2005

State of Utah v. Marty Joe Galvan : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v.	:	Case No. 20050005-CA
MARTY JOE GALVAN, Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM SENTENCES FOR THEFT, A THIRD DEGREE FELONY, AND ATTEMPTED SIMPLE ASSAULT, A CLASS A MISDEMEANOR, IN THE THIRD JUDICIAI DISTRICT, SALT LAKE COUNTY, THE HONORABLE JOHN PAUL KENNEDY PRESIDING

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

ADDENDUM

State v. McGuire, 2005 UT App 13 (unpublished opinion)

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	:	
v.	:	Case No. 20050005-CA
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from sentences for theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404, and attempted simple assault, a class A misdemeanor in violation of Utah Code Ann. § 76-5-102, in the Third Judicial District, Salt Lake County, the Honorable John Paul Kennedy presiding.[1] This Court has jurisdiction over the appeal under Utah Code Ann. § 78-2a-3(2)(e).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. A substitute prosecutor, unaware of the State's plea bargain agreement to recommend probation with jail time, appeared at sentencing and recommended prison. When defense counsel explained the problem, the prosecutor withdrew the recommendation and instead recommended probation. The trial court then imposed

[1] Unless otherwise stated, all citations to the code are to the West 2004 publication.

sentence. **Is defendant entitled to resentencing by a new judge where the prosecutor cured any inadvertent breach of the plea agreement before sentencing?**

To prevail on this unpreserved claim, defendant must establish plain error. He must show (1) that an error occurred; (2) that the error should have been obvious to the trial court; and (3) that the error was prejudicial. *See State v. Casey*, 2003 UT 55, ¶ 41, 82 P.3d 1106.

2. Did the trial court have jurisdiction to rule on defendant's 22(e) motion?

Whether a court has subject matter jurisdiction is a question of law, reviewed for correctness. *State v. One 1980 Cadillac*, 2001 UT 26, ¶ 8, 21 P.3d 212.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 22(e), Utah Rules of Criminal Procedure, provides: "The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time."

STATEMENT OF THE CASE

Defendant was charged with robbery, a second degree felony, and attempted theft, a third degree felony. R2-3. Defendant waived preliminary hearing, and defendant was bound over as charged. R47.

Defendant pled no contest to theft, a third degree felony, and attempted simple assault, a class A misdemeanor. R51. The section of the plea statement entitled "plea agreement" states: "At sentencing, the [S]tate recommends jail time on the Class A with completion of CATS or a release to an intensive inpatient program. At the end of successful probation, the [S]tate does not oppose a 76-3-402 reduction." R60. The notification of charges section has this footnote: "The [S]tate amends the Information to

charge the two offenses listed above, and defendant pleads as charged to the amended offenses. State recommends probation." R56. Defendant acknowledged in his plea statement that any sentencing recommendation was not binding on the trial court. *Id.*

The trial court accepted the plea. R63. The court also ordered Adult Probation & Parole (AP&P) to prepare a presentence investigation report (PSI). R51.

At sentencing, Paul Parker appeared for the State, substituting for prosecutor Kelly Sheffield, who had negotiated the plea agreement. R146 (December 6, 2004 Sentencing) at 18. Mr. Parker noted that the PSI detailed defendant's "long and extensive" and "violen[t]" criminal history and his poor record in probation settings. *Id.* at 23-24. He further observed, "[I]t looks to me like [defendant] needs to be in prison, as the pre-sentence report has indicated." *Id.* at 24. Defendant then made his statement. *Id.* at 24-25.

The trial court then asked if there was any reason the court should not proceed with sentencing. *Id.* at 25-26. Defense counsel responded, "[T]here's no legal reason not to proceed with sentencing; however, I need to make a couple of observations I want on the record." *Id.* at 26. He continued, "If you look at the first page of the change-of-plea form, . . . Mr. Sheffield's position was that [defendant] should plead to one third and [one] Class A. In exchange for that, the State would recommend probation with AP&P, with appropriate jail time." *Id.* He observed that the position that Mr. Parker had taken was "contrary to the official plea bargain position from the district attorney's office, and apparently Mr. Parker did not know that because Mr. Sheffield didn't leave the relevant

note to him." *Id.* He asked the court to "take judicial notice" of "the official state's position in this case at the time the plea was negotiated." *Id.*

At that point, Mr. Parker interrupted. He said, "I think I do need to make that amendment because it clearly says on the plea form . . . that the State would make a recommendation of probation. *Id.* at 27. He continued, "I do not have that in the file, but we need to stab[ilize] our agreement to make that recommendation, and I will withdraw my comments and make an affirmative recommendation of probation." *Id.*

Defense counsel added, "In addition to that, your Honor, Mr. Sheffield was not opposed, eventually, to a 402 reduction on the third to a Class A if [defendant] performed well on probation." *Id.* at 27. He summarized, "[A]gain I'm asking that the Court follow basically the joint recommendation of the State and the defense and allow probation to go forward consistent with where [defendant] fits on AP&P's matrix." *Id.* at 28.

The court then responded, "Well, I'm not obligated to follow your recommendation. Ordinarily I have been following recommendations, but in this instance I see a record of probably twenty or so situations where the defendant is involved in assault or some kind of abuse in his record." *Id.* "I just don't feel that, regardless of what [the] agreement was with Mr. Sheffield," and regardless of the victim's "pretty dramatic statement" about defendant's violent behavior, "[e]ven setting those aside and not weighing those in the balance, my inclination would still be to sentence the defendant at this time to zero to five years in the state prison." *Id.* Accordingly, the court sentenced defendant to zero to five years in prison on his felony

conviction. *Id.* The court also sentenced defendant to one year in jail on his class A misdemeanor conviction and ordered that the sentences run consecutively. *Id.*

On December 3, 2004, defendant timely appealed from his sentences. *Id.* at 76. Current counsel then appeared and moved for an order vacating defendant's sentence pursuant to rule 22(e), Utah Rules of Criminal Procedure, and transferring the case to another court for resentencing. R82, 84. On March 3, 2005, the trial court entered an order ruling that the December 3, 2004 notice of appeal deprived it of jurisdiction to hear defendant's rule 22(e) motion. R139-40. Defendant timely appealed that order. R142.

On March 14, 2005, this Court consolidated the two appeals. R144.

STATEMENT OF THE FACTS[2]

Defendant had been drinking "all day and ni[ght]" in the hours preceding the June 27, 2004 offense. PSI at 4. That Sunday morning, at approximately 3:30 a.m., he took a cab to a Salt Lake City grocery store. *Id.* at 3. Shortly thereafter, store employee Lonnetta Lopshire saw defendant "walk out of the store with a grocery cart containing four cases of beer." PSI at 3. Realizing that beer could not be sold legally at that hour, she tried to stop defendant. *Id.* "[D]efendant 'punched' Ms. Lopshire in the face, and again on the side of the head." *Id.* After she had fallen to the ground, "he continued to batter [her] while [she was] on the ground." R146 (December 6, 2004 Sentencing) at 22.

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[2] This statement relies on the factual summary of the offense and on defendant's statement, both included in the PSI, and on the victim's account of the offense at sentencing. *See* PSI at 3-4; R146 (December 6, 2004 Sentencing) at 22-23.

The cab driver, having witnessed the incident, got out of his car and took the keys with him. PSI at 3. He saw defendant drop one case of beer and put the other three into the cab. *Id.* Defendant then tried to drive away. *Id.* When he could not, he left on foot. *Id.*

Police apprehended defendant the following day. *Id.* at 4. He later stated that he "[w]as intoxicated, went to [the] store in [a] cab[,] walked out with 4 cases of beer[,] got into [an] altercation[, and] fled the scene." *Id.*

SUMMARY OF ARGUMENT

1. The trial court did not plainly err when it sentenced defendant, and defendant is not entitled to resentencing. Although the substitute prosecutor may initially have breached the plea agreement, he cured any breach before sentence was imposed. Moreover, defendant has not shown that the trial court relied on the State's initial recommendation when it imposed sentence or that he was denied the benefit of his bargain.

2. The trial court properly ruled that it lacked jurisdiction to address defendant's rule 22(e) motion to vacate. First, defendant had already filed an appeal raising the very issue he attempted to raise in his rule 22(e) motion. While rule 22(e) permits a defendant to attack an illegal sentence at any time and in any forum, it does not permit a defendant to repeatedly challenge his sentence on the same legal basis. Defendant chose to raise his breach-of-plea challenge to his sentence in the appellate courts. That choice deprived the district court of jurisdiction to simultaneously address the same issue. Second, because

defendant's sentence was both legal and legally imposed, rule 22(e) did not confer upon the trial court jurisdiction to address the claims raised in the motion.

ARGUMENT

Defendant claims that he was deprived of "the benefit of his plea bargain" and asks for "resentencing before a different judge." Br. Appellant at 6. Defendant did not preserve this claim below and does not argue exceptional circumstances or plain error on appeal. Defendant, in fact, invited the very error he now claims on appeal. This Court should therefore decline to review this claim. In any case, defendant has not shown that the trial court plainly erred when it sentenced him or that he was deprived of the benefit of his plea bargain. Thus, he is not entitled to resentencing.

After filing a notice of appeal from his sentence, defendant filed a motion to vacate his sentence in the trial court, arguing that the sentence was illegal or illegally imposed in violation of rule 22(e), Utah Rules of Criminal Procedure. The trial court ruled that defendant's filing of the initial notice of appeal deprived the court of jurisdiction to entertain the motion. That ruling was proper. Defendant had already filed an appeal raising the very issue he attempted to raise in his rule 22(e) motion, thereby depriving the district court of jurisdiction to address the same claim. Moreover, because defendant's sentence was both legal and legally imposed, rule 22(e) did not confer upon the trial court jurisdiction to address the claims raised in the motion.

I.

DEFENDANT RECEIVED THE BENEFIT OF HIS PLEA BARGAIN; EVEN ASSUMING THE STATE INITIALLY BREACHED THE PLEA AGREEMENT, THE STATE CURED THE BREACH

A. Defendant did not preserve this claim.

Defendant claims that he was deprived of the "benefit of his plea bargain" when the trial judge imposed sentence after the substitute prosecutor had initially recommended prison. Br. Appellant at 6-7. Defendant did not preserve this claim below.

It is well-settled that "claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. *See also State v. Thomas*, 1999 UT 2, ¶ 29, 974 P.2d 269 ("Absent any indication that this issue was raised at trial, it cannot be considered for the first time on appeal"); *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996) (declining to address claims not raised in the trial court). To preserve an issue for appeal, a defendant "must enter an objection on the record that is both timely and specific." *State v. Rangel*, 866 P.2d 607, 611 (Utah App. 1993). "The preservation requirement is based on the premise that, 'in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it.'" *State v. Cruz*, 2005 UT 45, ¶ 33, ___ P.3d ___ (quoting *Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346) (additional internal quotations omitted). "Accordingly, an objection "must at least be raised to a level of consciousness such that the trial [court] can consider it.'" *Id.* (quoting *State v. Brown,* 856 P.2d 356, 361 (Utah App. 1993) (additional internal quotations omitted). In other words, "[t]he objection must 'be specific enough to give the trial court notice of the very error' of which counsel [or

defendant] complains." *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998) (quoting *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 460 (Utah App. 1996)).

Here, defendant did not claim below that he had been denied the benefit of his plea bargain or that he was entitled to sentencing before a different judge. Defense counsel did not object to Judge Kennedy's imposing sentence after the substitute prosecutor stated that "it look[ed] . . . like [defendant] need[ed] to be in prison." R146 (December 6, 2004 Sentencing) at 24. Rather, defense counsel asked the court to take judicial notice that "the official state's position in this case at the time the plea was negotiated" included an agreement to recommend probation. *Id.* at 26. Following defense counsel's request, the substitute prosecutor acknowledged his error, withdrew his comments, and "ma[de] an affirmative recommendation of probation." *Id.* at 27.

Defense counsel was satisfied by the prosecutor's cure. Defense counsel therefore did not object to sentence being imposed by Judge Kennedy. Defendant never claimed that the prosecution's initial breach of the plea bargain tainted the proceedings or required sentencing before a different judge. Defendant thus waived below the claim he now makes on appeal.

B. Defendant invited the very error he now claims on appeal.

Where a defendant does not preserve his claim below, he must show "plain error" to prevail on appeal. *See State v. Brown*, 948 P.2d 337, 343 (Utah 1997). The plain error doctrine "exists to permit review of trial court rulings as a way of protecting a defendant from the harm that can be caused by less-than-perfect counsel." *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989).

Plain error review, however, does not lie when a party, through counsel, consciously refrains from objecting or has led the trial court into error. *Id.*; *State v. Geukgeuzian*, 2004 UT 16, ¶ 9, 86 P.3d 742 (holding, in context of challenge to jury instruction, that "a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error"). A defendant invites error "if counsel, either by statement or act, affirmatively represent[s] to the court that he or she had no objection" to the court's act or decision. *Geukgeuzian*, 2004 UT 16, ¶ 9 (internal quotation marks and citation omitted).

Thus, "'invited error . . . is procedurally unjustified and viewed with disfavor, especially where ample opportunity has been afforded to avoid such a result.'" *State v. Parsons*, 781 P.2d 1275, 1284-85 (Utah 1989) (quoting *State v. Tillman*, 750 P.2d 546, 560-61 (Utah 1987)). Otherwise, a criminal defendant could 'invite' prejudicial error and "implant it in the record as a form of appellate insurance . . . ." *Id.*

Defendant invited the very error he now claims on appeal. Before the trial court sentenced defendant, the court asked the parties if there was any reason why it should not proceed with sentencing. R146 (December 6, 2004 Sentencing) at 26. Defendant stated, "Your Honor, there's no legal reason not to proceed with sentencing; however, I need to make a couple of observations I want on the record." *Id.* Defendant did not ask the court to continue sentencing. Defendant did not argue that the court, having heard the prosecutor's initial recommendation, could not or should not impose sentence. Rather, defendant only wanted the court to be aware of the original bargain before it imposed sentence. *See id.* Indeed, after the prosecutor had withdrawn his initial recommendation

and had affirmatively recommended probation, defense counsel asked the court to proceed on the basis of "the joint recommendation of the State and of the defense." *Id.* at 28.

Moreover, as a matter of policy, this Court should not allow defendant to preview the trial court's sentencing decision and then argue that no sentencing should have occurred. Having affirmatively represented that there was no legal reason not to proceed with sentencing, defendant should not be permitted to now claim, for the first time on appeal, that the trial court erred when it imposed sentence.

C. Defendant has not alleged, much less shown, that the trial court plainly erred when it sentenced defendant after the State had cured its breach of the plea agreement.

In any event, defendant has not alleged, much less shown that the trial court plainly erred when it sentenced defendant after the State had cured its breach of the plea agreement. Defendant has not shown (1) that an error occurred; (2) that the error should have been obvious to the trial court; and (3) that the error was prejudicial. *See State v. Casey*, 2003 UT 55, ¶ 41, 82 P.3d 1106.

1. Where defendant has not argued "exceptional circumstances" or "plain error" to justify review of his unpreserved claim, this Court should decline to consider it on appeal.

Where an appellant has waived an issue and "does not argue that 'exceptional circumstances' or 'plain error' justifies a review of the issue," this Court may decline to consider it on appeal. *See State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995) (citation omitted).

As stated, defendant did not preserve his claim below. Moreover, he does not argue on appeal that "exceptional circumstances" or "plain error" justify review of the claim. This Court should therefore decline to consider the claim on appeal.

2. Defendant has not shown that the trial court erred.

Defendant bases his claim of error on *Santobello v. New York*, 404 U.S. 257 (1971), where the United States Supreme Court addressed a defendant's entitlement to the benefit of a plea bargain. In that case, a new prosecutor, replacing the prosecutor who had negotiated the plea, appeared for sentencing and recommended the maximum sentence. *Id.* at 259. When defense counsel objected on the ground that the State had promised to make no recommendation, the new prosecutor, "apparently ignorant of his colleague's commitment, argued that there was nothing in the record to support [Santobello's] claim of a promise." *Id.* The sentencing judge ended the discussion, stating that he was "not at all influenced by what the [prosecutor] sa[id]," and then imposed the maximum sentence. *Id.*

The Supreme Court vacated the sentence, holding that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty" required remand. *Id.* at 262. The court ordered the state court to determine "whether the circumstances of [the] case require[d] only that there be specific performance of the agreement on the plea, in which case [Santobello] should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require[d] granting the relief sought by [Santobello], i.e., the opportunity to withdraw his plea of guilty." *Id.* at 263.

Santobello involved no effort by the State to cure its breach of the plea bargain and is therefore distinguishable from this case. When the State cures its breach of a plea agreement, as it did in this case, the cure alters the significance of the breach.

In *State v. Smit*, 2004 UT App 222, 95 P.3d 1203, this Court addressed a *cured* breach of a plea agreement. In *Smit*, the parties entered into a plea agreement, which included the State's promise "to recommend that any sentence imposed be suspended and that [Smit] be granted probation." 2004 UT App 222, ¶ 2. During the change of plea hearing, the court advised Smit "that it was not bound by the plea agreement and that it could sentence [him] to prison for up to five years." *Id.* at ¶ 3.

At sentencing, the State recommended jail time, and Smit objected. *Id.* at ¶ 4. The court called a recess so that the parties could listen to tapes of the change of plea hearing. *Id.* When court reconvened, "the State withdrew its affirmative recommendation for jail." *Id.* The court observed, "'Apparently, the recommendation that was part of the agreement was that it was to impose no jail sentence." *Id.* The State responded, "'Correct.'" *Id.* The court clarified its understanding of the bargain, stating that "it imposed the sentence 'under the impression that the State's recommendation was that [it] should not send [Smit] to jail—or to prison and [it] should not impose, as a condition of probation any jail sentence.'" *Id.* The court nevertheless imposed a suspended prison term, placed Smit on probation for thirty-six months, and sentenced him to ninety days in jail as part of his probation. *Id.*

Smit then filed a motion to withdraw his plea, arguing that the State breached the plea agreement when it recommended jail time. *Id.* at ¶ 5. The trial court denied the

motion, concluding that the State had cured the breach by withdrawing its affirmative recommendation for jail. *Id.* at ¶ 5. At some point in the proceedings, whether at sentencing or in its ruling on the motion to withdraw, "the trial court stated that it was not influenced by the State's initial recommendation." *Id.* at ¶ 21.

On appeal, the State in *Smit* conceded that its initial recommendation breached the plea agreement, but argued that "by promptly withdrawing its recommendation, it cured the breach." *Id.* at ¶ 19. Smit argued "that the cure was ineffective because '[i]t was . . . insufficient to erase in the court's consciousness the State's real recommendation.'" *Id.* This Court concluded that the trial court did not abuse its discretion in denying the motion to withdraw the plea. The Court reasoned, "[T]he State cured its initial breach of the plea agreement . . . ." *Id.* at ¶ 21. Observing that the trial court had stated that it was not influenced by the State's initial recommendation and noting that the only evidence potentially "supporting Defendant's argument that the trial court was influenced by the State's initial recommendation [was] the fact that the trial court imposed a sentence consistent with that [initially] suggested by the State," the Court held that there was "no evidence to support Defendant's contention that the trial court was influenced by the initial recommendation." *Id.*

Smit controls here. In *Smit*, as in this case, the State recommended jail time, but withdrew that recommendation following the defendant's objection that it violated the plea agreement. By contrast, in *Santobello*, the State recommended jail time and stood by its recommendation in the face of defense counsel's objection that the recommendation violated the plea agreement.

Here, as in *Smit*, while the substitute prosecutor's initial recommendation may have violated the plea agreement, upon defense counsel's request that the court take judicial notice of the earlier prosecutor's promise to recommend probation, the substitute prosecutor concurred in defense counsel's representation of the initial plea agreement, withdrew his comments, and "ma[de] an affirmative recommendation of probation." R146 (December 6, 2004 Sentencing) at 27. Moreover, in this case, as in *Smit*, the trial court clarified that its decision did not rest on the State's initial recommendation. The court explained, "Ordinarily I have been following recommendations, but in this instance I see a record of probably twenty or so situations where the defendant is involved in assault, battery, or some kind of abuse in his record." *Id.* at 28. Based on that record, the court continued, "I just don't feel that, regardless of what your agreement was with Mr. Sheffield, . . . my inclination would still be to sentence the defendant at this time to zero to five years in the state prison." *Id.*

Defendant here received the benefit of his bargain. The State affirmatively recommended probation. R146:27. The trial court chose not to follow the recommendation, not because it was persuaded by the State's initial recommendation, but because the PSI presented an extensive record of violent criminal behavior. Thus, defendant is not entitled to resentencing before a different judge.

3. Even assuming that error occurred, it could not have been obvious.

Even assuming that error occurred, defendant has not shown that it was obvious. To show obviousness, defendant must show that the law was clear at the time of trial. *State v. Garcia*, 2001 UT App 19, ¶ 6, 18 P.3d 1123; *see also State v. Frausto*, 2002 UT

App 259, ¶ 22, 53 P.3d 486, *cert. denied*, 63 P.3d 104; *State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997). As explained above, *Smit* appears to be controlling law. *Smit*, decided six months before defendant's sentencing, holds that where the State cures its initial inadvertent breach of a plea bargain by withdrawing any recommendation inconsistent with the plea agreement, the trial court may still impose sentence. *See Smit*, 2004 UT App 222, at ¶ 21. Moreover, a trial court's imposition of "a sentence consistent with that suggested by the State" does not, by itself, "establish that the trial court was influenced by the State's recommendation." *Id.*

Given this precedent, any error in proceeding to sentencing could not have been obvious.

4. Defendant has not shown that any error was prejudicial.

As stated, a trial court's imposition of "a sentence consistent with that suggested by the State" does not, by itself, "establish that the trial court was influenced by the State's recommendation." *Id.* Defendant has pointed to nothing more. Thus, defendant has not shown that any error was prejudicial.

II.

THE TRIAL COURT PROPERLY DETERMINED THAT IT LACKED JURISDICTION TO REVIEW DEFENDANT'S POST-APPEAL RULE 22(E) MOTION TO VACATE SENTENCE

The trial court ruled that defendant's appeal deprived it of jurisdiction to hear his rule 22(e) motion. R139-40. Defendant claims that, despite the filing of his appeal, the trial court had jurisdiction address the motion. *See* Br. Appellant at 10.

A. Defendant chose to raise his breach-of-plea claim on appeal, thereby depriving the district court of jurisdiction.

The trial court's ruling was proper. As a general rule, a trial court loses jurisdiction over the merits of a controversy once an appeal is perfected. *See Saunders v. Sharp*, 818 P.2d 574, 477 (Utah App. 1991); *Frost v. District Court*, 83 P.2d 737 (Utah 1938). Although the court may retain jurisdiction as to collateral issues, it loses jurisdiction with respect to the issues that affect the subject matter of the appeal.[3] *Saunders*, 818 P.2d at 578; *Epic Assoc. v. Wasatch Bank*, 725 P.2d 1369, 1372 (Utah 1986).

A defendant may bring a motion under rule 22(e), Utah Rules of Criminal Procedure, to correct an illegal sentence "at any time." Utah R. Crim. P. 22(e). However, although "a criminal defendant may challenge an illegal sentence at any time and in any forum," he does not have "the right to repeatedly challenge his . . . sentence on the same legal basis." *State v. Clark*, 913 P.2d 360 (Utah App. 1996).

Defendant chose where to attack his sentence. He chose to attack the sentence in this Court when he filed his January 3, 2005 notice of appeal. His docketing statement, filed January 21, 2005, lists a single issue: "Did the prosecutor's breach of the plea agreement render [his] guilty plea involuntary, requiring its withdrawal, and/or resentencing before a different judge." Docketing Statement at 2. The trial court

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[3] The court may, for instance, "retain jurisdiction to reassess costs, correct the record, enforce a judgment, . . . or preside over matters which are independent of and do not interfere with the subject matter of the appeal." *Clark v. State*, 727 N.E.2d 18, 20 (Ind. App. 2000).

therefore determined that it did not have jurisdiction to address the identical issue in the context of a rule 22(e) motion, where defendant had chosen to raise the issue on appeal. *See* R139-40.

The trial court's ruling was proper. Defendant's choice to raise the breach-of-plea issue on appeal deprived this Court of jurisdiction to address the same issue in the context of a rule 22(e) motion. *Cf. Clark*, 913 P.2d at 362 (holding that a defendant may not "repeatedly challenge his or her sentence on the same basis" and holding that defendant could not bring a rule 22(e) motion to challenge a sentence on the basis of a claim earlier raised and adjudicated on appeal). Had the trial court ruled otherwise, the result may have been simultaneous adjudication of the issue in the district and appellate courts and successive appeals on the matter.

B. Under rule 22(e), a court may correct only an illegal or illegally imposed sentence. Even assuming the sentence was imposed erroneously, it was not an illegal or illegally imposed sentence.

In any case, the issue raised by defendant is not a claim properly brought under rule 22(e). Rule 22(e) provides that a "court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." *See State v. Telford*, 2002 UT 51, ¶ 5, 48 P.3d 228 (noting that "because an illegal sentence is void," a rule 22(e) claim "may be raised at any time") (citation and internal punctuation omitted).

Further, "[w]hile rule 22(e) allows a court to review an illegal sentence at any time, it must be 'narrowly circumscribed' to prevent abuse." *State v. Thorkelson*, 2004 UT App 9, ¶ 15, 84 P.3d 854 (quoting *State v. Telford*, 2002 UT 51, ¶ 5, 48 P.3d 228). "The Utah Supreme Court has held that a rule 22(e) illegal sentence is a 'patently' illegal

sentence or a 'manifestly' illegal sentence." *Id.* (citing *Telford*, 2002 UT 51, ¶ 5; *State v. Brooks*, 908 P.2d 856, 860 (Utah 1995)). "A 'patently' or 'manifestly' illegal sentence generally occurs in one of two situations: (1) where the sentencing court has no jurisdiction, or (2) where the sentence is beyond the authorized statutory range." *Id.* (citing *Telford*, 2002 UT 51, ¶ 5 n.1).

However, where a sentence is neither illegal nor illegally imposed, a trial court has no jurisdiction to correct it under rule 22(e). Where a defendant claims "ordinary or 'run-of-the-mill' error[]," his claims must be "reviewed on appeal under rule 4(a) of the Utah Rules of Appellate Procedure." *Thorkelson*, 2004 UT App 9, ¶ 15.

Here, defendant's sentence was not subject to correction under rule 22(e). It was not "patently" or "manifestly" illegal. Because the trial court had jurisdiction to impose the sentence, the sentence was not imposed in an illegal manner. Because the sentence was within statutory parameters, the sentence was not illegal. Thus, rule 22(e) "[could] not serve as a vehicle" for raising defendant's breach-of-plea claims. *See Telford*, 2002 UT 51, ¶ 6.

Rather, if the trial court erred by imposing sentence after the prosecutor had cured any breach of the plea bargain, the court's error was ordinary or "run of the mill" error, to be raised and addressed on appeal. Thus, the trial court, if it had any jurisdiction under rule 22(e), had jurisdiction only to determine that the alleged error was not "properly raised under rule 22(e)." *Telford*, 2002 UT 51, ¶¶ 5-6.

Moreover, this Court has jurisdiction only to dismiss defendant's appeal of the trial court's disposition of his motion to vacate. Where "the initial sentence [is] legal, the

district court los[es] subject matter jurisdiction over the sentence. Likewise, [the appellate] court has no jurisdiction. Lacking jurisdiction, [the appellate court is] required to dismiss the appeal." *State v. McGuire*, 2005 UT App 13, *2 (memorandum decision) (attached in the **Addendum**).

ORAL ARGUMENT REQUESTED

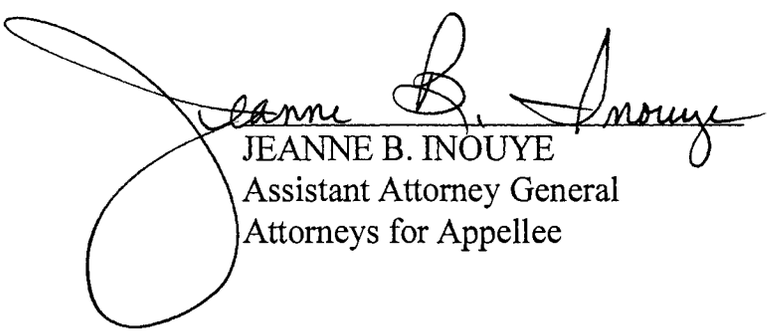
The State requests oral argument. "[O]ral argument is a tool for assisting the appellate court in its decision making process," *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706, and "the only opportunity for a dialogue between the litigant and the bench." *Moles v. Regents of University of California*, 187 Cal. Rptr. 557, 560 (Cal. 1982). In the case at bar, the decisional process would "be significantly aided by oral argument." Utah R. App. P. 29(a).

CONCLUSION

This Court should affirm defendant's conviction and dismiss his appeal of the trial court's disposition of his motion to vacate.

Respectfully submitted this 5th day of August, 2005.

MARK L. SHURTLEFF
Attorney General



JEANNE B. INOUYE
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2005, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Brief of Appellee to appellant's counsel of record, as follows:

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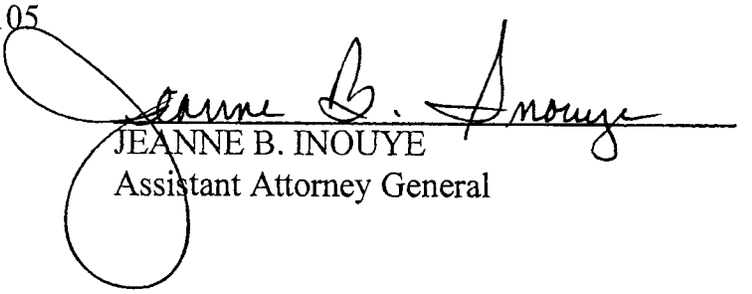

JEANNE B. INOUYE
Assistant Attorney General

ADDENDUM

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellee,
v.
Shawn C. McGUIRE, Defendant and Appellant.
No. 20030418-CA.

Jan. 13, 2005.

Third District, Salt Lake Department; The Honorable Paul G. Maughan.

Joan C. Watt and Nisa J. Sisneros, Salt Lake City, for Appellant.

Mark L. Shurtleff and Matthew D. Bates, Salt Lake City, for Appellee.

Before Judges DAVIS, JACKSON, and THORNE.

MEMORANDUM DECISION (Not For Official Publication)

PER CURIAM:

***1** Shawn C. McGuire appeals the sentence entered by the trial court. McGuire also appeals an order denying a motion to reconsider the sentence.

McGuire pleaded guilty to operation of a clandestine laboratory, a first degree felony under the circumstances of this case. *See* Utah Code Ann. § § 58-37d-4(1)(a), -5 (2004 Supp.). On August 12, 2002, the trial court sentenced McGuire to an indeterminate term of "not less than five years and which may be life in the Utah State Prison." Rather than file an appeal, on August 13, 2002, McGuire filed a "motion to reconsider sentence." The motion was denied on April 1, 2003, on the basis that there were no grounds upon which to "reconsider" the sentence, and that the trial court lacked jurisdiction to reconsider a legally imposed sentence. McGuire subsequently filed this appeal.

An appeal must be filed within thirty days from the entry of a final judgment or order. *See* Utah R.App. P. 4. In a criminal case, it is "the sentence itself which constitutes a final judgment from which the appellant has the right to appeal." *State v. Bower*, 2002 UT 100, ¶ 4, 57 P.3d 1065. The "30- day period for filing a notice of appeal in a criminal case ... is jurisdictional and cannot be enlarged by this [c]ourt." *State v. Johnson*, 635 P.2d 36, 37 (Utah 1981).

McGuire's notice of appeal was filed eight months after entry of the sentence by the trial court, long past the jurisdictional deadline. *See* Utah R.App. P. 4. However, McGuire argues that the time for filing an appeal was tolled in this case because McGuire filed a "motion to reconsider sentence" the day after the sentence was issued. [FN1]

> FN1. McGuire argues that the "motion to reconsider" the sentence was actually a motion to "alter or amend the judgment" under rule 59(e) of the Utah Rules of Civil Procedure, thereby tolling the time for appeal under rule 4 of the Utah Rules of Appellate Procedure. *See* Utah R.App. P. 4(b). McGuire's attempt to categorize his "motion to reconsider" the sentence as a motion under rule 59 is unavailing because rule 22 of the Utah Rules of Criminal Procedure specifically applies to sentences. *See* Utah R. Crim P. 22; Utah R. Civ. P. 81(e) ("These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule...."). The fact that a remedy under rule 22(e) is extremely limited does not alter this outcome.

Once a court imposes a valid sentence, it loses subject matter jurisdiction over the case. *State v. Montoya*, 825 P.2d 676, 679 (Utah Ct.App.1991). However, rule 22(e) of the Utah Rules of Criminal Procedure provides a mechanism by which a defendant may attack "an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R.Crim. P. 22(e). McGuire sought reconsideration of the sentence which was imposed after his guilty plea was entered in this case. Giving McGuire the benefit of the doubt, his motion to reconsider his sentence may be construed as a motion pursuant to rule 22(e). *See Montoya*, 825 P.2d at 679.

The district court's jurisdiction over the resentencing turns on whether the initial sentence was legal. *Id.* (citing *State v. Babbell*, 813 P.2d 86, 88 (Utah 1991)). Under *Montoya*, this court must "determine

whether the initial sentence was valid. If it was valid, the trial court would have had no further subject matter jurisdiction to resentence [defendant]. Likewise, this court would have no jurisdiction to hear the appeal." *Id.*

An illegal sentence under rule 22(e) must be "patently" or "manifestly" illegal. ***State v. Thorkelson*, 2004 UT App 9,¶ 15, 84 P.3d 854**. "**A 'patently' or 'manifestly' illegal sentence generally occurs in one of two situations: (1) where the sentencing court has no jurisdiction, or (2) where the sentence is beyond the authorized statutory range.**" ***Id.*** McGuire's challenge to his sentence does not fall under either situation. Instead, McGuire challenges the decision of the trial court to deny probation and sentence him to prison, a decision that is "within the complete discretion of the trial court." *State v. Rhodes*, 818 P.2d 1048, 1049 (Utah Ct.App.1991). As in ***Thorkelson,*** the error alleged by McGuire involves an "**ordinary or 'run-of-the-mill' error regularly reviewed on appeal under rule 4(a) of the Utah Rules of Appellate Procedure.**" ***Thorkelson*, 2004 UT App 9 at ¶ 15**. [FN2] There is no showing that there was anything illegal about McGuire's sentence.

> FN2. Moreover, there is no showing that the trial court abused its discretion, let alone entered an "illegal sentence, or a sentence imposed in an illegal manner[.]" Utah R.Crim. P. 22(e).

***2** Jurisdiction to resentence McGuire would require an illegality in the initial sentence. Because the initial sentence was legal, the district court lost subject matter jurisdiction over the sentence. *See Montoya*, 825 P.2d at 680. Likewise, this court has no jurisdiction. *See id.* Lacking jurisdiction, we are required to dismiss the appeal. *See Loffredo v. Holt*, 2001 UT 97,¶ 11, 37 P.3d 1070.

Accordingly, we dismiss this appeal for lack of jurisdiction.

2005 WL 67585 (Utah App.), 2005 UT App 13

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