2004

State of Utah v. Marcelino Cruz : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	)	
	)	
Plaintiff/Appellee,	)	**Case No.20041055-CA**
	)	
	)	
vs.	)	
	)	
MARCELINO CRUZ,	)	
	)	
	)	
Defendant/Appellant.	)	

REVISED, SUPPLEMENTAL BRIEF OF APPELLANT

THIS IS AN APPEAL FROM A SENTENCING ON A FIRST-DEGREE FELONY CHARGE OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE IN A DRUG FREE ZONE, IN VIOLATION OF UCA §58-97-8(1)(a)(3), IN THE SECOND JUDICIAL DISTRICT COURT, THE HONORABLE MICHAEL D. LYON, JUDGE PRESIDING.

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LIST OF PARTIES BEFORE THIS COURT

The list of the parties before this Court are reflected in the caption of the case.

STATEMENT OF JURISDICTION OF THIS COURT

This Court obtains statutory jurisdiction over this first degree felony conviction poured over by the Supreme Court pursuant to UTAH CODE ANN. §§78-2a-3(2)(e) (1953, as amended); 78-2a-3(j).

QUESTIONS PRESENTED FOR REVIEW

A. Issue

1. Did the trial court abuse discretion when it sentenced Mr. Cruz solely based on alienage to prison instead of the recommended jail and probation sentence?

2. Did the trial court sentencing decision violate the equal protection clause as it disparately treated defendant – a non-citizen – differently from citizen defendants.

B. Preservation of Issue and Propriety of Review

The issue raised here was properly preserved below. *See* R. 58. (defendant inquiring as to the propriety of the prison sentence when he was under the impression he would get one-year jail term and probation. Accordingly, review is proper in this Court. Further, even if not properly preserved in the court below, as trial counsel could not have preserved his own ineffectiveness for appellate review, *see State v. Garrett,* 849 P.2d 578, 580 n.3 (Utah Ct. App.), *cert. denied,* 860 P.2d 943 (Utah 1993), this Court should nonetheless review the issues raised because of the significant constitutional implications. In the alternative, this Court should apply the "plain error" or "exceptional circumstances" doctrine to failure to preserve the issues.

See Utah R. Evid. 103(d); *Eldredge,* 773 P.2d at 35 & nn.7-12; *State v. Sepulveda,* 842 P.2d 913, 917 (Utah Ct. App. 1992).

C. Standard of Appellate Review

1. The standard of review is whether the district court abuse discretion when it sentenced defendant to prison. "A sentence will not be overturned on appeal unless the trial court has abused discretion, failed to consider all legally relevant factors, or imposed a sentence that exceeds legally prescribed limits." *State v. Nutall*, 861 P.2d 454, 456 (Utah Ct. Appp. 1993); *accord State v. Valdovinos*, 2003 UT App. 432, ¶14, 82 P.3d 1167.

2. With respect to defendant's claim that he was deprived equal protection of the law at sentencing, whether a district court's ruling is constitutionally sound is a question of law reviewed *de novo*. *See State v. Mohi*, 901 P.2d 991, 1009 (Utah 1995).

3. A plain error analysis requires this Court to view the trial record as a whole to determine if the claimed errors seriously affected the fairness of the trial and thus review is for correctness. *See State v. Labrum*, 925 P.2d 937, 939 (Utah 1996); *State v. Eldredge*, 773 P.2d 29, 35 & nn.7-12 (Utah), *cert. denied,* 493 U.S. 814, 110 S. Ct. 62 (1989); *State v. Tarnawiecki*, 2000 UT App. 186, ¶, 6 5 P.3d 1222.

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional provisions, statutes and rules are relevant to resolving this case, the relevant portions of which are reproduced verbatim in Addendum A:

United States Constitution, Amendment V;

United States Constitution, Amendment XIV;

Utah Constitution, Article 1, Section 24;

Utah Code Ann. § 58-37A-5

Utah Code Ann. § 58-37-8(1)(a)(3) (2004);

Utah Code Ann. § 77-18-1 (2004);

STATEMENT OF THE CASE

A. Nature Of The Case

The defendant was originally charged with two first degree felony counts of Possession of a Controlled Substance with Intent to Distribute in a drug-free zone, in violation of U.C.A. § 58-37-8(1)(a)(3), one second-degree felony of Possession of a Controlled Substance with Intent to Distribute in a drug-free zone, in violation of U.C.A. § 58-37-8(1)(a)(3), and one class B misdemeanor, Possession of Drug Paraphernalia, in violation of U.C.A. § 58-37A-5. R. at 17. On October 7, 2004, Defendant plead guilty to count 2, a first degree felony, and the three remaining charges were dismissed.

Defendant was sentenced on November 18, 2004. The Pre-Sentence Report (PSR) recommended that defendant serve one year in jail, noting that after incarceration defendant would be delivered to Immigrations and Customs Enforcement (ICE) for immediate removal from the United States. The State argued for a more severe sentence, while Defendant's counsel argued for a sentence no longer than one year, preferably to be served in the county jail. R. at 50.

B. Course Of Proceeding and Disposition

There were no pre-trial motions of significance filed by the parties. After entering the guilty pleas, the district court sentenced defendant on November 18, 2005, to an indeterminate prison term of five years to life. R. at 51. Thereafter, in a document dated November 19, 2004, and stamped by the court on December 7, 2004, Defendant filed a pro se motion to withdraw guilty plea,[1] claiming he did not understand the consequences of the pleas. *See* R. at 58. On December 7, 2004, the District Court denied Defendant's motion to withdraw guilty plea. R. at 59-60; Addendum B. An appeal ensued to this Court on December 6, 2004. R. 53-54.

On April 15, 2005, the Legal Defenders office filed an *Anders* brief[2] on

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[1] Defendant's guilty pleas may not have been knowing and voluntary in light of his refusal to acknowledge that he understood that he would get five to life in prison as opposed to one year in jail *See* R. at 58. However, for other reasons, Defendant does not challenge the voluntariness of the underlying plea.

[2] *See Anders v. California*, 386 U.S. 738 (1967).

behalf of the Defendant. The State thereafter filed its concurrence with the Legal Defenders Office's *Anders* brief on May 12, 2005. Thereafter, Defendant retained new counsel, who files the instant brief.

STATEMENT OF THE FACTS

Mr. Roy Cole represented the defendant below at both the plea hearing and sentencing. The defendant used a court interpreter for translation purposes as noted throughout the record and the docket. During the plea hearing, the judge told defendant to say yes or si and not just "grunt noises" (Plea T. p. 6 line 7).

The defendant claims that he was under the impression that he would be pleading to a second degree felony. R. at 58. The defendant, through a hand-written letter written in third person, informed the trial judge of this, and the judge ruled that no withdrawal of plea was warranted R. at 59, 60.

The PSR recommended one year of jail time. Mr. Cole, defendant's counsel, urged the court to follow the recommendation. The State argued against the recommendation. Sent. T. at 3.

The prosecution initially represented to the judge that an admission had been made by the defendant, but then backed away from that representation stating that he did not remember whether or not an admission had truly been made. Sent. T. at 4. Mr. Parmley mentioned "owe sheets" that had been recovered in the search, and Defense counsel never offered a separate explanation nor objection.

The court asked the probation officer how much time defendant would serve at state prison if sentenced to a first degree felony, and the probation officer did not know. Sent. T. at 4, 5. The court commented that many "illegals" were given suspended sentences then later deported. In this case, according to the judge, the quantity of drugs was higher and merited prison time. Sent. T. at 5 and 6. Defendant should be an "example." Sent. T. at 6. The court sentenced defendant to five years to life at state prison. Sent. T. at 6.

This appeal then followed. R 53-54.

SUMMARY OF THE ARGUMENT

The trial judge, as he recognized, has the option of sentencing defendant to one year in jail and probation or to prison for an indeterminate period of five years to life. Although the judge recognized that the sentencing recommendation was for a jail term and probation, the Court nonetheless chose to employ defendant as "an example," and opting to send defendant to prison for five years solely because of his alienage.

The trial court clearly abused discretion by basing his sentencing decision solely on the fact that defendant is a non-citizen. Unlike other cases before this Court in which the court may have imposed prison term because of the difficulty of monitoring probation internationally, the district court in this case upped defendant's sentence solely on the basis of alienage.

When a state lays unequal hand on similarly situated defendants, the strictest judicial scrutiny is employed, requiring the state to show a compelling interest for the invidious discrimination. By denying defendant the option of a jail term and probation solely because of alienage, the district court abused discretion and committed reversible constitutional error.

DETAIL OF THE ARGUMENT

POINT I

THE DISTRICT COURT ABUSED DISCRETION BY REFUSING TO FOLLOW THE RECOMMENDATION OF THE PROBATION DEPARTMENT THAT DEFENDANT BE PLACED ON PROBATION AND INSTEAD IMPOSED AN INDETERMINATE PRISON TERM ON THE BASIS OF DEFENDANT'S ALIENAGE.

The sentencing decision of a trial court is reviewed for abuse of discretion. *State v. Helms,* 2000 UT 12, ¶ 8, 40 P.3d 426; *State v. Houk,* 906 P.2d 907, 909 (Utah Ct. App. 1999). An abuse of discretion occurs when "it can be said that no reasonable [person] would take the view adopted by the trial court. *Id.* The Supreme Court has found an abuse of discretion where, for example, fails to appropriately follow statutory precepts. *See, e.g., State v. Galli*, 967 P.2d 930 (Utah 1998).

The district court has the option of sentencing defendant to probation. *See* Utah Code Ann. §77-18-1; *see also State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991) (sentence of probation is not a right but one which is meted out if it best serves the interest of justice and is compatible with public interest). However, the court

declines to follow the recommendations of the probation department because it wants to make an example of the defendant, such that non-citizens will be wary of committing serious drug offenses. *See* Sent. Transcript at 5-6. (Court stating that "it is not uncommon ... to receive recommendations from the probation department ... on people who are here illegally to ... give them a suspended prison sentence ... [But] when you commit a very serious crime, which this is [and you are non-citizen], that there ought not to be court probation."

The trial court expressed no such concern for citizens who commit serious drug offenses: they are always eligible for probation if recommended by the probation department. *See id.* Rather, the court's ire was reserved for non-citizens who commit serious drug offenses. However, there is no requirement in § 77-18-1 that only non-citizens be sentenced beyond the guidelines recommended by the probation department. Accordingly, as glaringly exposed by the district court's pronouncements, the only reason the defendant drew a stiffer sentence than recommended by the probation department was solely because of his non-citizen status in the United States – a factor which should have no bearing on whether defendant was probation-eligible. Phrased differently, the trial court's decision to sentence defendant to prison is patently "unfair" and constitutes an abuse of discretion. *See State v. Helms, supra.*

The record in the instant case shows that defendant has no prior criminal record. They have four children, 16, 13, 9, 6, two of which are US Citizens. He held a job at a

factory in Ogden and later Logan for over ten years. The probation department gave him favorable recommendation after having compared his background and circumstances to other similarly situated persons who have committed serious drug offenses. Yet, the court declined to impose probation because of defendant's citizenship status. This is an abuse of discretion, which this Court should reverse. *See State v. Galli, supra.*

POINT II

AS APPLIED, THE DISTRICT COURT'S DECISION PURSUANT TO SECTION 77-18-1 VIOLATED THE EQUAL PROTECTION GUARANTEES IN THE CONSTITUTIONS THAT SIMILARLY SITUATED PERSONS NOT BE TREATED DISPARATELY.

The district court's application of § 77-18-1 violates equal protection and uniform operation of laws by differentiating between a citizen defendant who may be placed on probation upon recommendation by the probation department and a non-citizen defendant who is ineligible for probation because of his alienage.

The Equal Protection clause provides protection to all persons similarly situated, forbidding the states to "deny to any person within its jurisdiction the equal protection of the laws." *See* U.S. Const. amend. XIV; *see also* Utah Const. art. I, § 24.[3]

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[3] There are three methods for testing classifications of a statute under the equal protection clause. One is the "facial challenge," meaning that the law on its own face and terms disparetly classifies people. The second is the "as applied challenge," contesing that while the statute shows no classification the official applying the law are applying it with fifferent degrees of severity. The third is the "purpose and effect challenge," raising the question whether the law is being in relaioty meant to burden different clases or

When legislation creates classifications that impinge upon a fundamental interest, the statute is upheld only if it furthers a compelling state interest. *See State in the Interest of N.R.*, 967 P.2d 951, 953-54 (Utah App. 1998). It is also axiomatic that when a State discriminates a person on the basis of alienage, the reviewing court must apply the strict scrutiny. *Carey v. Brown,* 447 U.S. 455, 461-62, 100 S.Ct. 2286 (1980) (strict scrutiny test requires that "the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"); *Graham v. Richardson,* 403 U.S. 365, 372, 91 S.Ct. 1848 (1971); *State v. Bell*, 785 P.2d 390, 398 (Utah 1989), *questioned on other grds. by State v. Mohi*, 901 P.2d 991, 995 (Utah 1995) (statute must be reasonable in relation to state's need to enact it).

Article I, section 24 of the Utah Constitution similarly requires that all laws have uniform operation. *See* Utah Const. art. I, § 24. At least in the context of economic legislation, this constitutional protection is as rigorous as the protection provided by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See Blue Cross and Blue Shield of Utah v. State*, 779 P.2d 634, 637 (Utah 1989). The Utah Supreme Court has indicated that the tests of "strict scrutiny" and "rational basis" are not helpful in assessing whether legislation violates the uniform

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persons differently. *See* Rotunda and Nowak, *Treatise on Constitutional Law : Substance and Procedure*, §18.4, p.41 (2d d.). The instant case raises a variety of the last two challenges.

operations of the law provision. *See Ryan v. Gold Cross Services, Inc.*, 903 P.2d 423, 426 (Utah 1995). Rather than employing strict scrutiny or rational basis tests, the analysis for determining whether a statute violates Article I, section 24 is "(1) whether the classification is reasonable, (2) whether the legislative objectives are legitimate, and (3) whether there is a reasonable relationship between the two." *Id.* at 426 (citing *Blue Cross*, 779 P.2d at 637).

The right in a criminal case to be sentenced non-disparately is clearly of fundamental importance. *See,e.g., State v. Anderson,* 929 P.2d 1107, 1110 (Utah 1996) (right at sentencing to present mitigating evidence fundamental); *Wanosik,* 2001 UT App. 241, ¶ 30, 31 P.3d 615 626 (sentencing is a critical stage in criminal proceedings), *aff'd* 79 P.3d 937 (Utah 2003); Andrews v. Shulsen, 802 F.2d 1256, 1267 (10th Cir. 1986) (disparate treatment at sentencing could violate equal protection guarantee); *Julian*, 966 P.2d 249, 254 (Utah 1998) (referring to deprivation of due process in a criminal proceeding as a fundamental right); *Lyon v. Burton*, 2000 UT 19, ¶20, 5 P.3d 616 ("A just and peaceful society must secure by law the fundamental rights of all its citizens"; these fundamental rights include criminal law sanctions); *accord State v. Merrill,* 2005 UT 34, 114 P.3d 585, 2005 WL 1367368 (Utah). Moreover, these due process rights directly implicate the right to liberty and therefore are fundamental. *See Chapman v. United States*, 500 U.S. 453, 465, 111 S.Ct. 1919 (1991) (further citation omitted) ("Every person has a fundamental right to liberty in the sense that the

Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees."). Because, as applied here, the ruling in the district court directly subjugates a non-citizen criminal defendant's exercise of his liberty interests compared to that of a citizen, the district court's decision is subject to strict judicial scrutiny under equal protection analysis. *See, e.g., Ryan v. Gold Cross Services, Inc.*, 903 P.2d at 426; *State v. Bell*, 785 P.2d at 398; *State v. Rodriguez*, 2002 UT App. 119, 46 P.3d 767, n.1 (noting that classification based on alienage is subject to strict scrutiny).[4]

The State clearly does not have a compelling need to up the sentence of a non-citizen defendant solely because of alienage. In fact, the Supreme Court has recognized that a state criminal procedure may not disparately treat similarly situated defendants lest an equal protection violation occurs. *See Skinner v. Oklahoma,* 316 U.S. 535, 541, 62 S.Ct. 1110 (1942) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . It has made an invidious discrimination as if it had selected a particular group for oppressive treatment."). Because the district court articulated no compelling treatment for treating defendant disparately from other defendants who are citizens, the district court's

[4] In *Rodriguez*, this Court specifically declined to rule on whether the sentenced meted out to defendant violated the equal protection clause. *See* 2002 UT App. 119, ¶ 4.

application of Section 77-18-1 violates equal protection.

Application of Article I, Section 24 uniform operations of the law test also demonstrates that the district court's application of § 77-18-1 is unconstitutional as applied here. If the requirement to sentence a defendant to probation is usually followed particularly when the probation department so recommend, a decision to depart from such procedure only with respect to a non-citizen becomes indefensible under the uniform operation of the law clause.

In sum, the district court has created two classes of people not required by the statute: non-citizen defendants and citizen defendants. The classes, as here, have been subjected to significantly disparate treatment solely on the basis of alienage. In addition, there are no compelling legislative objectives warranting the disparate treatment. There is no reasonable objective to warrant such disparity between citizen defendants who may be eligible for probation notwithstanding first degree felony drug conviction – as clearly recommended here by the probation department – and non-citizen defendants who the district court simply to chose to use as an example. In *State v. Nolfi*, 141 N.J. Super. 528, 358 A.2d 853 (NJ 1976), following the dictates of the Supreme Court in *Skinner*, the Court specifically held that a state statute prohibiting non-institutionalized rehabilitation treatment to non-citizens while affording the same to citizens violated the equal protection clause. *Cf. State v. Orsman*, 108 P.3d 1287 (Wash. App. 2005) (finding no equal protection violation when the judge simply

factors in alienage as a reason to deny non-institutionalize treatment to a convicted sexual predator).

The instant case, if distinguishable from *Skinner* and *Nolfi*, is only on the ground of degree but not of substance. The essence of the district court sentencing pronouncement is to teach defendant - a non-citizen – a lesson, and to use him as "an example" that "when you commit a very serious crime, which this is [and you are non-citizen], that there ought not to be court probation." Sent. Transcript at 5-6.

Defendant reiterates that he raises no wholesale, facial constitutional challenge to § 77-18-1. Axiomatically, whenever possible, a statute must be interpreted so as not to conflict with constitutional requirements. *See State v. Mohi*, 901 P.2d at 1009; *State v. Rodriguez*, 46 P.3d 767. The district court's application of § 77-18-1 violates equal protection for the reasons stated above, and was an abuse of the court's discretion. Accordingly, that application should be rejected and this Court should remand for further proceedings consistent with the equal protection guarantees.

CONCLUSIONS AND PRECISE RELIEF SOUGHT

For the reasons specified above, this Court should reverse the decision of the district court and remand the matter for proceedings, ordering a sentence of one year for defendant, followed by supervised release, and other proceedings consistent with the Court's opinion.

RESPECTFULLY SUBMITTED this 16th day of September, 2005.

KEEN LAW OFFICES, LLC
Attorneys for Defendant-Appellant

J. Christopher Keen

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing Appellant's Opening Brief was mailed by first-class postage prepaid this 16TH day of September, 2005, to:

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Addendum A

Determinative Constitutional and Statutory Provisions

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Utah Constitution, Article 1, Section 24;

All laws of a general nature shall have uniform operation.

Utah Code Ann. § 58-37A-5

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.
(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. Any person who violates this subsection is guilty of a class A misdemeanor.
(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.
(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

Utah Code Ann. § 58-37-8(1)(a)(3) (2004)

(1) Prohibited acts A--Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(iii) possess a controlled or counterfeit substance with intent to distribute; or

Utah Code Ann. § 77-18-1 (2004)

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

Addendum B

Ruling denying Defendant's motion to withdraw guilty plea

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
2004 DEC -7 P 1:25
OGDEN DEPARTMENT, STATE OF UTAH
2ND DISTRICT COURT

State of Utah, Plaintiff, vs. Marcelino Cruz, Defendant.	RULING DEC 07 2004 Judge Michael D. Lyon Case No. 041905221

The Court received a letter signed by the Defendant but written in third-person, as though someone else wrote it about him. Giving the letter the most liberal interpretation in favor of the Defendant, the Court treats the letter as a motion to withdraw a guilty plea because the Defendant thought that he was pleading guilty to a second degree felony, not a first degree felony. The Court denies the motion.

After reviewing the written plea agreement and the video tape of the plea colloquy on November 18, 2004, the Court has no doubt that the Defendant understood perfectly that he was pleading guilty to a first degree felony, carrying a prison sentence of five years to life. Further, he signed, and acknowledged in court that he understood, the plea agreement written in English with a parallel in the Spanish language. During all phases of the oral plea-colloquy, a certified court interpreter translated to Spanish all English spoken by the Court and his counsel, and she translated all Spanish spoken by Defendant to English. At no time did Defendant say that he did not understand the agreement or otherwise convey uncertainty about the category of crime to which he was pleading or about the plea agreement. The Court finds no reasonable basis for

Defendant to claim that he thought that he was pleading guilty to a second degree felony.

The Court found on November 18, and it affirms again today, that Defendant's plea of guilty was knowing and voluntary. Accordingly, the Court denies Defendant's motion because it finds no good cause for Defendant to withdraw his guilty plea.

Dated this 7 day of December, 2004.

Michael D. Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 1 day of December, 2004, I sent a true and correct copy of the foregoing ruling to counsel as follows:

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Deputy Court Clerk

Addendum C

Transcript of Sentencing Hearing on November 18, 2004

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

*****

STATE OF UTAH,
Plaintiff,
vs.
MARCELINO CRUZ,
Defendant.

REPORTER'S TRANSCRIPT

CASE NO. 041905221

*****

SENTENCING

NOVEMBER 18, 2004

HONORABLE MICHAEL D. LYON

*****

APPEARANCES:

FOR THE STATE: MR. RICHARD A. PARMLEY

FOR THE DEFENDANT: MR. ROY D. COLE

*****

INTERPRETER: MS. BEA RUMP

ORIGINAL

Laurie Shingle, RPR, CMRS
(801) 395-1055

P R O C E E D I N G S

(A certified court interpreter translated English spoken during the proceedings to Spanish, and Spanish to English.)

THE COURT: State of Utah versus Marcelino Cruz.

All right. This is the time set for sentencing. May I hear your recommendations, please?

MR. COLE: Yes, Your Honor. I've gone over the recommendation in the PSR with Mr. Cruz. It is obviously a very favorable recommendation. I've also spoken with many of his family members, and I got to tell you, I -- I've attempted to translate every letter that we got on his behalf, but there were more than 30 of them attesting to his good character, attesting to this being outside of his character.

We're going to ask, Your Honor, that you just give him credit for time served, serve whatever time in the Weber County Jail you have him serve, and then allow his deportation as per the recommendation. He's got 70 days in right now. Maybe after he does 180 days, if you'd allow him -- immigration to come whenever they're ready.

THE COURT: Thank you.

Do you have anything you want to say, Mr. Cruz?

THE DEFENDANT (through interpreter): No.

THE COURT: Does the State wish to be heard?

MR. PARMLEY: Your Honor, I disagree with the

recommendations.

THE DEFENDANT (through interpreter): The worst thing for me is -- is being separated from my family.

MR. PARMLEY: My recollection, Your Honor, is that I previously addressed the facts when the Court took the plea of guilty in this case. And my view of it was that it's so serious that it warrants commitment to the prison.

My reason for that was the very, very large quantity of controlled substances that were in the possession of the defendant. The cocaine, as I recall, was 92 grams. And 92 grams represents a good three to four ounces. It would be between three and four ounces, which would represent probably over 500 hits and have a value I'm thinking of -- let me think. No, I'm -- I'm sorry. That would -- yeah, it would be three ounces, probably around 400 hits in that quantity, Your Honor. And the other one, the methamphetamine was about a half ounce. That's also a large quantity.

I think that my -- my real concern is that that kind of substantial quantity, once it hits the streets, causes such serious problems for the entire community. And I think that when we consider just how serious those consequences are, of trying to get that much controlled substance out onto the streets.

And the defendant, as I recall, admitted that that was his intention. His words to the detective were that -- let

me see if I can -- they found what they call owe sheets where they saw the word owes in Spanish. These were collected as evidence as well.

There was also over a pound of marijuana that I had --

THE DEFENDANT (through interpreter): What are those?

MR. PARMLEY: -- that I had neglected to mention. And I thought that he'd made an admission. He may not have.

THE DEFENDANT (through interpreter): They say that there was a list?

MR. PARMLEY: He was on his way -- according to the police report, he said he was on his way to entregar or drop off or deliver the marijuana and the cocaine he possessed in the vehicle. He said that he was a user of both cocaine and methamphetamine, and that he did not sell large quantities of cocaine, only 20 or $40 here and there. He recently began selling more because he needed money for his bills.

Those are my concerns, Your Honor, that it's a large quantity, that he intends on getting it out onto the street, and it is a first degree felony and I think that it warrants a commitment to the prison. And that's what we are asking the Court to do in this case.

THE COURT: Thank you.

Mr. Woodring, how much time would he spend down at the prison if I send him down there on a first degree?

PROBATION: You know, I -- I really don't know. The Board of Pardons -- it's pretty hard to predict anymore what they'll do. I don't know that he'd do the whole five years before they'd parole him. I have no idea.

MR. COLE: What we'd ask the Court to do is if you don't want to give him credit for the time he's served and just start the year starting tomorrow morning, that would be fine, too.

THE COURT: Let me say this. This is a difficult case. It is not uncommon for this Court to receive recommendations from the probation department on people who are here illegally to just put them on court probation -- give them a suspended prison sentence, place them on court probation and give them a stiff jail sentence and then make as a condition of court probation that they not return to the country illegally.

And in some instances involving simple possession charges or maybe even a small amount that's being distributed, I sometimes don't have a heartburn with that. But I think the -- the State today has raised a very good issue and that is that this was -- it involves a large amount of narcotics, it was in a drug-free zone, it's a first degree felony, that maybe from time to time there ought to be an example made that -- that when you commit a very serious crime, which this is, that there ought not to be court

probation. There ought to be a prison commitment. And I think this is one.

And so I'm going to, in this instance, not follow the recommendation from the probation department. And it is the sentence of this Court, Mr. Cruz, that you be committed to the Utah State Prison for a period of five years and which may be for life.

THE DEFENDANT (through interpreter): Am I going to be sent there?

THE COURT: Yes, you are. Today.

THE DEFENDANT (through interpreter): Why?

THE COURT: I -- I will recommend that you receive credit for the time that you've served.

MR. COLE: Thank you, Your Honor.

THE COURT: Thank you.

(Proceedings conclude)

CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF WEBER)

I, Laurie Shingle, do hereby certify that the foregoing six pages of transcript constitute a true and accurate record of the proceedings to the best of my knowledge and ability as a Certified Shorthand Reporter for the Second Judicial District Court of Weber County in and for the State of Utah.

Dated at Ogden, Utah, this the 10th day of January, 2005.

Laurie Shingle, RPR, CMRS

Addendum D

Sentence, Judgement and commitment by Judge Lyon

SECOND DISTRICT COURT - OGDEN COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES APP SENTENCING SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 041905221 FS
MARCELINO CRUZ, Defendant.	:	Judge: MICHAEL D. LYON Date: November 18, 2004

NOV 2 3 2004

PRESENT
Clerk: shannone
Reporter: SHINGLE, LAURIE
Prosecutor: CAMILLE NEIDER
Defendant
Defendant's Attorney(s): ROY COLE, PDA
Interpreter: BEA RUMP

DEFENDANT INFORMATION
Language: SPANISH
Date of birth: September 3, 1964
Video
Tape Number: L111804 Tape Count: 3:59

2004 NOV 23 P 2:36
SECOND DISTRICT COURT

CHARGES

2. POSS W/INTENT TO DIST CONTR/CNTRFT SUBST - 1st Degree Felony
Plea: Guilty - Disposition: 10/07/2004 Guilty

HEARING

This is time set for sentencing. The defendant is present in custody and represented by Roy Cole.
Defense counsel reports that the defendant has served 70 days in the Weber County Jail and agrees with the recommendation from Adult Probation and Parole.
The State responds and requests that the defendant be committed to the Utah State Prison.
Based on the factual evidence of the case, the Court agrees with the State.

050

Case No: 041905221
Date: Nov 18, 2004

SENTENCE PRISON

Based on the defendant's conviction of POSS W/INTENT TO DIST CONTR/CNTRFT SUBST a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

To the WEBER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE RECOMMENDATION NOTE

The Court recommends credit for the time that the defendant has served.

Dated this 23 day of Nov, 2004.

MICHAEL D. LYON
District Court Judge

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