and defendant has not argued plain error or exceptional circumstances on appeal. In any event, there is no record evidence that prison authorities breached any duty under section 77-29-2.

A. Defendant filed a premature 120-day disposition request.

Defendant signed his 120-day disposition request on December 9, 2003, referring to his arrest for "arson and auto theft," charges assertedly pending in Tooele County. R7. The 120-day disposition request was stamped "received" on January 5, 2004, but it also bore a hand-written certification that indicated that it had been received on January 8, 2004. *Id.* Six days later, on January 14, an information charging defendant with theft by receiving stolen property and arson was filed in the Third District Court, Tooele County. R3-2.

B. A prematurely-filed 120-day disposition request is a legal nullity.

Utah's "speedy trial" statute (also known as the "detainer" statute) provides that "[w]henever a prisoner is serving a term of imprisonment in a state prison . . . and *there is pending against the prisoner in this state any untried . . . information*, and the prisoner shall deliver to . . . the custodial officer in authority, a written demand specifying the nature of the

---

defendant's constitutional claims. *See State v. Brandley*, 972 P.2d 78, 81 n.3 (Utah Ct. App. 1998) (refusing to address claim that counsel's ineffective assistance violated rights under article I, section 12, of the Utah Constitution where "no independent authority or argument" was provided).

charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the delivery of the written notice." UTAH CODE ANN. § 77-29-1(1) (West 2004) (emphasis added).

"Deciding whether the district court properly denied [the defendant's] motion to dismiss pursuant to the detainer statute requires a two-step inquiry." *State v. Heaton*, 958 P.2d 911, 916 (Utah 1998). "First, we must determine when the 120-day period commenced and when it expired. Second, if the trial was held outside the 120-day period, we must then determine whether 'good cause' excused the delay." *Id.*

In *State v. Lindsay*, 2000 UT App 379, 18 P.3d 504, this Court held that the second step of the foregoing inquiry was obviated by the facts of that case. *Id.* at ¶ 9. There, this Court held that the delivery of a 120-day disposition request to the custodial authority before the filing of the information was a nullity in triggering the 120-day disposition period. *Id.* at ¶ 14. The Court noted that the plain language of the statute required that "formal charges must be pending against [the defendant] when the request is delivered." *Id.* at ¶ 10. The Court observed that "[a]n action cannot be pending when it is yet to be commenced." *Id.* at ¶ 12 (citing Utah R. Crim. P. 5 (a)). Rule 5, Utah Rules of Criminal procedure states, "all criminal prosecutions . . . shall be commenced by the filing of an information . . . ." The Utah Supreme Court has explained that "a written signed accusation does not become an information until *filed* with the clerk of the court." *State v. Leatherbury*, 2003 UT 2, ¶ 12, 65 P.3d 1180 (citing UTAH CODE ANN. § 77-1-3(3) (1999)) (emphasis added). Because Lindsay delivered his 120-day disposition request before the information was filed, his

request was premature, a legal nullity, and therefore "[did not] trigger[] the statutory right to demand trial on any untried . . . information." *Lindsay*, 2000 UT App 379, ¶ 14 (quoting *State v. Wright*, 745 P.2d 447, 450-51 (Utah 1987)) (brackets added). Consequently, this Court upheld the trial court's denial of the defendant's motion to dismiss. *Id.* at ¶ 16. See *Leatherbury*, 2003 UT 2, ¶¶ 12-13 (same).

As in *Lindsay* and *Leatherbury*, because defendant's 120-day disposition request was filed prematurely and thus was of no effect. This Court should therefore uphold the trial court's denial of defendant's motion to dismiss. Although the trial court did not deny the motion based on defendant's premature filing of his disposition request, "[i]t is well settled that an appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action . . . .'" *State v. Topanotes*, 2003 UT 30, ¶ 9, 76 P.3d 1159 (citations omitted).

Here, like the defendants in *Lindsay* and *Leatherbury*, defendant filed a premature 120-day disposition request. The trial court found that defendant filed his 120-day disposition request on January 8, 2004. R271:35. Defendant does not challenge that finding. Aplt. Br. at 32. The information was filed on January 14, 2004. R271:58. Thus, the trial court's undisputed findings show that defendant's request was prematurely filed before the information was filed. Based on these facts and the foregoing discussion, defendant's premature request was a legal nullity and the trial court properly denied his motion to dismiss.

C. Defendant's due process claim that his premature filing "kicked in" when the information was filed is unpreserved, unsupported by any exception to the preservation rule or the record, and substantively without merit.

1. Defendant failed to preserve his argument in the trial court and does not argue plain error or exceptional circumstances on appeal.

In *Lindsay*, this Court stated: "[A] premature request for disposition does not later 'kick in" once the information is ultimately filed . . . . A premature request is simply a nullity, having no legal effect." *Lindsay*, 2000 UT App 379, ¶ 14. *See also Leatherbury*, 2003 UT 2, ¶ 12. For the first time on appeal, defendant recognizes *Lindsay* and *Leatherbury* and that his request was filed prematurely. Aplt. Br. at 26-27. He nevertheless argues that due process demands that his disposition request should be held to have "kicked in" on the day the information was filed, primarily because the prison authorities breached their duty to inform him when the information had actually been filed as required by UTAH CODE ANN. § 77-29-2 (West 2004). Aplt. Br. at 27. The Court should decline to consider this argument because defendant did not preserve it in the trial court and defendant does not argue plain error or exceptional circumstances on appeal.

"'Generally speaking, a timely and specific objection must be made [at trial] in order to preserve an issue for appeal.'" *State v. Winfield*, 2006 UT 4, ¶ 14, 543 Utah Adv. Rep. 31 (quoting *State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551) (additional citations omitted). "When a party raises an issue on appeal without having properly preserved the issue below, '[this Court will] require that the party articulate an appropriate justification for appellate re . iew, . . . specifically, the party must argue either plain error or exceptional circumstance.'" *Id* (quoting *Pinder*, 2005 UT 15, ¶ 45) (additional quotations and citations omitted).

Defendant did not raise his due process claim below. Indeed, he did not even acknowledge that his 120-day disposition request was premature and therefore a legal nullity. Consequently, his due process claim is unpreserved. *See id.*

"[I]n general, appellate courts will not consider an issue, including constitutional arguments, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances." *State v. Dean*, 2004 UT 63, ¶ 13, 95 P.3d 276 (citing *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346). Further, a party seeking review of an unpreserved issue must "articulate the justification for review in the party's opening brief." *Pinder*, 2005 UT 15, ¶ 45 (citing *Coleman v. Stevens*, 2000 UT 98, ¶ 9, 17 P.3d 1122). When a party fails to do so, an appellate court will refuse to consider the unpreserved issue. *Id.* at ¶¶ 50, 58 (refusing to consider Pinder's unpreserved claims because he "failed to argue plain error or show exceptional circumstances on appeal"). *Accord State v. Pugmire*, 898 P.2d 271, 272 -73 (Utah Ct. App. 1995) (alleged due process violation where statutory term claimed to be insufficiently specific); *State v. Scheel,* 823 P.2d 470, 473-474 (Utah Ct. App. 1991) ("[Unpreserved] *Shondel* claim presents neither 'plain error' nor 'exceptional circumstances' and, therefore, we refuse to consider it for the first time on appeal.")

Defendant here does not argue that "plain error" or "exceptional circumstance" should excuse his failure to preserve his due process claim. This Court should therefore decline to consider it. *See Pinder*, 2005 UT 15, ¶ 45.

2. Defendant fails to support his section 77-29-2 claim with an adequate record.

This Court should also decline to consider defendant's claim because he has not provided any record to support his primary contention—prison authorities breached their statutory duty to inform him of the filing of the information.

Section 77-29-2 provides:

> The warden, sheriff or custodial officer shall promptly inform a prisoner in writing of the source and contents of any untried indictments or informations against that prisoner *concerning which he has knowledge* and of that prisoner's right to make a request for final disposition thereof.

UTAH CODE ANN. § 77-29-2 (West 2004) (emphasis added).

Defendant argues that his premature disposition notice should be held to have "kicked in" when the information was filed on January 14, 2004 because prison authorities failed to inform him when the information was filed, as required under section 77-29-2. Aplt. Br. at 27-28.

This Court should not consider this claim because defendant has not provided this Court with an adequate record to review it. Specifically, there is no record evidence that the authorities ever knew that the information had been filed on January 14. *See State v. Careno*, 2005 UT App 208, ¶ 19, 113 P.3d 1004 (declining to consider claim unsupported by adequate record); *State v. Linden*, 761 P.2d 1386, 1388 (Utah 1988) ("Inasmuch as defendant has failed to provide an adequate record on appeal on this point, this [c]ourt presumes regularity in the proceedings below.")

Alternatively, and contrary to defendant's contention, the record evidence suggests that the prison authorities fulfilled their duties under the statute. Defendant acknowledged

that the authorities fulfilled their initial duty to inform him of his right to a final disposition of any untried information when, as he admitted, the prison authorities gave him a packet which included the 120-day disposition request as soon as he entered the prison on December 3, 2003. R271:26. As to prison authorities' second duty defendant repeatedly asserts that they did not inform him of the filing of the information on January 14. Aplt. Br. at 28. The statute, however, requires that they inform a defendant only of any untried informations of which they have knowledge. There is no record evidence that the authorities ever knew that the information had been filed on January 14. Indeed, there is no record evidence to support that the authorities did not inform defendant that the information had been filed. In short, defendant's claim fails for lack of record evidence.

*3. **Defendant has failed to show that his due process arguments have merit.***

In spite of the foregoing fundamental defects in his argument, defendant nevertheless argues that the trial court, the prosecutor, and his attorneys apparently accepted that his premature 120-day notice "kicked in" on the date the information was filed. Therefore, he claims that he, legally untutored, must be given the benefit of the same misunderstanding. Aplt. Br. at 28-29. In effect, defendant argues that the State should be estopped from arguing that his claim fails because he filed his request prematurely: "The State cannot come back and state Mr. Legg's request for a 120-day disposition is 'null and void' when the prison did not follow the statutory requirements under UCA 77-29-1 and 77-29-2." Aplt. Br. at 28.

That argument fails. First, as stated, defendant has not shown that the prison officials did not follow the statutory requirements. Second, although the prosecution bears

the burden of showing that it has complied with the 120-day disposition requirement of section 77-29-1, that burden only arises *after* a defendant properly requests the 120-day disposition. *See Wright*, 745 P.2d at 450-51 (the disposition request must be properly delivered to proper authorities and contain an appropriate demand to be effective); *State v. Viles*, 702 P.2d 1175, 1176 (Utah 1985) ("Section 77-29-1 places the burden on the prisoner to give notice to the warden."); *Lindsay*, 2000 UT App 379, ¶ 7, 18 P.3d 504 ("*After* a prisoner appropriately requests speedy resolution of pending charges, the burden shifts to the prosecution to commence trial within the 120-day period set out in the statute.") (emphasis added). Third, defendant cites no legal authority to support his claim that due process requires relief under these facts. Thus, defendant was not relieved of his burden to timely file a 120-day disposition request merely because the trial court later, albeit incorrectly, fixed the commencement of the 120-day disposition period on the date the information was signed.

Furthermore, defendant did not bring the matter to the court's attention until May 4, three days before the 120-day period was to expire. R52-50. The trial court had already moved the trial date back from May 19 to May 6, to accommodate defendant's alleged wish to be tried within 120 days from January 8, the day on which he prematurely delivered his disposition request. R28-26, 42-41; 271:40-41. The prosecutor was ready to try defendant on May 6, the day before the 120-day period would have expired even if it did run from January 8. But it was defendant who was not ready to proceed (R62; 271:53-55).[6] Thus, it

[6] At the May 6 hearing on defendant's motion to dismiss, the court granted defendant's stipulated request to set trial for May 25, to have a defense expert review the State's arson expert's report (R54; 271:36-37).

is defendant who should be estopped from taking advantage of the trial court's later error in fixing the commencement of the 120-period at January 12.

Defendant cursorily argues that other aspects of his case require a reversal under due process. Aplt. Br. at 29-31. None of these other arguments have merit. Defendant argues that Mr. Freestone and Mr. Angerhoffer, prison contract attorneys whom he met with on December 15, 2003, told him that they could not provide any services concerning his 120-day request. Aplt. Br. at 29 (citing R103). Defendant presents no record evidence of this conversation or that these attorneys even represented him at the time he met with them. Indeed, the information had not even been filed then. Therefore, defendant has shown no duty on the part of these attorneys.

Defendant impliedly argues that because the Tooele County Attorney's Office had received defendant's disposition request, it had a duty to bring him to trial within the time provided by section 77-29-1. Aplt. Br. at 29-30 (citing R271:35). However, *Wright*, *Lindsay*, and *Leatherbury* implicitly teach that a prosecutor has no duty to inform defendant that his notice is premature. The prosecutor only has a duty to bring defendant to trial within 120 days of a timely filed 120-day notice, and as extended for "good cause" delays attributable to defendant. Moreover, even if defendant's arguments under section 77-29-2 had been preserved, it would not serve him here because the duty imposed by that section is on the custodial officers, not the prosecutor. *See* UTAH CODE ANN. § 77-29-2 (West 2004).

Defendant argues that adjudication of the charges in this case within the 120-day period was made more imperative because a parole hearing, apparently stemming from

another conviction, would be put on hold until the disposition of the instant charges. Aplt. Br. at 30 (citing R103). However, the basis of defendant's assertion is again his own self-serving, unnotarized statement, which does not even mention that a parole board hearing was set. R103. Further, defendant cites no legal authority in support of this claim. But more important, as stated, the prosecution had no duty to bring defendant to trial within 120 days because his disposition request was premature and thus a legal nullity. *See Lindsay*, 2000 UT App 379, ¶ 14, and *Leatherbury*, 2003 UT 2, ¶ 12.

Defendant argues that the prosecutor unduly delayed filing the information. Aplt. Br. at 30 (citing R112-111). He argues that although the fire marshal's report was dated December 10, 2003 and faxed to the Tooele County Attorney's Office on December 12, the prosecutor "sat on" the report until he filed the information on January 14, 2004. *Id.* (citing R112-111, 32). This argument fails for lack of record support. Two copies of the fire marshal's report, dated December 10, 2003, appear in the record. R34-32, 124-122. Neither copy nor any record the State has located, other than defendant's self-serving, unnotarized statement, indicates that the report was faxed to the Tooele County Attorney's Office on December 12. R112-111, 34-32, 124-122. But again, *Lindsay*, expressly rejected this argument because the "purpose of the statute is to promote speedy trials, not the speedy filing of informations." *Lindsay*, 2000 UT App 379, ¶ 15.

In sum, defendant's premature filing of his 120-day disposition request obviated any duty the prosecutor had to bring defendant to trial within the time period specified by section

77-29-1.[7]

POINT II

THE STATE CONCEDES THAT THE TRIAL COURT'S SENTENCING ORDER SHOULD BE REVERSED—THE TRIAL DISREGARDED ITS AFFIRMATIVE DUTY TO AFFORD DEFENDANT THE OPPORTUNITY FOR ALLOCUTION; THE CASE SHOULD BE REMANDED FOR RESENTENCING

Defendant claims that the trial court violated his due process rights and his rights under rule 22(a), Utah Rules of Criminal Procedure when he was sentenced without an opportunity for allocution, *see* Aplt. Br. at Pt. III (23), or for the prosecutor to present information material to the imposition of his sentence.[8] *See* Aplt. Br. at Pt. II (19-13). He also claims that the trial court violated his right to counsel when it sentenced him without counsel. Aplt. Br. at Pt.I (13-19).

---

[7] Despite this conclusion, defendant nevertheless repeats his argument that the 120-day period did "kick in" on January 14, 2004, the date the information was filed, because the trial court found at the August 23 hearing that that was the date the 120-day period began. Aplt. Br. at 31-33. Defendant here specifically argues that because the trial court miscalculated the 120-day period, beginning on January 14, 2004, to have ended on May 29, the court failed to make the "good cause" findings required to show that trial beyond 120 days was attributable to him. Aplt. Br. at 34-35. As argued above, because defendant's prematurely filed disposition request was a legal nullity, any failure of the trial court in later miscalculating the expiration of the 120-day disposition period or to make adequate "good cause" findings is irrelevant to the resolution of defendant's claim.

[8] Defendant claims violations of his due process rights under both the United States and Utah constitutions and rule 22(a) to support Points II and III. Aplt. Br. at 19, 23. However, because "[n]o argument has been made as to why . . . under the Utah [Rules of Criminal Procedure], the result would be different under wither the Utah or the federal constitution, we will therefore treat the contention as a single argument rather than as three separate arguments." *State v. Wanosik*, 2001 UT App 241, ¶ 11 n.2, 31 P.3d 615 (citation omitted), *aff'd*, 2003 UT 46, 79 P.3d 937.

Rule 22, Utah Rules of Criminal Procedure, provides:

> 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.

Utah R. Crim. P. 22(a).

"A defendant's *personal exercise* of the rights granted in rule 22(a) is referred to as allocution." *State v. Wanosik*, 2001 UT App 241, ¶ 29, 31 P.3d 615 (citations omitted) (emphasis in original), *aff'd*, 2003 UT 46, 79 P.3d 937. "Rule 22(a) codifies the common-law right of allocution, allowing a defendant to make a statement in mitigation or explanation after conviction but before sentencing." *Wanosik*, 2003 UT 46, ¶ 18 (citation omitted). The State concedes that the trial court did not allow defendant to personally exercise his right to allocution.[9] Under *Wanosik*, this was reversible error. *See Wanosik*, 2003 UT 46, ¶ 18. The case should therefore be remanded for a new sentencing hearing at which defendant may allocute.

Because the State agrees that defendant should be given a new sentencing hearing on the allocution claim, this Court need not address defendant's other claims. However, because the case should be remanded for resentencing, any error in failing to grant defendant's

---

[9] Notwithstanding its concession, the State recognizes that the trial court's action was understandably provoked. At sentencing, defendant generally insisted on directing the proceeding as he thought appropriate, rather than responding to the court's reasonable and explicit instructions. R271:76-85. At one point, defendant simply disregarded the court's refusal to hear defendant's unrelated legal arguments, said, "Oh, shit," and carried on as before. R271:79. Defendant's request for counsel was downright impertinent and offensive. R271:84-85. Nevertheless, the affirmative requirement to afford a defendant an opportunity to allocute is clear. *See Wanosik*, 2003 UT 46, ¶ 18.

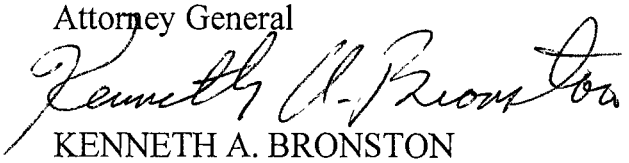
request for counsel can be readily cured on remand. Indeed, it would be appropriate for this Court to direct the trial court to appoint counsel if it finds that defendant is indigent. The State assumes that defendant would not now oppose such appointment given his request at sentencing and his claim of error on appeal.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's conviction be affirmed.

RESPECTFULLY SUBMITTED this 1st day of March, 2006.

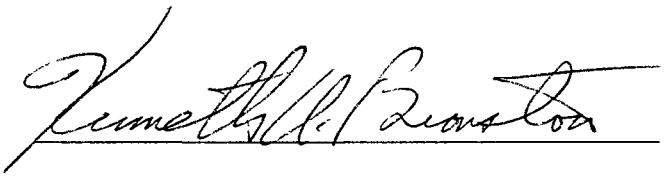
MARK L. SHURTLEFF
Attorney General



KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Alan J. Buividas, attorney for defendant, 7321 South State St., Ste. A, Midvale, Utah 84047, this 1st of March, 2006.



Addenda

Addendum A

UTAH CODE ANN. § 77-29-1 (West 2004)

§ 77-29-1. Prisoner's demand for disposition of pending charge--Duties of custodial officer--Continuance may be granted--Dismissal of charge for failure to bring to trial

(1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

(2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

(3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

(4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

Laws 1980, c. 15, § 2.

UTAH CODE ANN. § 77-29-2 (West 2004)

§ 77-29-2. Duty of custodial officer to inform prisoner of untried indictments or informations

The warden, sheriff or custodial officer shall promptly inform a prisoner in writing of the source and contents of any untried indictments or informations against that prisoner concerning which he has knowledge and of that prisoner's right to make a request for final disposition thereof.

Laws 1980, c. 15, § 2.

Utah Rules of Criminal Procedure Rule 22

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.

Addendum B

Chronology of proceedings in prosecution of defendant John L. Legg:

November 30, 2003 - defendant was arrested for possession of a stolen vehicle and arson (R1).

December 9 - defendant signed a "Notice and Request for Disposition of Pending charges" (120-day disposition request), which referred to "arson and auto theft" charges pending against him in Tooele County, brought by "the Utah Highway Patrol" (R7);

January 5, 2004 - the 120-day notice was stamped, "received" (R7);

January 8 - the authorized agent who certified receipt of the 120-day notice mailed it to the Tooele County Attorney's Office (R.6).

January 14 - an information charging defendant with theft by receiving stolen property (Count I) and arson (Count II) was docketed (R3-2);

March 8 - a two-day trial is set for May 19 and May 20 (R28);

April 26 - based on defendant's asserted conflict with Mr. Broadhead, trial, formerly set for May 19, was moved forward to May 6 to ensure that defendant was tried within the 120-day period (R28-26, 42-41; 271:39-41);

May 4 - defendant, represented by Scott A. Broadhead, moved to dismiss the information with prejudice because defendant had not been tried withing 120 days from either December 9, 2003 or January 5, 2004 (R52-50);

May 6 - the trial court heard defendant's motion to dismiss and denied it (R54, 271:26-37); the trial court found that January 8, 2004 marked the beginning of the 120-day period because that was the date that was "officially noted as being sworn to by the officer" at the Division of Institutional Operations (R271:35); based on that date, the court concluded that the 120-day period expired on May 10, 2004 *(id.)*; the court also found good cause to extend the 120-day period because defendant repeatedly had not objected to the setting of trial dates outside the 120-day period (R271:33-36); the court then granted defendant's stipulated request to set trial for May 25, to have a defense expert review the State's arson expert's report, which the prosecutor had sent to defense counsel on April 8 (R36-29, 54; 271:36-37);

May 24 - the May 25 trial setting was vacated and a scheduling hearing was set for June 6, 2004 (R56);

June 6 - the trial court denied defendant's request for an interlocutory appeal, and trial was set for July 20 (R58);

June 30 - defendant informed the court that he had been hospitalized for injuries suffered in a recent prison assault and requested an extension until mid-August to prepare his defense (R62);

July 8 - defendant filed a motion in which he claimed that his counsel, Mr. Broadhead, had consented to continuances without defendant's consent and in which defendant requested that the trial court appoint new counsel (R66);

July 15 - defendant notified the clerk of the district court to reschedule the trial, set for July 19 [sic] because he had filed a petition for interlocutory review in the court of appeals on July 12 (R67, 86); this Court returned the petition to defendant because the petition was not addressed properly (R86); this Court denied defendant's refiled petition because it was untimely (R86);

On July 19 - defendant filed a motion to dismiss in which he alleged not only the prosecutor's failure to timely bring him to trial under Utah Code Ann. 77-29-1, but also that Mr. Broadhead had rendered ineffective assistance of counsel in failing to file defendant's motions and that the court lacked jurisdiction of the theft-by-receiving charge because the incident occurred in Salt Lake County (R74-71); the trial court granted Mr. Broadhead's request to withdraw, appointed substitute counsel, Wayne Freestone, struck the July 20 trial setting, and set defendant's motion to dismiss for hearing at a new pretrial conference on August 2 (R70-68);

July 22 - defendant filed a motion for "statu[t]es review" in which he claimed that his newly appointed attorney, Wayne Freestone, had a conflict of interest with him and in which he requested the trial court not appoint Mr. Freestone as his counsel (R83-81);

July 28 - defendant, without reference to a specific purpose or date, moved to extend the proceedings to allow him to proceed pro se in the preparation of his defense until new counsel could be appointed (R88-85);

August 2 - because of a scheduling conflict, Mr. Freestone did not appear for the hearing; defendant, pro se, argued that Mr. Freestone had a conflict; the trial court continued the hearing to August 16, at which time the court would hear defendant's pro se motions (R90-89);

August 16 - the trial court granted Mr. Freestone's request to withdraw and appointed L. Douglas Hogan as standby counsel, with which defendant agreed (R93-92; 271:38-39); defendant argued his own motion for extension of time for filing his petition for interlocutory appeal (R93; 271:41-42)[10]; defendant, pro se, also again moved to dismiss the case based on the expiration of the 120-day disposition period (R93; 271:40-41); the court had not reviewed the motion, believing that it had already reviewed it on May 6, and continued that matter to August 23 (R271:45-46); defendant also filed a motion for transcripts in contemplation of proceeding pro se at trial (R95-93; 271:45);

August 23 - defendant again represented himself; Mr. Hogan acted as standby counsel (R271:47); defendant again argued that the Department of Institutional Operations had improperly retained his 120-day notice for 30 days—December 9 to January 8—before processing it, and that the120-day period had expired (R103-100; 271:49-53); the prosecutor noted that the State would have tried defendant within the 120-day period on May 6, but for defendant's repeated requests for continuances—first to locate an expert to counter the State's arson expert, then for defendant to prepare after firing his attorneys, and finally because defendant suffered physical injuries in a prison altercation (R62; 271:53-55); the trial court again denied defendant's motion to dismiss, concluding that the 120-day disposition period began to run from the date the information was filed—January 12, 2004—and expired 120 days later—May 29 (R271:58); the court found that "extension has been granted as a result of requests by counsel and they're reasonable" (*id.*); the court also denied defendant's

---

[10] Defendant was mistakenly before the trial court on August 16 on his pro se motion to extend the time for filing his pro se petition for interlocutory appeal, which the court of appeals had apparently denied as untimely. R271:41-42, 53. The trial court explained to defendant that it lacked the power to rule on a matter that lay entirely within this Court's jurisdiction. R271:42.

pro se motion to dismiss for lack of jurisdiction, finding that the theft-by-receiving incident occurred in Tooele County (R271:58-60); the trial court then sought to set the case for trial (R271:60); Mr. Hogan stated that he was ready to proceed immediately, but that defendant wanted to represent himself (*id.*); defendant stated that Mr. Hogan had a conflict because he was representing "the victim of one of my crimes, an assault on an inmate within this Tooele County Jail" (*id.*); the trial court stated that it would not hear defendant's oral motion to disqualify his counsel because it was not then properly before the court (*id.*); defendant agreed to file a written motion (*id.*); the court set trial for October 26 (R271:61); the court set September 20 to hear any motions, directing defendant to file his prospective motion to disqualify his counsel as soon as possible and indicating that standby counsel needed to be located to help represent defendant at trial, all of which defendant also agreed with (*id.*);

August 26 - the trial court granted Mr. Hogan's motion to withdraw (R107-104);

September 1 - defendant moved to dismiss the case on the ground that the prosecutor had misrepresented that the filing of the information had been delayed by the extended time necessary for the fire marshal to prepare his report and for the prosecutor to review it (R112-109);

September 5 - defendant moved for a bill of particulars, alleging that Mr. Hogan had ineffectively failed to request one to prepare a defense (R115-114);

September 30 - the prosecutor prepared and filed a lengthy and detailed bill of particulars, with exhibits, which he hand-delivered to defendant two working days later (R135-116);

October 4 (pretrial conference) - possible conflicts counsel—Mrss. Broadhead, Freestone, and Hogan all have conflicts with defendant; trial court appoints Jon Williams as conflicts counsel and continues matter until October 18 for another pretrial conference; court denied defendant's renewed motion to dismiss of August 28 (R137-136);

October 18 - Mr. Williams entered his appearance as defendant's standby counsel, with whose appointment defendant agreed; following *Frampton* colloquy, the court allowed defendant to represent himself; defendant requested additional time to prepare himself for trial; jury trial was rescheduled to November 3, 2004 (R143-142; 271:63-71);

October 28 - Defendant, pro se, moved to continue the trial setting to allow him time to review the report of State's expert witness, to learn "the rules and procedures" required to cross-examine that witness, and to call his own expert witness (R151-149);

November 1 - the court denies defendant's motion to continue the trial (R153);

November 3 - jury trial (R158-156; 269:1-289).

Addendum C

APPEARANCES

For the Plaintiff: GARY K. SEARLE

For the Defendant: PRO SE

* * *

TOOELE, UTAH - JANUARY 24, 2005

JUDGE RANDALL N. SKANCHY PRESIDING

P R O C E E D I N G S

THE COURT: We're here in the matter of State of Utah v. John Legg. It's Cases 0413000055 and 041300016.

Mr. Legg, we were here last time for sentencing, you hadn't had an opportunity to review the pre-sentence report so we postponed it so that you might have an opportunity to do that. I should note for the record that Mr. Legg has chosen to represent himself, did so at the time of trial and is now representing himself here at the time of sentencing. Have you had an opportunity Mr. Legg now to review the pre-sentence report?

MR. LEGG: Yes, I have.

THE COURT: Is there anything in the pre-sentence report that is factually incorrect that needs to be addressed here before I hear your arguments about sentencing?

MR. LEGG: Yes.

THE COURT: Go ahead then and tell me what that would be.

MR. LEGG: I have to, I prepared, wrote it down.

Comes now I, the Defendant and attorney pro se, hereby objects to the pre-sentence report prepared in this case for the inaccuracies of the criminal history and the lack of mitigating factors and the victim impact statement along with the defendant's social background and accomplishments while on parole for his first time after being released from prison and that due to the fact the pre-sentence report are supplemental, the defendant has been prejudiced from such inaccuracies since 1988 when he was sentenced to prison for his first time and that due to such inaccuracies the defendant has never been granted a parole until this past release in which the defendant becomes subject again to an indeterminate sentence that's devised here in the state of Utah and which is becoming a widely known topic and a discussion whether or not such system is constitutional or not and should become a close scrutiny with the latest U.S. Supreme Court ruling in Blakeley v. Washington for such case involves the inaccurate pre-sentence report conducted by the parole and probation officers to the courts and the defendants are becoming subject to a minimum mandatory sentence that are being handed down and was of a highly well publicized case right here in Utah in September 2004 with Weldon Angelos receiving a 55 year sentence on his first time offense, possession of marijuana with the intent to distribute. And in this case, the defendant faces up to 15 to 20 years maximum depending on the sentences that are to run, if

they are to run concurrent or consecutive and/or a decision handed down by the Utah Board of Pardons for in Utah once the sentence or commitment is ordered by the trial court, once imposed and the information relied on becomes subject to the Board of Pardons and Parole in which vest almost complete discretion to them to determine the actual time served. (see State v. Schroeder).

THE COURT: Mr. Legg, what I need you to do at this time is—

MR. LEGG: I'm getting there.

THE COURT: —if there's some inaccuracies in the pre-sentence report and those are what we need to focus on.

MR. LEGG: I'm working up to that.

THE COURT: Well, I don't want you to work up to it. I want you to go to it now because I don't have time to—

MR. LEGG: I've already told you that I don't—

THE COURT: Just a minute, Mr. Legg. I don't have time for your discourse about federal minimum mandatory sentencing which is not applicable here.

MR. LEGG: This is 15 to 20 years that we're talking about. I don't have an attorney.

THE COURT: And that's your own choice. We went through this process.

MR. LEGG: You cannot allow me five to ten minutes?

THE COURT: I'll allow you as much time as you want

in the context of what we do for sentencing and at sentencing, I ask you, is there anything in this report that's inaccurate. If so, please tell me what that is.

MR. LEGG: It's my criminal background history.

THE COURT: Okay, well then—

MR. LEGG: The victim impact statement that I've already spoke on.

THE COURT: Then address that please.

MR. LEGG: Oh, shit.

THE COURT: I mean, I only have a certain amount of time.

MR. LEGG: And that the Utah Department of Corrections shall employ the necessary staff for providing investigations for conducting and preparing a pre-sentence report to assist the courts and the Utah Board of Pardons in its decision making responsibilities as described within Utah Code Annotated 64-13-20 and the Utah Code—

THE COURT: Are there, Mr. Legg, any inaccuracies—

MR. LEGG: There's no victim impact statements.

THE COURT: Are there any inaccuracies in this document you want to address?

MR. LEGG: Yes.

THE COURT: Well, then please address those.

MR. LEGG: I'm telling you, there's no victim impact statement which is mandatory language under 64-13-20 and

76-3-404. The social background is incorrect.

THE COURT: Tell me how it's—

MR. LEGG: The history incorrect.

THE COURT: Don't speak generally, speak specifically. What is, in terms of the criminal background, your record, incorrect?

MR. LEGG: I have my rap sheet. It says—

THE WITNESS: I want you to walk me through it so that I may make corrections.

MR. LEGG: In 1988 I was convicted. I pled guilty to a crime. It was a zero to five. I spent five years incarcerated. I did the whole term. I was out for two years.

THE COURT: Which one is that on this adult record? You say '88 and I see that there are two.

MR. LEGG: That would have been in front of Judge Young that used to work here at this courtroom. He was relieved of his duties.

THE COURT: I don't see that. When I'm looking at your adult record it shows January 17 of 1988 that you were charged with being a fugitive from justice but that was dismissed and then in September of '88 in West Valley City you were there on a bench warrant probation violation for a theft which you ended up serving a year at the Utah State Prison. Is that the one you're referring to? You were also on a warrant for burglary theft which was zero to five years a the Utah

State Prison.

MR. LEGG: I have it all right here, Your Honor.

If you'd like to show this to the Judge right here, 1988. Right there, was sentenced to prison.

That's my last pre-sentence report.

THE COURT: Okay.

MR. LEGG: Which is more accurate than this one that was prepared for this case.

THE COURT: And those again, I'm looking at this pre-sentence report and this one and they reflect the same thing. What you've shown me is on September 1st of 1988 you went back to prison because of violations of your probation. Okay. Now, tell me what is inaccurate about your record so that we can resolve any differences, if there are any.

MR. LEGG: Read that front page right there and once you read that, I'll be able to—

THE COURT: We're not here to discuss the law.

MR. LEGG: No, that's not the law. That's my pre-sentence report.

THE COURT: I've got your pre-sentence report right here.

MR. LEGG: I says that I've been arrested for 40 times. I've only been on the streets for the five years of the last 17 years. There is no possible way that I was arrested 40 times, okay?

THE COURT: That's something I can deal with and I'll—

MR. LEGG: I wasn't even alive in 1954 to commit larceny, okay? And that's part of the—

THE COURT: Again Mr. Legg, I'm looking at a pre-sentence report that has your adult record starting in 1987.

MR. LEGG: Right. In 1987—

THE COURT: So why do I have to hear about 1957?

MR. LEGG: 1988 if you would have just took a time out and reviewed the documentation that I have here, in 1988, since the pre-sentence report are supplemental as I was stating, right?

THE COURT: Uh-huh (affirmative).

MR. LEGG: In 1988 they used my dad's - I am a junior - they used by dad's criminal background to sentence me and since I didn't object in 1988 to the pre-sentence report, such has been supplemental to that and I'm still being punished for it today. You follow what I'm saying? There is impossible 40 arrests. There's—

THE COURT: I follow what you're saying, Mr. Legg, but this of course doesn't reflect a supplemental pre-sentence report.

MR. LEGG: If you—

THE COURT: This is a pre-sentence report prepared by—

MR. LEGG: It's inaccurate.

THE COURT: —the state of Utah and I'm asking you to simply tell me what the inaccuracies are. That's what we do here.

MR. LEGG: My criminal background, the victim impact. It does not contain a victim impact.

THE COURT: I've got the victim impact argument. I've heard that. Now, what's inaccurate with your criminal history?

MR. LEGG: There are charges that are in there that will -

THE COURT: Which charges then—

MR. LEGG: I haven't been able to obtain them records yet because I'm being refused through the Department of Corrections to give me access to the records that pertain to me Title 63 - what, 3-202 or something like that. I can't remember the exact title on that.

THE COURT: Let's go through these. They start in 1987 in West Valley. You were convicted of a business burglary and served five years at the Utah State Prison. Is that an accurate one?

MR. LEGG: That's inaccurate.

THE COURT: So you weren't charged in West Valley City Police Department?

MR. LEGG: No I was not, it was in Salt Lake County.

THE COURT: So that's the inaccuracy?

MR. LEGG: That's one of them.

THE COURT: So I will make that change. Instead of West Valley, I'll put Salt Lake Police Department but you did serve based upon a charge of business burglary, five years at the Utah State Prison, that was your sentence?

MR. LEGG: And I served the whole five years.

THE COURT: Good.

MR. LEGG: That's the point I'm trying to get to. The information that is being supplied to the Board of Pardons since you do not hand down the actual time served, okay, and you commit me to the Board of Pardons, the inaccuracies, if they're not corrected will allow me to be sentenced to 20 years. If you run the sentences concurrent, it'll be 15 years. I will be given a maximum sentence, do you understand, because of these inaccuracies. They have painted me and portrayed me as a violent criminal and I do not have any violence on my record.

THE COURT: I don't know about that except to—

MR. LEGG: Misdemeanor assault.

THE COURT: —say that your presentation today only underscores the fact that you are —

MR. LEGG: You won't let me even conduct myself as an attorney.

THE COURT: Well, you're not an attorney and I've

already advised you that you'd be foolish to represent yourself but you've gone ahead and chosen to do that anyway.

MR. LEGG: Okay, then why don't you appoint counsel and we'll get all this straightened out?

THE COURT: Because you've chosen to go the other route.

MR. LEGG: Make up you mind.

THE COURT: Make up my mind? Okay. I sentence you on these charges to theft by receiving stolen property, a second degree felony, 1 to 15 years in the Utah State Prison. On Arson, zero to five years at the Utah State Prison. I'll run them consecutive to each other. I'll do so based upon the aggravating circumstances that your adult record is legend and as a result of it being legend—

MR. LEGG: There ain't even a victim. Where's your victim.

THE COURT: We're now done because sentencing is over. Please take him to the Utah State Prison.

What do we need to do with the other case, revoke his probation and have it...

MR. LEGG: You don't need to bend my thumb.

THE COURT: This by the way is Mr. Legg's. If we can give that to him so that he can have it.

MR. CUNDICK: Your Honor, if you'll call this case, we'll dismiss it. (inaudible).

THE COURT: It's called and dismissed.

MR. CUNDICK: State v. Legg, the one ending in 055, If you call that the State would move to dismiss.

(Whereupon the hearing was concluded)

-c-