

2007

State of Utah v. Michael Samuel Weaver : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

vs.

MICHAEL SAMUEL WEAVER,

Defendant/Appellant.

Case No. 20070136-CA

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Possession of a Dangerous Weapon, a 3rd degree felony, in violation of Utah Code Ann. § 76-10-503, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Deno Himonas, Judge, presiding. Appellant is incarcerated.

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UTAH APPELLATE COURTS

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STATE OF UTAH,

Plaintiff/Appellee,

vs.

MICHAEL SAMUEL WEAVER,

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RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

a) Rules:

Utah R. Professional Conduct 1.2.5-6

b) Statutes:

Utah Code Ann. § 77-18-1. 5, 8-9

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. MICHAEL SAMUEL WEAVER, Defendant/Appellant.	Case No. 20070136-CA
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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Annotated §§ 77-18a-1 and 78-2a-3(2)(e) (1953 as amended).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether defense counsel was ineffective in failing to address errors in the presentence report with the trial court, despite the client's expressed directive to his lawyer to do so. *State v. Hernandez*, 2005 UT App 546 ¶ 17, 128 P.3d 556 (Utah App. 2005) (citation omitted) (Ineffective assistance of counsel may be established by showing that counsel “(1) rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel’s deficient performance prejudiced him.”).

PRESERVATION OF THE ARGUMENT

Mr. Weaver raised prior counsel's failure to address sentencing inaccuracies in his pro se letter to the trial court, filed January 22, 2007. R 166 (Letter from Mike Weaver to Judge Himonas, filed January 22, 2007) ("Also the Pre Sentence report is full of errors and very negative which I asked Brenda [Viera, prior trial counsel] to address but never happened. They told me today this report will be the basis for the report to the Board of Pardons."); *see also* State of Utah v. Michael Samuel Weaver, Docketing Statement, filed April 4, 2007 ("Prior to sentencing January 12, 2007, Mr. Weaver (Appell[ant]) received a copy of the Presentence Report from LDA Viera, this was on January 10th late afternoon. When Mr. Weaver reviewed the report he became concerned as the content of the report was not accurate and very biased.... I appeared before Judge Himonas January 11th 2007, in an attempt to speak to him about all of the above as well as my attorney's ineffective coercion of plea, failure to correct Presentence...").

The issue was also raised in his Rule 23B Motion.

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

The texts of the following relevant constitutional and statutory provisions are contained in this brief or Addendum A.

STATEMENT OF THE CASE

On November 28, 2006, Mr. Weaver and the State agreed to a global resolution which encompassed four different cases and which was resolved through the entry of four

guilty pleas (Trial Case No. 061902866 [Possession of a Dangerous Weapon, 3rd degree felony]; Trial Case No. 051907570 [Forgery, 3rd degree felony, and Burglary, 2nd degree felony], and Trial Case No. 051907618 [Assault by a Prisoner, 3rd degree felony]). As part of the plea agreement, the other charges in those cases were dismissed and Case No. 061902551 was also dismissed.

On January 12, 2007, the Court sentenced Mr. Weaver to prison. In case 051907570 [Forgery, 3rd degree felony, and Burglary, 2nd degree felony], the counts were imposed concurrently with each other. However, the Court then imposed case 051907570 consecutively to cases 051907618 and 061902866. Case No. 061902866 [Possession of a Dangerous Weapon, 3rd degree felony] is the appeal at issue in the case at bar. R 152, 164.

Almost immediately after sentencing, Mr. Weaver wrote a letter to the trial court that set forth the following allegation: "Also the Pre Sentence report is full of errors and very negative which I asked Brenda (Viera, prior trial counsel) to address but never happened. They told me today this report will be the basis for the report to the Board of Pardons." R 166 (Letter from Mike Weaver to Judge Himonas, filed January 22, 2007) (attached as Addendum B). However, the trial court did not address Mr. Weaver's concerns.

STATEMENT OF THE FACTS

The above paragraphs adequately capsulize Mr. Weaver's position about the errors in the presentence report and his expressed concerns to trial counsel, which went unheeded.

SUMMARY OF THE ARGUMENT

Prior to sentencing, Mr. Weaver told his trial counsel about factual errors or omissions in his presentence report. At the time of sentencing, however, his defense counsel failed to bring those errors to the attention of the trial court. In essence, trial counsel performed deficiently by waiving a matter that may have effected the lower court's sentencing decision and that, if left uncorrected, may continue to perpetuate falsehoods with other sentencing agencies (e.g. the Board of Pardons) who will consider the same erroneous report in the future.

A plain error analysis or like theories are inapposite here because the errors were not obvious since counsel did not raise them with the trial court. However, counsel should not be rewarded nor shielded by his own inactions in waiving the matter. An ineffective assistance of counsel claim is the only means of addressing counsel's prejudicial and deficient performance.

ARGUMENT

POINT I. PRIOR TRIAL COUNSEL PERFORMED INEFFECTIVELY IN FAILING TO BRING ERRORS IN THE PRESENTENCE REPORT TO THE ATTENTION OF THE TRIAL COURT

Ineffective assistance of counsel may be established by showing that counsel “(1) rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel’s deficient performance prejudiced him.” *State v. Hernandez*, 2005 UT App 546 ¶ 17, 128 P.3d 556 (Utah App. 2005) (citation omitted); U.S. Const. amend. VI.

Under the first prong, counsel performed deficiently because, on behalf of her client, she did not bring errors in the presentence report ("PSR") to the trial court's attention. *See* Utah Code Ann. § 77-18-1(6)(b) ("If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived."). The burden is on defense counsel, and not the defendant,¹ to avoid waiver by raising PSR errors on the client's behalf -- particularly where, as here, the client had instructed the attorney to do so. *See* Utah R. Professional Conduct 1.2(a) ("A lawyer shall abide by a client’s decisions concerning the objectives of representation,

¹ While this Court has required the attorney, who acts on behalf of the defendant, to preserve the record for his client, the opposite is not true. A defendant need not personally and independently object to the introduction of evidence at trial nor to the inaccuracies in a PSR in an effort to supplant the role of his inactive attorney. Otherwise, case law would have no such theory as ineffective assistance of counsel because the defendant himself, separate and apart from the attorney’s (in)actions, would be held individually responsible for any and all attorney wrongdoing. That is not the case.

subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued”).

Indeed, “with respect to the defendant’s burden of providing an adequate record on appeal, counsel’s ineffectiveness may have caused, exacerbated, or contributed to the record deficiencies, thus presenting the defendant with a catch-22 unique to claims of ineffectiveness of trial counsel.” *State v. Litherland*, 2000 UT 76, ¶ 12. As a point in fact, prior defense counsel did in fact cause, exacerbate, or contribute to the record deficiencies by failing to challenge the accuracy of the presentence investigation report. *See id.* For counsel to not have raised her client's expressed concern is to have performed deficiently and unreasonably.

The first prong of the ineffective assistance of counsel ("IAC") is thus satisfied. To conclude otherwise would enable counsel to secrete their own ineffectiveness by simply waiving an issue "on their client's behalf." The very essence of IAC claims is to counter against or to expose such deficient performances. Counsel’s failure to abide by her client’s decisions may not be written off as a tactical or strategic judgment. Utah R. Professional Conduct 1.2(a).² There is no legitimate excuse for waiving the opportunity

² Utah R. Professional Conduct 1.2(b) (“A lawyer may limit the objectives of the representation if the client consents after consultation”); Utah R. Professional Conduct 1.2(c) (“a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law”); Utah R. Professional Conduct 1.2(d) (“When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct”).

to correct errors in a report when such errors may have impacted the court's sentence and, if allowed to remain uncorrected, will continue to haunt the defendant because other sentencing entities (e.g., the Board of Pardons) rely subsequently on the uncorrected and inaccurate PSR. "[I]t is of no moment that the trial court may disregard the presentence report altogether in imposing a sentence. A defendant still has a right to disclosure of the report because of the subsequent uses made of it." *State v. Casarez*, 656 P.2d 1005, 1009 (Utah 1982) (citation omitted).

Under the second prong, counsel's deficient performance prejudiced him. *State v. Hernandez*, 2005 UT App 546 ¶ 17, 128 P.3d 556 (Utah App. 2005); U.S. Const. amend. VI. "[I]t is possible that resolution of the inaccuracies in his presentence investigation report could have led to different, and more favorable, probationary terms." *State v. Weaver*, 2007 UT App 229 (per curiam) (unpublished decision, filed June 28, 2007) (attached as Addendum C). In the present case, it is similarly possible that resolution of the inaccuracies in his presentence investigation report could have led to different, and more favorable, sentencing terms.

Coincidentally, the above-cited *Weaver* opinion (same defendant) contains principles that apply to the case at bar because the impact of the inaccuracies in the PSR there may have resulted in the same type of impact here.

If resolution of the objections affects the trial court's view of the appropriate sentence, the trial court may then revise the sentence accordingly. This disposition is appropriate in the present case because [Appellant] alleges that he was prejudiced by the district court's failure to resolve the alleged inaccuracies in the

report. Allowing the district court to revisit the sentences after resolving the alleged inaccuracies in the presentence investigation report gives appropriate deference to the district court's sentencing function. Accordingly, we remand, but reject the State's request that we affirm the sentences prior to remand.

State v. Weaver, 2007 UT App 229 (per curiam) (citing *State v. Maroney*, 2004 UT App 206, ¶ 31, 94 P.3d 295); cf. *State v. Lipsky*, 639 P.2d 174 (Utah, 1981) (“We mandated that the report should be disclosed to the defendant and if he thinks the report is inaccurate in any particular, he should then be given the opportunity to bring such inaccuracies to the court's attention.”).


One additional circumstance should be acknowledged. Due to prior counsel's failure to raise the errors in the presentence report, Mr. Weaver was only able to summarize the errors in his pro se docketing statement, filed April 4, 2007 (attached as Addendum D). While this Court denied his Rule 23B motion, Mr. Weaver requests that this Court “[allow] the district court to revisit the sentences after resolving the alleged inaccuracies in the presentence investigation report [thus giving] appropriate deference to the district court's sentencing function.” *State v. Weaver*, 2007 UT App 229; see also *id.* (“While the State's arguments that Weaver was not prejudiced by any alleged error and that the issue is now moot are plausible, the record is not sufficiently clear to allow us to make those determinations....); Utah Code Ann. § 77-18-1(6)(a) (“Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the

sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department.").

CONCLUSION

The deficient and prejudicial conduct by prior counsel in not raising the errors in the PSR require renewed consideration by the trial court. Defendant/Appellant, Michael Weaver, respectfully requests this Court to remand his case and to instruct the lower court to resolve the alleged inaccuracies of the report before the re-imposition of sentence.

SUBMITTED this 26th day of December, 2007.



Ronald S. Fujino
Attorney for Mr. Weaver

CERTIFICATE OF DELIVERY

I hereby certify that I have caused the original and seven copies of the foregoing to be hand-delivered to the Utah Court of Appeals, 450 South State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 26th day of December, 2007.



Addendum A:

Rules, Statutes, and Constitutional Provisions

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 77-18-1(6) Presentence Investigation

(6)(a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

(6)(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

Utah Code Ann. § 77-18a-1(1)(a) Appeals – When Proper

(1) A defendant may, as a matter of right, appeal from:

(a) a final judgment of conviction, whether by verdict or plea;

Utah Code Ann. § 78-2a-3(2)(e) Court of Appeals Jurisdiction

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Addendum B:

Letter from Michael Weaver to Judge Himonas,

Filed January 22, 2007

Del 902806
051907618
051907570

Mike Weaver

Jan 17-07

Dear Judge Hinman,

I arrived at the prison today. I had forgot how bad I hated it. I am writing to let the court know several things that are very unfair and I realize life isn't fair and I put myself in this position. OK Sir.

- ① I was told that if I took the deal it would be the only way I would stay out of prison. The deal was changed so much in two days I was a basket case as you saw that day.
- ② The charges I pled to, came to find out now that I'm here keep me from advancing to a county jail work program, and also from a number of other things because of violence and at the time since it didn't appear I was going to prison was an OK plan to me.
- ③ Also the Pre Sentence report is full of errors and very negative which I asked Brack to address but never happened. They told me today this report will be the basis for the report to the Board of Pardons.
- ④ I may get an appeal on my children's case and now that I'm here facing so much time I lose there also.

Judge I wrote you a couple days ago but I'm not sure it will go out and this is why I'm writing again. Also I can't count on my LDA to address you for me. I am without any visitors, anyone to call and it's just me. My request is for you to review my case, my years out with no problems, the many programs I finished and the advancements I made on my drug abuse and personality problems only to sit in a stagnant situation now. I beg you to allow me to get into something like Odyssey Step Father Program or something to keep me advancing and not reverting backwards. I am trustworthy and will not let you down if you will please help me.

/// 11

Addendum C:

State v. Weaver, 2007 UT App 229

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	Case No. 20060482-CA
)	
v.)	F I L E D
)	(June 28, 2007)
Michael S. Weaver,)	
)	2007 UT App 229
Defendant and Appellant.)	

Second District, Farmington Department, 051700456
The Honorable Rodney S. Page

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake
City, for Appellee

Before Judges Bench, Orme, and Thorne.

PER CURIAM:

Michael S. Weaver appeals his sentence for theft, a third degree felony. Weaver argues that the district court erred by failing to resolve alleged inaccuracies in the presentence investigation report. He also argues that his trial counsel was ineffective for failing to ensure that the district court resolved the alleged inaccuracies in the presentence investigation report.

Weaver argues that the district court erred in failing to resolve alleged inaccuracies in the presentence investigation report. The State concedes that the district court failed to comply with Utah Code section 77-18-1(6)(a) by not resolving the alleged inaccuracies on the record. See Utah Code Ann. § 77-18-1(6)(a) (Supp. 2006). However, the State argues that Weaver was not prejudiced by this mistake during sentencing, or alternatively, that the issue is moot because Weaver has already served his jail term. Accordingly, it requests this court to affirm Weaver's sentence and remand solely to comply with section 77-18-1(6)(a).

In State v. Maroney, 2004 UT App 206, 94 P.3d 295, we held that the district court erred in failing to resolve Maroney's

objections to the sentencing reports, and we remanded to allow the court to resolve the objections on the record. See id. at ¶31. We went on to state that "[i]f resolution of the objections affects the trial court's view of the appropriate sentence, the trial court may then revise the sentence accordingly." Id. This disposition is appropriate in the present case because Weaver alleges that he was prejudiced by the district court's failure to resolve the alleged inaccuracies in the report. Allowing the district court to revisit the sentences after resolving the alleged inaccuracies in the presentence investigation report gives appropriate deference to the district court's sentencing function. Accordingly, we remand, but reject the State's request that we affirm the sentences prior to remand.¹

Based upon our review of the record and the State's concession, we remand the case so "the sentencing judge can consider the objections to the presentence report, make findings on the record as to whether the information objected to is accurate, and determine on the record whether that information is relevant to sentencing." State v. Jaeger, 1999 UT 1, ¶44, 973 P.2d 404. After resolving the alleged inaccuracies in the presentence investigation report, the district court may revise the sentence as it deems appropriate. Our disposition makes it unnecessary to consider Weaver's alternative argument alleging ineffective assistance of trial counsel.

This matter is remanded to the district court.

Russell W. Bench,
Presiding Judge

Gregory K. Orme, Judge

¹While the State's arguments that Weaver was not prejudiced by any alleged error and that the issue is now moot are plausible, the record is not sufficiently clear to allow us to make those determinations. More particularly, we do not know the exact nature of the alleged inaccuracies with the presentence investigation report. Further, while Weaver speaks mainly to the jail term associated with his probation, it is possible that resolution of the inaccuracies in his presentence investigation report could have led to different, and more favorable, probationary terms.

William A. Thorne Jr., Judge

Addendum D:

Michael Weaver's Pro Se Docketing Statement,

Filed April 4, 2007

(1)

STATE OF UTAH
Plaintiff VS Appellant

Case # 20070158
District # C61902866

Mike Weaver
Defendant Appellee

Court - Verdicting Statement -

#8 - Factual Summary =

On December 2nd 2006 Michael Weaver (appeller) appeared before Judge Dana Hinman with Counsel Brenda Uiera (LDA) to enter plea. Prior to this court appearance (appeller) Mike Weaver had met with LDA to discuss details of plea and spent several hours by phone in negotiation + LDA Brenda Uiera and Appellee Mike Weaver reached an agreement on December 1st 2006. On December 2nd 2006 after leaving therapy and going to court Mr Weaver (Appellee) received a message that the plea had been withdrawn. Upon arriving at court LDA Brenda Uiera informed Mr Weaver that the plea was being changed to a greater degree. The court was also ready to proceed with trial at this point. The jury was waiting. LDA Uiera informed Appellee Weaver that she was not ready to proceed with trial and that the only chance Mr Weaver had to stay out of prison and get his children was to accept the "deal". Mr Weaver refused but LDA Uiera proceeded to pressure Mr Weaver and Mr Weaver became emotionally distant and unstable. LDA Uiera convinced Mr Weaver to "take the deal" offering the entire resource of the LDA office to insure Mr Weaver would continue on probation and get his children. During the questions by Judge Hinman Mr Weaver was visibly emotional and crying. The Judge at

Delecting Statement

Mike Weaver - 20070158c

(2)

Some point stopped court and took both attorneys into chambers for a discussion. Upon Resuming court Judge Himmels reformed Mr Weaver that he was concerned about Mr Weaver and was going to lock him up for his safety.

Ⓐ Thus brings up grounds for Appeal on the fact that Mr Weaver Appellee was obviously so emotionally distant and unable to think clearly the plea should have been postponed. The Judge and my attorney knew the depth of my mental anguish over my childrens future as well as the permanent loss of my family. Ⓑ LAD Brenda Uiers coerced my plea by the statement "the only chance I had to stay out of Prison and get my children was to take the deal, else that she would use every resource available to the LADs office to ensure I would remain on Probation. Ⓒ Both the Judge and LAD acted outside The scope and guidelines of law when accepting my plea. Ⓓ Both knew I was under the care of a psychologist, under great amounts of stress and there were reports available re this as well as psychological tests.

→ Prior to sentencing January 12th 2007 Mr Weaver (Appellee) received a copy of the Pre Sentence Report from LAD Uiers, this was on January 10th late afternoon when Mr Weaver reviewed the report he became concerned as the content of the report was not accurate and very bias. At one of the interviews with APP Mr Weaver was told by supervisor Ken Shelton that as long as Mr Weaver continued to perform as he was while on Probation APP had no reason to recommend incarceration. The report contained no mention of such an agreement.

Docketing Statement

Mike Weaver 20070158 CA

(3)

Nor did the report contain a log of the various Therapy, Counseling, Psychotherapy, church, court appearances, completed programming, psychological testing and status of childrens placement, nor any interview with employees or the attempt by Mr Weaver to recover lost property from the credit card. Nor did the report contain the fact that the credit card victim Brett Thompson was in "collusion" with the foster parents of my children, LITA Brenda Uera as well as the court prosecutors were well aware of the improper relationship of Brett Thompson and Craig Kehl as both appeared at several court hearings. This relationship borders on revenge instead of justice by Mr Thompson - My childrens status, visiting has been used by the Kehls (foster parents) as a tool for many months. This is also in court records (juvenile court)

I appeared before Judge Himmans January 11th 2007 in an attempt to speak to him about all of the above as well as my attorneys ineffective coercion of plea, failure to correct pre sentence and fact she never intended to follow through on her promise to use "full LITA resources". She actually went on vacation right after my plea. Judge Himmans told me he could talk to me about anything ~~I~~ as there was no prosecutor there and it was ex parte. I hereby request the court to review facts and grant a new trial appeal bond and new counsel. I have requested an attorney through the court to handle this appeal so far nothing.

Dated Feb. 29, 2007
Mike Weaver