

2005

Utah v. Robyn Celeste Hopkins : Brief of Appellee

Utah Court of Appeals

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Case No. 20051044-CA

IN THE
UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Robyn Celeste Hopkins,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for aggravated robbery and aggravated burglary, both first degree felonies, in the Second Judicial District Court of Utah, Weber County, the Honorable Scott M. Hadley presiding

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State of Utah,
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vs.

Robyn Celeste Hopkins,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (West 2004), and aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203 (West 2004). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

STATEMENT OF THE ISSUE

Did the trial court abuse its discretion in sentencing defendant to the sentences prescribed by the statute?

Standard of Review. “The decision whether to grant probation is within the complete discretion of the trial court.” *State v. Rhodes*, 818 P.2d 1048, 1049 (Utah App. 1991). This Court will not disturb that sentence unless the trial court abused that discretion. *Id.*

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The relevant statutory provisions and rules on appeal are set forth in the text of the brief.

STATEMENT OF THE CASE

Summary of Proceedings. Defendant was charged with aggravated robbery and aggravated kidnapping. R. 3-4. Pursuant to a plea agreement, defendant entered guilty pleas to aggravated robbery, as charged, and aggravated burglary (amended from aggravated kidnapping). R. 1-2, 63-69. The prosecution agreed that the weapons enhancement would be dismissed if defendant was sentenced to prison. R. 68. Thereafter, the trial court sentenced defendant to two concurrent prison terms of five years-to-life. R. 71-72. Defendant timely appealed. R. 80-81. The Utah Supreme Court transferred the appeal to the Utah Court of Appeals pursuant to rule 44, Utah Rules of Appellate Procedure. R. 85.

*Summary of Facts.*¹ Believing that Dirk George owed her money, defendant solicited the help of Steven Dirks to collect the disputed debt. R. 97: 9-10; R. 98: 8, 11. Dirks agreed and the two drove to George's home. R. 98: 11. The two entered George's home, Dirks displayed a gun, and they demanded that George give them various items of property. R. 97: 9, 12; R. 98: 12. As defendant scavenged George's house for property, Dirks threatened George with the gun. R. 97: 9-10. Unsatisfied

¹ The facts are taken from the prosecutor's recitation of the factual basis for the guilty plea made at the disposition hearing and from the prosecutor's recitation of facts made at sentencing.

with the property available at George's home, the two ordered George into their car, drove to a local convenience store, and demanded that he purchase various items for them. R. 97: 10. George alerted the store clerk about what was happening and the clerk called police. R. 97: 10. Defendant and Dirks fled the scene in their car and tossed the gun out of the car. R. 97: 10. Police apprehended defendant and Dirks and recovered the gun. R. 97: 10. Defendant and Dirks confessed to police. R. 97: 10-11.

SUMMARY OF ARGUMENT

Defendant argues that the trial court abused its discretion in sentencing her to prison (rather than probation). He claims that the trial court abused its discretion by failing to consider the sentencing factors set forth in section 76-3-401 and considered in *State v. Galli*, 967 P.2d 930 (Utah 1998). However, a trial court is required to consider those factors when considering the imposition of consecutive sentences. It is not required to consider them when considering probation. When consecutive sentencing is not at issue, the trial court is simply required to consider defendant's statement to the court at sentencing and any information presented by defendant in mitigation of punishment. See Utah R. Crim. P. 22(a). In any event, the record demonstrates that the trial court considered the factors identified in section 76-3-401. The trial court simply concluded that the gravity and circumstances of the offense were too serious to warrant probation. It is not an abuse of discretion to place more emphasis on one factor over another. Accordingly, defendant's claim fails and her sentence should be affirmed.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING DEFENDANT TO PRISON RATHER THAN IMPOSING PROBATION.

Defendant contends that the trial court abused its discretion in denying her probation. Aplt. Brf. at 7-11. Her argument lacks merit.

A defendant “has no right to be placed on probation.” *State v. Smith*, 842 P.2d 908, 910 (Utah 1992). “The decision whether to grant probation is within the complete discretion of the trial court.” *State v. Rhodes*, 818 P.2d 1048, 1049 (Utah App. 1991). “[T]he exercise of discretion in sentencing necessarily reflects the personal judgment of the [trial] court.” *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978). A trial court may place a defendant on probation ““if it thinks that will best serve the ends of justice and is compatible with the public interest.”” *Rhodes*, 818 P.2d at 1051; accord *State v. Valdovinos*, 2003 UT App 432, ¶ 23, 82 P.3d 1167.

In deciding whether probation is appropriate, the court considers “many different ingredients,” including deterrence, punishment, restitution, incapacitation, and rehabilitation. *Rhodes*, 818 P.2d at 1051. The decision to impose or deny probation “rests in many cases upon subtleties not apparent on the face of a cold record,” *id.*, e.g., “intangibles of [a defendant’s] character, personality and attitude,” *State v. Sibert*, 6 Utah 2d 198, 310 P.2d 388, 393 (1957).

This Court will not find an abuse of discretion unless the trial judge “act[ed] with inherent unfairness in sentencing, impose[d] a clearly excessive sentence, or fail[ed] to consider all legally relevant factors.” *State v. Thomas*, 2006 UT App 106U,

¶ 6; accord *Valdovinos*, 2003 UT App 432, ¶ 23. To prevail on a challenge to a trial court's decision not to grant probation, a defendant must "clearly show that the trial judge would have granted probation except for some wholly irrelevant, improper or inconsequential consideration." An "appellate court can properly find abuse only if it can be said that no reasonable [person] would take the view adopted by the trial court." *Gerrard*, 584 P.2d at 887.

Relying on *State v. Galli*, 967 P.2d 930 (Utah 1998), defendant claims that the trial court abused its decision in denying probation by failing to consider that: (1) no one was injured during the robbery, (2) the convictions constituted defendant's first felony convictions, (3) defendant gave a full statement to police and expressed sorrow for her actions, and (4) while in jail, defendant participated in drug counseling and received her GED. Apl't. Brf. at 8-11. Defendant's claim fails.

The sentencing factors identified in *Galli*—"the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant"—are set forth in section 76-3-401 of the Utah Code. See Utah Code Ann. § 76-3-401(2) (West 2004). That section requires that a trial court consider those factors "[i]n determining whether state offenses are to run concurrently or consecutively." *Id.* It does not require a trial court to consider these factors when considering probation. Reliance on *Galli* is thus misplaced.² Where consecutive sentences are not involved, the rules simply require that the court "afford the defendant an opportunity to make a statement and to *present any*

² Defendant was, in fact, given concurrent sentences. R. 98: 13.

information in mitigation of punishment, or to show any legal cause why sentence should not be imposed.” Utah R. Crim. P. 22(a) (emphasis added). The record demonstrates that the trial court afforded defendant that opportunity. *See* R. 98.

In any event, the record belies defendant’s claim that the trial court did not consider the history, character, and rehabilitative needs of defendant. Before sentencing, defense counsel pointed out that the presentence investigation report (PSI) erroneously assessed defendant one point for prior juvenile convictions and three points for weapons use. R. 98: 2-3. Counsel noted that defendant was thus improperly placed on Criminal History Row II (resulting in a prison recommendation) rather than Criminal History Row I (which would have resulted in a recommendation of intermediate sanctions). R. 98: 2-4. Moreover, counsel emphasized that defendant “has no prior felony record at all.” R. 98: 5. Counsel also advised the trial court of defendant’s rehabilitation needs and efforts:

She has certainly had some drug problems and that fueled this case, and the mere fact that she’s been in jail this long I think has contributed towards getting her on the road to getting through that stuff. She has gotten her GED while she’s been in there, gotten some additional classes, so she’s been productive and she can do that.

R. 98: 7. The trial court also heard from defendant, who expressed her “sorrow for what [she had] done.” R. 98: 7.

Contrary to defendant’s claim, therefore, the trial court did consider that defendant’s convictions constituted her first felony convictions, that she expressed her sorrow for her conduct, and that while in jail, she participated in drug counseling and received her GED. Additionally, the trial court reviewed the

presentence investigation report (PSI), R. 98: 2, which would have also addressed defendant's rehabilitative needs.³ The court was also made aware of the factual basis for the convictions, and was thus well aware that no one was injured in the robbery and that defendant confessed to police after being apprehended. R. 97: 9-11. Finally, the record demonstrates that the court accepted defendant's challenges to the PSI and acknowledged that the resulting recommendation would have been intermediate sanctions. R. 98: 12-13.

The trial court thus considered all of the factors set forth in section 76-3-401. It permitted defendant to present information in mitigation of punishment. It also accepted defendant's challenge to the PSI. The court concluded, however, that the gravity and circumstances of the offense were "too serious" to justify alternative sentencing and sentenced defendant to prison. R. 98: 13. This Court has long recognized that a trial court "d[oes] not abuse its discretion by placing more emphasis on punishing [a] defendant rather than rehabilitating [her]." *State v. Nutall*, 861 P.2d 454, 458 (Utah App. 1993).

In sum, it cannot be said that "no reasonable [person] would take the view" that defendant's conduct warranted prison, rather than probation. *See Gerrard*, 584 P.2d at 887. "[T]he sentence given by the court is the sentence prescribed by statute." *Smith*, 842 P.2d at 910. Moreover, the facts supporting defendant's guilty

³ Because defendant did not make the PSI a part of the record on appeal, this Court will assume the regularity of the proceedings below. *See State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998).

pleas also provided a factual basis for aggravated kidnapping, the original charge before the plea bargain. *See* R. 97: 10-12; Utah Code Ann. § 76-5-302(1)(a) (West 2004).⁴ A conviction for aggravated kidnapping would have subjected defendant to a minimum mandatory sentence of either 6, 10, or 15 years-to-life in prison. *See* Utah Code Ann. § 76-5-302(3). The plea bargain avoided a minimum mandatory sentence of at least six years. Under these circumstances, the trial court cannot be faulted for rejecting alternative sentencing or probation. *See State v. Lipsky*, 639 P.2d 174, 176 (Utah 1981) (recognizing that a trial court may consider any offense, whether or not a conviction occurred, in imposing a sentence); *State v. Howell*, 707 P.2d 115, 118 (Utah 1985) (observing that facts relating to dismissed charges are properly considered at sentencing); *see also State v. Hines*, 663 So.2d 199, 202 (La. App. 1996) (observing that a trial court may consider a plea bargain when imposing sentence).

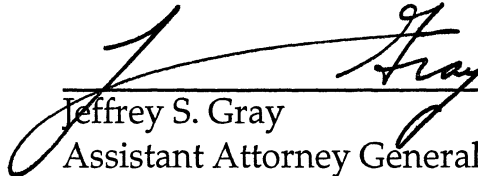
CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions and sentence.

⁴ Defendant, through counsel, admitted that she solicited the help of Steven Dirks to collect the alleged debt from Mr. George, that the two ordered Mr. George into their car, that they drove to a convenience store, and that the two demanded that Mr. George purchase items for them. R. 97: 10-11. Defendant did dispute that she knew of the gun before they entered Mr. George's home. R. 97: 11. However, defendant can claim no such ignorance with regard to the gun when they ordered Mr. George into their car, drove him to a convenience store, and demanded that he purchase items for them.

Respectfully submitted July 6, 2006.

Mark L. Shurtleff
Utah Attorney General



Jeffrey S. Gray
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2006, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Robyn Celeste Hopkins, by causing them to be delivered by first class mail to her counsel of record as follows:

Randall W. Richards
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2550 Washington Blvd.
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ADDENDUM

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050013-CA
v.)	
)	
Robert Craig Thomas,)	F I L E D
)	(March 16, 2006)
)	
Defendant and Appellant.)	2006 UT App 106

Third District, Salt Lake Department, 041905292
The Honorable Leslie A. Lewis

Attorneys: John P. Pace and Catherine E. Roberts, Salt Lake
City, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City,
for Appellee

Before Judges Billings, McHugh, and Thorne.

McHUGH, Judge:

Robert Craig Thomas appeals his sentence of two indeterminate prison terms of zero to five years and two jail terms of twelve months, all to be served consecutively. Thomas pleaded guilty to possession of a controlled substance, theft by deception, attempted unlawful use of a transaction card, and attempted forgery. Thomas argues that the trial court abused its discretion by (1) failing to order a diagnostic evaluation and probation and (2) ordering that the sentences be served consecutively rather than concurrently.¹ We affirm.

The record reveals that Thomas's crimes stem from a lengthy methamphetamine addiction. The presentence report stated that Thomas had been imprisoned several times in the past for drug-related crimes and had completed several treatment programs. The report also stated that Thomas was still using drugs

1. The State argues that Thomas failed to preserve either of his arguments. After reviewing the record, we conclude that both issues were sufficiently addressed by the trial court and should be resolved on the merits by this court.

regularly despite receiving treatment. The report recommended more prison time.

At the sentencing hearing, the trial court heard statements from several victims of Thomas's crimes. The court also heard from defense counsel, who stated that the prosecution had agreed to probation if Thomas could enter an intensive inpatient program such as the Odyssey House. The judge noted that although she was disinclined to order probation, it would be possible only if Thomas first underwent a diagnostic evaluation. The following exchange then occurred:

THE COURT: I'll be frank with you, [defense] counsel, and indicate to you that I'm doing the diagnostic evaluation because I believe in looking at all alternatives, but frankly at this point I'm inclined to send him to prison. But we will see how he performs in the diagnostic unit, and whatever the penalty is going to be it's going to involve a significant amount of time behind bars.

You need to be prepared for that. It's not going to be a month or two. And so I'd put your best foot forward, sir, at the diagnostic center, and if you do treat this as a joke, or flippantly, . . . the consequences will be real and significant. Do you understand me?

THE DEFENDANT: Yes, your honor.

THE COURT: All right. Forthwith--and we'll set this ninety days hence. I think I'm going to ask for a ninety-day diagnostic evaluation.

THE DEFENDANT: Just send me to prison, then.

THE COURT: You'd just like to go to prison?

THE DEFENDANT: Just send me to prison. I ain't doing no evaluation. I ain't wasting ninety days.

. . . .

THE COURT: So why don't you want to do it?

THE DEFENDANT: Because they're going to recommend prison automatic. Every--your honor, every time I've been in front of anybody, I went straight to prison. They

send me to prison. I don't get no chance in there.

I'm a drug addict. I'm sorry for what I did to them people. You think I like what I do? No, I don't like doing it. I want to go to Odyssey House where I can get some help. . . . No matter what I say, no matter what I do in diagnostic, they're going to send me to prison. . . . The board's going to look at that ninety days, and they're going to go, "So what?"

The trial court subsequently offered Thomas a chance to confer with his attorney, after which the court stated, "Mr. Thomas, your attitude has had an impact on me. I'm inclined to do what you've asked . . . and that is sentence you to prison." Thomas replied, "Okay, your honor. Thank you." The court then imposed the maximum sentences allowed by statute and ordered that they run consecutively. Thomas later filed a Motion for Relief from Judgment, which was denied.

Thomas asserts the trial court misconstrued his comments as exhibiting a poor attitude when in actuality he was merely expressing his desire to overcome his drug addiction. He contends that the court then retaliated against him for his comments by sentencing him to consecutive prison terms rather than probation.

"We review the sentencing decisions of a trial court for abuse of discretion." State v. Montoya, 929 P.2d 356, 358 (Utah Ct. App. 1996) (quotations and citation omitted). Abuse of discretion may be manifest if the judge acts with inherent unfairness in sentencing, imposes a clearly excessive sentence, or fails to consider all legally relevant factors. See id. "An appellate court may only find abuse if it can be said that no reasonable [person] would take the view adopted by the trial court." Id. (alteration in original) (quotations and citation omitted).

Thomas first contends the trial court should have ordered an evaluation and probation. "Whether or not the judge elects to order an evaluation before passing sentence is clearly within [her] discretion, based on [her] own judgment of the case before [her]." State v. Gerrard, 584 P.2d 885, 887 (Utah 1978). Moreover, the granting of "[p]robation is not a matter of right," but involves "considering intangibles of [the defendant's] character, personality[,] and attitude, of which the cold record gives little inkling." State v. Sibert, 6 Utah 2d 198, 310 P.2d 388, 393 (1957). For this reason, the decision whether to grant probation necessarily rests with the trial court. See id.; see

also State v. McClendon, 611 P.2d 728, 730 (Utah 1980) (same); State v. Rhodes, 818 P.2d 1048, 1049 (Utah Ct. App. 1991) (same). A trial court abuses its discretion if a defendant "clearly show[s] that the trial judge would have granted probation except for some wholly irrelevant, improper[,] or inconsequential consideration." Sibert, 310 P.2d at 393.

Here, the trial court did not abuse its discretion when it ordered prison time rather than a diagnostic evaluation or probation. We cannot know from the cold record on appeal, see id., the attitude Thomas exhibited to the trial court. Furthermore, at the outset, the judge stated that she planned to sentence Thomas to significant prison time. She also expressed uncertainty as to whether a diagnostic evaluation would accomplish anything. We cannot conclude that the trial judge would have granted probation absent some wholly improper consideration. See id.

Thomas's second argument is that the trial court abused its discretion by failing to consider all of the necessary factors before imposing consecutive sentences. Utah Code section 76-3-401 states:

(1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. . . .

. . . .

(2) In determining whether state offenses are to run concurrently or consecutively, the court shall consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant.

Utah Code Ann. § 76-3-401(1), (2) (2003). "Concurrent sentences are favored over consecutive ones." State v. Perez, 2002 UT App 211, ¶43, 52 P.3d 451.

Thomas argues that because the trial court did not make findings on the record regarding the gravity and circumstances of his offense, the number of victims, and his history, character, and rehabilitative needs, it failed to consider these statutory factors and, thus, improperly imposed consecutive sentences. This argument is foreclosed by State v. Helms, 2002 UT 12, 40 P.3d 626, in which the Utah Supreme Court, considering a similar issue, stated: "[A]s a general rule [we] uphold[] the trial

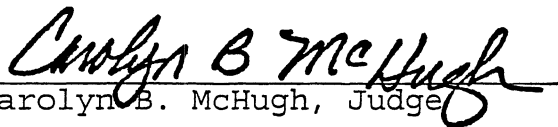
court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings." Id. at ¶11 (quotations and citation omitted). This assumption should not be made, though, when "(1) an ambiguity of facts makes the assumption unreasonable, (2) a statute explicitly provides that written findings must be made, or (3) a prior case states that findings on an issue must be made." Id. "Absent these circumstances, we will not assume that the trial court's silence, by itself, presupposes that the court did not consider the proper factors as required by law." Id. Neither case law nor statute requires a trial court to make specific findings of fact in a sentencing order. Thus, an ambiguity of facts would be the only circumstance in which record findings need be made. See id.

Here, the record supports a conclusion that the trial court considered these factors even though it did not make formal findings on the record. The presentence report contained detailed information about Thomas's criminal history, his past attempts at rehabilitation, and the circumstances of the offenses. The judge referred to specific parts of the presentence report before sentencing and asked counsel for both sides whether any changes needed to be made to the report. The judge clearly relied on the information in the report in determining Thomas's sentence. The court also heard from several victims of Thomas's crimes before imposing the sentence. Therefore, it is apparent that the trial court considered the statutory factors. We see no ambiguity of facts that would have necessitated record findings.

Thomas also asserts that the court ignored the presentence report's recommendation of concurrent sentences. However, a trial court is not required to follow the recommendations of a presentence report. See State v. Thurston, 781 P.2d 1296, 1300 (Utah Ct. App. 1989) ("The entire sentencing process is a search for truth and an evaluation of alternatives. Therefore, the recommendations of the prosecutor or any other party are not binding upon the court." (citation omitted)). The sentence was within the statutory guidelines, see Utah Code Ann. §§ 76-3-203(3), -204 (2003), and, thus, was not clearly unfair or excessive. Thomas has provided nothing that would support a

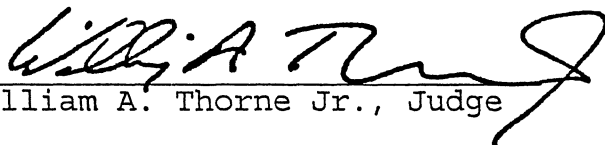
conclusion that the trial court abused its discretion when it sentenced him.

Affirmed.


Carolyn B. McHugh, Judge

WE CONCUR:


Judith M. Billings, Judge


William A. Thorne Jr., Judge