2006

State of Utah v. Michael William Kissell : Brief of Appellant

Utah Court of Appeals

Assistant Attorney General.
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IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	**Case No. 20061121-CA**
MICHAEL WILLAM KISSELL,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM AN ORDER
ENTERED IN THE SEVENTH DISTRICT COURT
IN AND FOR GRAND COUNTY, STATE OF UTAH,
THE HONORABLE LYLE R. ANDERSON, JUDGE, PRESIDING.

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

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BRIEF OF APPELLANT

JURISDICTION

Appellant appeals from the trial court's *Order* denying his *Petition for Relief Under the Post-Conviction Remedies Act* and a *Memorandum in Support of Petition for Relief Under the Post-Conviction Remedies Act* (collectively, the "**Petition**") entered April 5, 2005, in this case involving his convictions in the Seventh Judicial District Court for the County of Grand, State of Utah, for five (5) counts of Dealing in Material Harmful to a Minor, all third-degree felonies. A copy of the Order is attached hereto as Addendum "A" and incorporated herein by this reference. The Utah Court of Appeals has jurisdiction over this appeal in this matter pursuant to UTAH CODE ANN. §§78-2a-3(2)(e) and UT. R. APP. P. 3(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS STATEMENT OF ISSUES PRESENTED ON APPEAL, AND STANDARD OR REVIEW

ISSUE #1: *Did the trial court err in denying Appellant's Petition for Relief under the Post-Conviction Remedies Act challenging the trial court's reliance upon irrelevant and unreliable evidence and information when sentencing the Appellant?*

STANDARD OF REVIEW: "Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion." Wickham v. Galetka, 2002 UT 72, ¶7, 61 P.3d 978. "This Court traditionally afford[s] the trial court wide latitude and discretion in sentencing. State v. Woodland, 945 P.2d 665, 671 (Utah, 1997). Generally, we will reverse a trial court's sentencing decision only if it is an abuse of the judge's discretion. State v. Gibbons, 779 P.2d 1133, 1135 (Utah 1989). A trial court abuses its discretion in sentencing when, among other things, it fails to consider all legally relevant factors." State v. Helms, 2002 UT 12, ¶8, 40 P.3d 626 (*quoting* Gibbons, 779 P.2d at 1135). "A court abuses its discretion in imposing consecutive sentences only if no reasonable [person] would take the view by the [sentencing] court." State v. Thorkelson, 2004 UT App 9, ¶12, 84 P.3d 854, (*quoting* State v. Gerrard, 584 P.2d 885, 887 (Utah 1978)).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

I. UNITED STATES CONSTITUTION AMEND. XIV

II. UTAH CONSTITUTION ART. I § 7

III. UTAH CONSTITUTION ART. I § 24

IV. UTAH CODE ANN. § 76-3-401

V. UT. R. CIV. P. 65(c)

STATEMENT OF THE CASE

On August 27, 2004, Michael William Kissell (hereinafter "**Kissell**") was charged by *Information* in the Seventh Judicial District Court, in and for Grand County, State of Utah, with forcible sexual abuse, a second-degree felony; thirty-four (34) counts of dealing in harmful material, all third-degree felonies under UTAH CODE ANN. §76-10-1206, allowing for a separate charge for each article allegedly exhibited; and contributing to the delinquency of a minor, a Class B misdemeanor. R0013-R0014. On November 8, 2004, Kissell was charged by *Amended Information* with forcible sexual abuse, a second-degree felony; thirty-four (34) counts of dealing in harmful material to a minor, all third-degree felonies; and contributing to the delinquency of a minor, a Class B misdemeanor. R0014.

On March 1, 2005, Kissell filed his *Statement of Defendant in Support of Guilty Plea and Certificate of Counsel*, pleading guilty to five (5) separate counts of dealing in harmful material to a minor pursuant to a plea agreement with the State of Utah ("**State**"), with the remainder of the charges dismissed pursuant to plea negotiations. *Id.* On April 5, 2005, the trial court sentenced Kissell to five (5) zero to five (0-5) year terms to be served consecutively in the Utah State Prison, and entered its *Judgment and Commitment to Utah State Prison* (the "**Judgment**") in this matter. R0029.

On July 14, 2006, Kissell filed a *Petition for Relief Under the Post-Conviction Remedies Act* and a *Memorandum in Support of Petition for Relief Under the Post-Conviction Remedies Act*, challenging that the trial court had relied upon irrelevant and unreliable evidence and information in sentencing Appellant to consecutive terms. R0005 and R0013. On October 20, 2006, the trial court entered its *Order* denying Kissell's Petition. R0032- R0033. On November 8, 2006, Kissell, timely filed his *Notice of Appeal* from the Order denying the Petition. R0035.

STATEMENT OF THE FACTS

On November 8, 2004, Kissell was charged by *Amended Information* with forcible sexual abuse, a second-degree felony; thirty-four (34) counts of dealing in harmful material to a minor, all third-degree felonies; and contributing to the delinquency of a minor, a class B misdemeanor. R0014. On March 1, 2005, Kissell filed his *Statement of Defendant in Support of Guilty Plea and Certificate of Counsel*, pleading guilty to five (5) separate counts of dealing in harmful material to a minor pursuant to a plea agreement with the State, with the remainder of the charges dismissed pursuant to plea negotiations. *Id.*

On April 5, 2005, Kissell appeared for sentencing before the Honorable Lyle R. Anderson of the Seventh Judicial District Court in and for Grand County, State of Utah. At sentencing, Kissell was remorseful and apologized to the victim's family for what he had done. He had minimal prior criminal history, the crimes committed were non-violent crimes, and he had appeared at all scheduled hearings in this matter. Additionally, Kissell has maintained employment and has been a productive member of the community. Many

letters were written by his neighbors and friends in support of Kissell which showed that he had a good reputation and a great job history. The prosecution and defense counsel as well as Adult Probation and Parole, who had prepared a pre-sentence investigation report, believed that Kissell should receive concurrent sentences.At the sentencing hearing, prior to entering the sentence, Judge Anderson set forth the following analysis of factors he used in determining Kissell's sentence:

> **THE COURT**: "You're – you're bisexual, Mr. Kissell, ah, so you're aroused by the idea of sexual contact with people of either sex; --"
> **MR. KISSELL**: "Yes, sir."
> **THE COURT**: "– -is that right?"
> **MR. KISSELL**: "Yes, sir."
> **THE COURT**: Ah, but you understand that, ah most heter- - - well, all heterosexuals, I think, prefer to be heterosexual, and – and probably a very substantial portion of those people who, ah, are attracted to persons of the same sex wish that were not the case because of they see the effect that it has on their own lives and on their own families. And it's still difficult, even in America today, to fit in with the templates of family life. Ah, even as loose as they've become it's difficult for those people."
> "And I—I hear it all the time, you know: 'Do you think I would choose to be this way? I must be born this way. No one would choose this,' so."
> "And then there's this controversy. Ah, do we need to keep people who are attracted to persons of the same sex away from our children because they may try to recruit our children?"
> "And now you're a poster boy for those people who want to keep persons attracted to people of the same sex away from their children. You're a poster boy now for them, because you did exactly what everyone fears."
> "I don't think the most open minded parents out there would choose a homosexual life over a heterosexual life for their children, ah, then – even if they, once confronted it, they're accepting and –loving and caring. So this is this is what bothers me about this the most is that, ah you're – you're not

only got involved with someone who's underage, but it was in a way that's going to create and confuse – a very substantial likelihood of confused sexual identity for this person."
"Why am I? Why – why was I?"
"And you used – using heterosexual images to stir up sexual desire, and then turning it to your own advantage. So I mean I – I think you have to understand why the Keoughs must be absolutely furious with you."
MR. KISSELL: "I do, your Honor."
THE COURT: "Ah, I'm going to give you a prison sentence here and I'm going to impose these terms consecutively to give the Board of Pardons the option of keeping you for as long as 25 years, if you – if you're stonewallin' on your treatment."
"I – I have a concern, if I give a concurrent – if I give concurrent sentences here, that you may reach a point where they're confronting you in your treatment and you decide to just bail out of the treatment and survive five years. I'm— I'm not gonna give you that option. So you're going to have to be very consecutive and, ah, if they're – if they're willing to actually hold your feet to the fire, ah, they'll – subject to the budget limitations that they have, I'm sure, I'm gonna give 'em all the discretion they need to make sure that you, ah – you not ever do this again. At least create the greatest likelihood of that."

Sentencing Tr. at pp. 10-12. At the conclusion of the hearing, the trial court sentenced Kissell to five (5) zero to five (0-5) year terms to be served consecutively in the Utah State Prison, and entered the Judgment in this matter. R0029.

On July 14, 2006, having exhausted all potential appellate remedies, Kissell filed a *Petition for Relief Under the Post-Conviction Remedies Act* and a *Memorandum in Support of Petition for Relief Under the Post-Conviction Remedies Act Act*, challenging that the trial court had relied upon irrelevant and unreliable evidence and information in sentencing Appellant to consecutive terms. R0005 and R0013. On October 20, 2006, the trial court entered its *Order* denying Kissell's Petition. R0032- R0033. On November 8,

2006, Kissell, timely filed his *Notice of Appeal* from the Order denying the Petition. R0035.

SUMMARY OF THE ARGUMENT

UTAH CODE ANN. §76-3-401 states that "[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." The Utah Code mandates that, "[a] court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences." UTAH CODE ANN. §76-3-401(4)(1999).

In this matter, the trial court erred by relying upon irrelevant and unreliable evidence in sentencing Appellant to five (5) zero to five year sentences consecutive to one another. In attempt to correct such error, Appellant filed his Petition for post-conviction relief pursuant to UT. R. CIV. P. 65. The trial court subsequently denied the relief requested in the Petition, relying again upon irrelevant and unreliable evidence as a basis for such denial. The trial court erroneously sentenced Appellant to consecutive sentences and then supported that determination with the denial of the Petition on the same basis. Such determinations should be overturned by this Court for the reasons stated below.

ARGUMENT

I. THE TRIAL COURT ERRED BY RELYING ON IRRELEVANT AND UNRELIABLE EVIDENCE IN SENTENCING THE APPELLANT

In State v. Wanosik, the Utah Court of Appeals held that, "[t]he due process clause of Article 1, Section 7 of the Utah Constitution, requires that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence." *Ibid.*, 2001 UT App 241, ¶34, 31 P.3d 615, *citing* State v. Howell, 707 P.2d 115, 118 (Utah 1985). UT. R. CRIM. P. 22(a) sets forth procedures for ensuring a defendant's right to be sentenced based upon relevant and reliable information, stating as follows:

> Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

However, the Utah Court of Appeals has recognized that "[a]lthough [UT. R. CRIM. P.] 22(a) implements sound procedures aimed at insuring that the trial court bases its sentencing decision on such information, a criminal defendant's right to be sentenced based on relevant and reliable information regarding his crime, his background, and the interests of society stands independent of Utah Rule of Criminal Procedure 22(a)." Wanosik, *supra*.

"A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." Wanosik, *citing* State v. McClendon, 611 P.2d

728, 729 (Utah 1980). "'[T]he sentencing judge[ ][has] discretion in determining what punishment fits both the crime and the offender,' but [the Utah appellate courts] have consistently sought 'to shore up the soundness and reliability of the factual basis upon which the judge must rely in the exercise of that sentencing discretion.'" *Id., citing* State v. Lipsky, 608 P.2d 1241, 1249 (Utah 1980) (requiring disclosure of presentence report to defendant prior to sentencing).

UTAH CODE ANN. §76-3-401 sets forth the following with respect to the trial court's authority to impose consecutive rather than concurrent sentences:

> 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. The court shall state on the record and shall indicate in the order of judgment and commitment: (a) if the sentences imposed are to run concurrently or consecutively to each other; and (b) if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is already serving. (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.

The Utah Supreme Court has long determined that this statute favors concurrent sentences. *See*, State v. Strunk, 846 P.2d 1297, 1301 (Utah 1993); State v. Galli, 967 P.2d 930, 938 (Utah 1998). As it pertains to the imposition of consecutive sentences, "[t]he Utah Code mandates: 'A court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.'" State v. Perez, 52 P.3d 451, ¶43, 2002 UT App 211, *citing* UTAH CODE ANN. § 76-3-401(4) (1999).

In Perez, this Court acknowledged the requirements of UTAH CODE ANN. § 76-3-401(4), explaining that consideration of certain factors in a determination of consecutive sentences is necessary:

> The only comment at the sentencing hearing that could be construed as touching on Perez's history, character, or rehabilitative needs is defense counsel's statement that Perez was not on probation at the time of the incident. The trial court's brief commentary dealt only with the "gravity and circumstances of the offenses," and did not explicitly address the presentence report's recommendation of concurrent sentences. In short, there is nothing in this record to indicate that the trial court "consider[ed] the ... history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences." Utah Code Ann. § 76-3-401(4) (1999).

Perez, at ¶48.

Our appellate courts are not without experience in this area of law, having handed down decisions in several cases in which a defendant was considered to have been appropriately or inappropriately consecutively sentenced after trial court determination of the individual circumstances. Many of these circumstances are similar to those that are present in the instant matter.

In State v. McGinnis, 2006 UT App. 85, ¶1, the district court weighed McGinnis's lengthy criminal history, his failure to attend court appearances in the present case; and his lengthy, unsuccessful parole history against his rehabilitation needs; the AP & P recommendation; and his professed desire to pursue drug rehabilitation. Under the facts of McGinnis's case, this Court determined that the trial court had not abused its discretion in sentencing McGinnis to consecutive sentences in the two cases, rather than ordering concurrent terms or probation and rehabilitation. Because the terms were within

the statutory parameters for the offenses, this Court concluded that the terms were not unfair or unnecessarily harsh. Unlike McGinnis, Kissell did not have a lengthy criminal history, attended all court appearances, and did not have a parole history.

In State v. Galli, our Utah Supreme Court held that the trial court had abused its discretion in imposing consecutive sentences because of its refusal to give weight to certain mitigating evidence. *Ibid.*, 967 P.2d 930, 938 (Utah 1998). Such mitigating evidence included Galli's use of a pellet gun rather than a real gun, Galli's voluntary confession to the offenses he committed, and his likelihood of rehabilitation. *Id.* Similarly, Kissell herein also entered what was tantamount to a confession by pleading guilty to five (5) of the charges, weighing in favor of rehabilitation and an order requiring the sentences to be served concurrently.

In State v. Montoya, 929 P.2d 356 (Utah App. 1996), Montoya relied on two Utah Supreme Court cases in support of his consecutive sentencing challenge: State v. Smith, 909 P.2d 236 (Utah 1995), and State v. Strunk, 846 P.2d 1297 (Utah 1993). In Smith, the defendant was convicted of four first degree felonies: aggravated kidnapping, rape of a child, and two counts of sodomy on a child. *Ibid.* at 238. On each of the four counts, the trial judge imposed a sentence of fifteen-years-to-life, the greatest minimum mandatory sentence available, and ordered that the sentences run consecutively. *Id.* In vacating the trial court's sentencing determination, the Utah Supreme Court declared that a "highly important factor in deciding whether to impose consecutive or concurrent sentences is that the Legislature ... has opted to give the Board of Pardons wide latitude in deciding what a maximum sentence ought to be." Smith at 244. The Court noted that, "[t]he Board

of Pardons is in a far better position than a court to monitor a defendant's subsequent behavior and possible progress toward rehabilitation while in prison and to adjust the maximum sentence accordingly." *Id.* Hence, because the minimum mandatory sixty-year sentence imposed was deemed "tantamount to a minimum mandatory life sentence," depriving the Board of "discretion to release defendant, irrespective of his progress," the Utah Supreme Court declared the trial judge's sentencing decision "unreasonable and an abuse of discretion," and remanded the case for re-sentencing. *Id.*

In Strunk, the defendant was convicted of the capital offense of first degree murder, as well as child kidnapping and aggravated sexual abuse of a child, both first degree felonies carrying minimum mandatory sentences. Strunk was sentenced to life imprisonment for the capital offense and received minimum mandatory fifteen-year and nine-year sentences for the kidnapping and sexual abuse offenses, with all three sentences ordered to run consecutively. *Ibid.*, 846 P.2d 1297, 1298 (Utah 1993). Our Utah Supreme Court ruled that the trial court "abused its discretion in failing to sufficiently consider defendant's rehabilitative needs in light of his extreme youth and the absence of prior violent crimes," because "the twenty-four year term robs the Board of Pardons of any flexibility to parole Strunk sooner." *Id.* at 1301-1302.

In the instant matter, Kissell was sentenced to five (5) zero to five (0-5) year terms consecutively. Although it is within the trial court's discretion to sentence Kissell as they see fit, they must base their discretion on the criteria as set forth *supra* in UTAH CODE ANN. §76-3-401. Evidence and information was presented at sentencing that met the criteria set forth in UTAH CODE ANN. §76-3-401. At sentencing, Kissell was remorseful

and apologized to the victim's family for what he had done. He had minimal prior criminal history, the crimes committed were non-violent crimes, and he had appeared at all scheduled hearings in this matter. Additionally, Kissell maintained employment and is a productive member of the community. Many letters were written by his neighbors and friends in support of Kissell which showed that he had a good reputation and a great job history. The prosecution and defense counsel, as well as Adult Probation and Parole who had prepared a pre-sentence investigation report, believed that Kissell should receive concurrent sentences. The trial court, however, deviated from such recommendations.

The rehabilitative needs of Kissell were also part of the evidence and information that the trial court was to take under consideration in determining whether to order consecutive or concurrent sentences. Kissell was very cooperative during his legal proceedings and was apologetic and remorseful. This behavior is supportive of Kissell doing well in rehabilitation and following through with his rehabilitation. He is more likely to rehabilitate quickly and return to be a productive member of society, which is contradictory of the trial court's assumption at sentencing that Kissell would "stonewall" on his treatment. There was no evidence presented to show that Kissell would not be cooperative in rehabilitation. At the sentencing hearing the trial court stated that:

> Ah, I'm going to give you a prison sentence here and I'm going to impose these terms consecutively to give the Board of Pardons the option of keeping you for as long as 25 years, if you – if you're stonewallin' on your treatment. I – I have a concern if I give you a concurrent – if I give you concurrent sentences here, that you may reach a point where they're confronting you in your treatment and you decide to just bail out of the treatment and survive the five years. I'm – I'm not gonna give you that option. So your going to have to be very cooperative and, ah, if they're – if they're willing to actually hold your feet to the fire, ah , they'll – subject to

> the budget limitations that they have, I'm sure, I'm gonna give 'em all the discretion they need to make sure that you, ah – you not ever do this again. At least create the greatest likelihood of that.

R044 at p. 12. None of the evidence presented at the sentencing hearing in this matter leaned toward the possibility that Kissell would not be easily and quickly rehabilitated. In fact, the evidence presented was quite the opposite. Kissell was remorseful, apologetic, and cooperative, which evidenced extreme support for the contention that Kissell *would not* "stonewall" on his treatment and would rehabilitate quickly and effectively. Clearly, the trial court relied upon irrelevant or unreliable information in its determination to impose consecutive sentences.

A. Kissell's Equal Protection Rights were Violated by the Imposition of Consecutive Sentences.

The Utah Court of Appeals has recently held that the federal Equal Protection Clause embodies the general principle that "...persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." State ex. rel. Z.C., 2005 UT App 562, ¶8, 128 P.3d 561; U.S.C.A. CONST.AMEND. 14; U.C.A. CONST.ART. I § 24. The Utah appellate courts have long recognized that "[c]oncurrent sentences are favored over consecutive ones." State v. Perez, 52 P.3d 451, ¶43, 2002 UT App 211; *see*, State v. Galli, 967 P.2d 930, 938 (Utah 1998). UTAH CODE ANN. §76-3-401(4)

Similar to Wanosik, *supra*, in a recent case out of Pennsylvania, their superior court held as follows:

> [S]entencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest

> abuse of discretion. To constitute an abuse of discretion, the sentence imposed must either exceed the statutory limits or be manifestly excessive. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. Commonwealth v. Mouzon, 828 A.2d 1126, 1128 (Pa.Super.2003) (citations and quotation marks omitted)."

Com. v. Perry 883 A.2d 599, (Pa.Super.,2005). Also similar to Wanosik, *supra*, a Kansas appellate court similarly indicated as follows:

> [A]n appellate court will not disturb a sentence that complies with the statutory guidelines if it is within the trial court's discretion and not a result of partiality, prejudice, or corrupt motive. Judicial discretion is abused when the trial court's decision is arbitrary, fanciful, or unreasonable; that is, no reasonable person would take the trial court's view."

State v. Huff, 31 Kan.App.2d 717, 71 P.3d 1185, (Kan.App.,2003), *citing* State v. Chastain, 265 Kan. 16, 22, 960 P.2d 756 (1998); State v. Vanderveen, 259 Kan. 836, 843, 915 P.2d 57 (1996). Sentencing should be based upon "reasonably reliant and relevant" information and not on "reasons of partiality, prejudice, bias or ill will." Nor should the decision be "...manifestly unreasonable," "arbitrary," "fanciful" or one that "no reasonable person" would make. Huff, Perry, Wanosik, *supra*. Circuit Judge Aldisert of the United States 3rd Circuit Court of Appeals stated in a concurring opinion as follows:

> Herbert Wechsler reminded us that a court is "bound to function otherwise than as a naked power organ," and for decisions to have any legal quality, their determinations must be "entirely principled."[FN18] Any court must always distinguish between the cultivated personal tastes of its members and generally accepted concepts of moral obligation. In discussing the "common morality of society," Dean Rostow reminds us that "in the life of the law, especially in a common law country, the customs, the common views, and the habitual patterns of the people's behavior properly count for much ...."[FN19] In his perception of conventional morality, H.L.A. Hart distinguishes between standards of conduct that are widely shared in a

> particular society and moral principles or ideals "which may govern an individual's life, but which he does not share with any considerable numbers of those with whom he lives.[FN20] I do not believe that the Court paid sufficient respect to either of these salutary considerations.
> FN18. H. Wechsler, Principles, Politics and Constitutional Law 27 (1961).
> FN19. Rostow, The Enforcement of Morals, 1960 Camb.L.J. 174, 197.
> FN20. H.L.A. Hart, The Concept of Law 165 (1961).

Loughney v. Hickey, 635 F.2d 1063, 1069-1070 (C.A.3 1980), *Circuit Judge Aldisert concurring*.

In Utah, there are many cases were the defendants were charged with the same crime to which Kissell pled guilty, but who received either lesser sentences or probation and a fine. In State v. Haltom, Haltom was found guilty of selling an adult video to minor and was convicted of dealing harmful material to a minor and sentenced to 0-5 years, which sentence was suspended and he was ordered to serve 30 days and probation. *Ibid.*, 2005 UT App 348, 121 P.3d 42. In State v. Brown, the defendant was convicted of showing a pornographic video to a minor, and the trial court sentenced him to five years imprisonment and imposed a $5000.00 fine. 856 P.2d 358 (Utah App.,1993). The trial court in Brown's case then stayed the sentence, placing defendant on probation subject to his serving the fourteen (14) day minimum mandatory sentence and abiding by other probation conditions. *Id.* Another example is found in State v. Vigil, where Vigil was convicted of dealing harmful material to a minor and was fined $12,650 and sentenced to two terms of 0-5 years in the Utah State Prison and one year in the Davis County Jail to be served *concurrently*. 840 P.2d 788 (Utah App.,1992).

It appears in Utah caselaw that consecutive sentences are typically imposed only in situations where a violent crime accompanies the charge of dealing in harmful material

to a minor. For example, in State v. Helms, the trial court sentenced Helms to three years to life in prison for both counts of *aggravated sexual assault* and zero to five years in prison for each of the three counts of dealing in harmful material to a child. *Ibid.*, 2002 UT 12, 40 P.3d 626. The Helms trial court ordered that Helms serve the five sentences consecutively, obviously based on the trial court's concern over Helms' safety to the community.

In the instant matter, Kissell was not treated as those who had been in a similar situation were. The trial court undertook an irrelevant and unreliable colloquy respecting homosexual versus heterosexual lifestyles, with an emphasis towards the latter and attributing a greater degree of harm to the victim based upon Kissell's lifestyle preference. Sentencing Tr. at pp. 10-12. The trial court reiterated this in the Order denying the Petition when it stated that it viewed the acts at issue herein with a greater degree of harm stating that, "[t]he victim of petitioner was of the same sex as petitioner, which has made the victim's trauma even greater and recovery more problematic." *See*, Addendum "A." While a judge is authorized and expected to undertake moral judgments in our society with respect to actions taken by individuals, those actions are typically attributable to crime and punishment on the basis that they are determined to be illegal or against the greater moral conscience by ruling of our legislative body in codifying such on our behalves.

A judge, however, is neither authorized nor expected to render a determination for sentencing or otherwise that is based upon his *personal* moral beliefs, particularly when society appears accepting of both sides of the issue and such actions are not considered

either illegal or immoral by a great majority of lawmakers or judges themselves, evidenced by a lack of codification of any such actions as illegal. While Kissell's actions with respect to the victim were codified as illegal based upon the *age* of the victim, Judge Anderson's colloquy clearly indicates that age was not the only determining factor in ordering consecutive sentences, evidencing possible partiality, prejudice, bias or ill will towards Kissell.

In the cases listed *supra*, Haltom, Vigil and Brown were either given concurrent sentences or put on probation for committing similar crimes to the one at issue herein. Only in violent crime situations such as Helms has a similar punishment been afforded to someone guilty of the crimes at issue herein. Kissell was unreasonably sentenced to up to (25) twenty-five years in prison for a crime that was non-violent, and particularly when he did not have any previous criminal history and was apologetic and remorseful for what had occurred. Because Kissell had committed the same crime as the cases cited *supra*, but received excessive punishment for such, his equal protection rights have been violated. U.S.C.A. CONST.AMEND. 14; U.C.A. CONST.ART. I § 24.

B. Kissell's Due Process Rights Were Violated Because the Judge Relied upon Irrlevant and Unreliable Information at the Sentencing.

In Wanosik, *supra*, the Utah Court of Appeals held that: "[t]he due process clause of Article 1, Section 7 of the Utah Constitution, requires that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence." 31 P.3d 615, 428 Utah Adv. Rep. 10, 2001 UT App 241, *citing* State v. Howell, 707 P.2d 115, 118 (Utah 1985). Wanosik's due process rights were

compromised by the trial court's failure to base its sentencing decision on relevant and reliable information regarding the crime, Wanosik's background, and the interests of society.

Kissell's due process rights were violated because the trial court did not rely on evidence that was reliable or reasonable in making their decision to sentence Kissell to consecutive sentences. No evidence was presented at sentencing that showed that Kissell would "stonewall" on his rehabilitation and not be quickly and effectively rehabilitated. In fact, the opposite appears to be more accurate. Before even entering treatment, Kissell had shown that he was amendable to rehabilitation by his apology to the victim and the victim's family, his remorsefulness, and his cooperative behavior. Instead of receiving acknowledgment for the steps he had taken towards rehabilitation on his own he was unjustly laden with a sentence that could keep him in prison for up to twenty-five (25) years. This sentence was based upon *an assumption* that he would "stonewall" on his treatment and not be rehabilitated when no such character evidence was ever presented.

The trial court also appears to have given Kissell consecutive sentences because of his admission that he was bi-sexual. This admission seems to have planted a seed in the court's mind that because of these tendencies he would be harder to rehabilitate and may "stonewall" on his treatment, causing the court to feel that he possibly needed to be put away for a long period of time. Again no evidence was presented to show that this was the case. It is clear that the intent behind UTAH CODE ANN. §76-3-401 was to allow the trial court to utilize relevant and reliable information in sentencing, while recognizing that concurrent sentences are favored. *See*, Perez and Galli, *supra*. Kissell's due process

rights were violated by failure to take into consideration relevant and reliable information in determining the sentence.

II. THE TRIAL COURT ERRED IN DENYING KISSELL'S PETITION

UTAH CODE ANN. § 78-35a-101 is also known as the Post-Conviction Remedies Act. UT. R. CIV. P. 65 (c) governs all petitions filed under the Post-Conviction Remedies Act and states as follows:

> This rule shall govern proceedings in all petitions for post-conviction relief filed under Utah Code Ann. § 78-35a-101 et seq., Post-Conviction Remedies Act. (b) Commencement and venue. The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

In the instant matter, Kissell filed a Petition for Post-Conviction relief under UT. R. CIV. P. 65c challenging that the trial court erred in imposing consecutive rather than concurrent sentences. After the trial court reviewed the Petition, it entered an Order denying the Petition. The Order articulated, in pertinent part, as follows:

> The court articulated at the time of sentencing that it was imposing the sentence consecutively in order to afford the Board of Pardons the latitude to hold petitioner more than five years, not because the court expected or even desired the Board to hold defendant longer than five years. Even with this sentence, the Board will have discretion to release defendant at any time, if he has successfully completed treatment and appears to be a low risk to reoffend.
> Petitioner obtained the benefit of a plea bargain which reduced his most serious charged crime from a second degree felony to a third degree felony. The victim of petitioner was of the same sex as petitioner, which has made the victim's trauma even greater and recovery more problematic.

> Because defendant targeted a minor for a sexual offense, and his conduct was persistent, the court wished to ensure that defendant not be released without any effort at rehabilitation. The court imposed consecutive sentences to reduce this risk, but expressly stated that this should not be taken as a recommendation for a longer term if petitioner participates productively in treatment. This does not exceed the court's discretion.

See, Addendum "A."

The trial court erred in denying the Petition because it did in fact err in imposing consecutive sentences as argued *supra* because it relied upon irrelevant and unreliable evidence in imposing sentence. Because of this error the trial court should have granted Kissell's Petition and re-sentenced him to concurrent sentences. Therefore, the trial court erred in denying Kissell's Petition.

CONCLUSION

Wherefore, based upon the foregoing, Kissell respectfully requests that this Court reverse the trial courts denial of his Post-Conviction Motion, set aside his current consecutive sentences, and remand this matter for more appropriate sentencing.

DATED THIS 8th day of June, 2007.

K. Andrew Fitzgerald
Attorney for Michael William Kissell

CERIFICATE OF MAILING

I hereby certify that on this 8th day of June, 2007, I mailed, first class postage prepaid, true and correct copies of the foregoing Appellant's Brief to:

Assistant Attorney General
160 E. 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Addendum ~A~

Order, dated April 5, 2005

THE SEVENTH DISTRICT JUDICIAL COURT IN AND FOR GRAND COUNTY
STATE OF UTAH

MICHAEL WILLIAM KISSELL, Plaintiff, vs THE STATE OF UTAH, Defendants,	ORDER Case No. 0607-140 Judge Lyle R. Anderson

Petitioner has filed a petition for extraordinary relief seeking a resentencing. He argues that his sentence should be concurrent instead of consecutive. The court articulated at the time of sentencing that it was imposing the sentences consecutively in order to afford the Board of Pardons the latitude to hold petitioner more than five years, not because the court expected or even desired the Board to hold defendant longer than five years. Even with this sentence, the Board will have discretion to release defendant at any time, if he has successfully completed treatment and appears to be a low risk to reoffend.

Petitioner obtained the benefit of a plea bargain which reduced his most serious charged crime from a second degree felony to a third degree felony. The victim of petitioner was of

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the same sex as petitioner, which has made the victim's trauma even greater and recovery more problematic.

Because defendant targeted a minor for a sexual offense, and his conduct was persistent, the court wished to ensure that defendant not be released without any effort at rehabilitation. The court imposed consecutive sentences to reduce this risk, but expressly stated that this should not be taken as a recommendation for a longer term if petitioner participates productively in treatment. This does not exceed the court's discretion.

The petition for extraordinary relief is denied.

Dated this 20th day of October, 2006

Lyle R. Anderson, District Judge

STATE OF UTAH
SEVENTH DISTRICT COURT

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060700140 by the method and on the date specified.

METHOD	NAME
By Hand	KEITH A FITZGERALD

Dated this 23rd day of October, 2006.

Deputy Court Clerk

STATE OF UTAH SEVENTH DISTRICT COURT

Addendum ~B~

Sentencing Transcripts pp. 10-12

nature. And, ah, he's, ah -- ah, has some very good attributes about him. And he is, ah -- I believe he just made a -- a terrible mistake here that, ah, I think detracts from his other good qualities, and we'd hope that the Court would consider those.

THE COURT: All right. I'm trying to understand. You're -- you're bisexual, Mr. Kissell, ah, so you're aroused by the idea of sexual contact with people of either sex; --

MR. KISSELL: Yes, sir.

THE COURT: -- is that right?

MR. KISSELL: Yes, sir.

THE COURT: Ah, but you understand that, ah, most hetero- -- well, all heterosexuals, I think, prefer to be heterosexual, and -- and probably a very substantial portion of those people who, ah, are attracted to persons of the same sex wish that were not the case because of they see the effect that it has on their own lives and on their own families. And it's still difficult, even in America today, to fit in with the templates of family life. Ah, even as loose as they've become, it's difficult for those people.

And I -- I hear it all the time, you know: "Do you think I would choose to be this way? I must be born this way. No one would choose this," so.

And then there's this controversy. Ah, do we need to keep people who are attracted to persons of the same sex

away from our children because they may try to recruit our children?

And now you're a poster boy for those people who want to keep persons attracted to people of the same sex away from their children. You're a poster boy now for them, because you did exactly what everyone fears.

I don't think the most open minded parents out there would choose a homosexual life over a heterosexual life for their children, ah, then -- even if they, once confronted with it, they're accepting and -- and loving and caring. So this is -- this is what bothers me about this the most is that, ah, you're -- you're not only got involved with someone who's underage, but it was in a way that's going to create and confuse -- a very substantial likelihood of confused sexual identity for this person.

"Why am I? Why -- why was I?"

And you used -- using heterosexual images to stir up sexual desire, and then turning it to your own advantage. So I mean I -- I think you have to understand why the Keoughs must be absolutely furious with you.

MR. KISSELL: I do, Your Honor.

COURT ORDER

THE COURT: Ah, I'm going to give you a prison sentence here and I'm going to impose these terms consecutively to give the Board of Pardons the option of

keeping you for as long as 25 years, if you -- if you're stonewallin' on your treatment.

I -- I have a concern, if I give a concurrent -- if I give concurrent sentences here, that you may reach a point where they're confronting you in your treatment and you decide to just bail out of the treatment and survive five years. I'm -- I'm not gonna give you that option. So you're going to have to be very cooperative and, ah, if they're -- if they're willing to actually hold your feet to the fire, ah, they'll -- subject to the budget limitations that they have, I'm sure, I'm gonna give 'em all the discretion they need to make sure that you, ah -- you not ever do this again. At least create the greatest likelihood of that.

So it's the judgment and sentence of the Court that the defendant be incarcerated in the Utah State Prison for a term not to exceed five years on each of these counts and that those be served consecutively.

He's remanded to the custody of the Sheriff to be transported to the prison to serve this sentence.

MR. FITZGERALD: Judge, we've just got one request. Mike has a blind dog that he's trying to make arrangements for. He's askin' if he could have 24 hours to -- to make that arrangement.

THE COURT: I can't imagine what possibly -- what possible reason you had to think that you would not be going

Addendum ~C~

State v. McGinnis, 2006 UT App. 85

State v. McGinnis
Utah App.,2006.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellee,
v.
Douglas Troy MCGINNIS, Defendant and Appellant.
No. 20050141-CA.

March 2, 2006.

Eighth District, Duchesne Department, 031800097; The Honorable A. Lynne Payne.

Julie George, Salt Lake City, for Appellant.
Mark L. Shurtleff and Kris C. Leonard, Salt Lake City, for Appellee.

Before Judges BILLINGS, DAVIS, and THORNE.

MEMORANDUM DECISION (Not For Official Publication)

PER CURIAM:

*1 Douglas Troy McGinnis appeals his sentence for convictions in cases consolidated for sentencing. McGinnis argues that the district court abused its discretion by sentencing him to a prison term rather than probation and by running the sentences in the two cases consecutively to each other. Because he did not preserve the claim in the district court, McGinnis asserts plain error and ineffectiveness of his trial counsel.

"A sentence will not be overturned on appeal unless the trial court has abused its discretion, failed to consider all legally relevant factors, or imposed a sentence that exceeds legally prescribed limits." *State v. Nuttall*, 861 P.2d 454, 456 (Utah Ct.App.1993); *see also State v. Schweitzer*, 943 P.2d 649, 651 (Utah Ct.App.1997) (stating abuse of discretion may occur if the actions of the sentencing judge were inherently unfair or the judge imposed a clearly excessive sentence). In determining whether to impose consecutive sentences, the court is required to "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(2) (2003).

Although McGinnis asserts that he was promised concurrent sentences and probation, there is no record support for the claim. McGinnis stated at the plea colloquies that no sentencing promises had been made. The record also reflects, and McGinnis concedes, that he was advised by the court at the plea colloquies that the court would not be bound by any sentencing promises. The claim that absence of a written plea agreement supports the existence of a promise of concurrent sentences as a condition of the plea bargain is without merit. McGinnis also concedes that his sentence was not excessive under the statutory limits.

McGinnis contends that his trial counsel was ineffective by failing to "reiterate the degree and benefit of the drug rehabilitation program" and to adequately inform the court of relevant statutory factors. The record reflects that both defense counsel and McGinnis himself provided information at sentencing regarding his recent participation in a drug rehabilitation program and his intention to continue treatment. The court also considered the recommendation of Adult Probation and Parole (AP & P) that McGinnis be sentenced to probation in order to continue treatment. Counsel's failure to "reiterate" information that was already before the court was neither deficient performance nor was it prejudicial to McGinnis. It follows that the district court did not plainly err in failing to correct counsel's performance.

Based upon our review of sentencing, we conclude that the district court considered the factors relevant to sentencing. The court weighed McGinnis's lengthy criminal history; his failure to attend court appearances in the present case; and his lengthy, unsuccessful parole

history against his rehabilitative needs; the AP & P recommendation; and his professed desire to pursue drug rehabilitation. Under the facts of this case, the trial court did not abuse its discretion in sentencing McGinnis to consecutive sentences in the two cases, rather than ordering concurrent terms or probation and rehabilitation. Because the terms are within the statutory parameters for the offenses, we conclude that the terms are not unfair or unnecessarily harsh.

***2** We affirm the sentence in the consolidated cases.

Utah App.,2006.
State v. McGinnis
Not Reported in P.3d, 2006 WL 496219 (Utah App.), 2006 UT App 85

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