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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20000255-CA
v.	:	
DAN APPIS,	:	Priority No. 2
Defendant/Appellant	:	

BRIEF OF APPELLEE

APPEAL FROM A SENTENCE ENTERED ON A GUILTY PLEA TO THEFT, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-404 (1973), IN THE SEVENTH JUDICIAL DISTRICT COURT OF GRAND COUNTY, STATE OF UTAH, THE HONORABLE LYLE R. ANDERSON, PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 20000255-CA
v.	:	
DAN APPIS,	:	Priority No. 2
Defendant/Appellant	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a sentence entered on a guilty plea to theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1973). This Court has jurisdiction of the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Issue No. 1: Did the trial court properly sentence defendant to the statutory prison term for his third degree felony, rejecting in the process defendant's request for an inpatient alcohol treatment program?

Standard of Review: On appeal, sentencing decisions are reviewed for an abuse of discretion. *See State v. Wright*, 893 P.2d 1113, 1120-21 (Utah App. 1995). An abuse of discretion may occur if the actions of the sentencing judge were "inherently unfair," if

the judge imposed a "clearly excessive sentence" or imposed a sentence without considering all the legally relevant factors, or if the sentence exceeds the legal limits. *State v. Schweitzer*, 943 P.2d 649, 651 (Utah App. 1997); *see also State v. Gibbons*, 779 P.2d 1133, 1135 (Utah 1989); *State v. Montoya*, 929 P.2d 356, 358 (Utah App. 1996); *State v. Houk*, 906 P.2d 907, 909 (Utah App. 1995). An abuse of discretion may be found on appeal only if the appellate court concludes that '"no reasonable [person] would take the view adopted by the trial court."' *Schweitzer*, 943 P.2d at 651 (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)).

Issue No. 2: Did the trial court violate Utah Code Ann. § 76-3-201(6) (1999) when it did not set forth specific facts supporting its imposition of a statutory sentence that did not involve minimum mandatory terms?

Standard of Review: Issues raised for the first time on appeal are reviewed for plain error or exceptional circumstances. *See State v. Dunn*, 850 P.2d 1201 (Utah 1993). Because defendant does not raise plain error or exceptional circumstances on appeal, defendant may not receive review of this issue. *See State v. Pledger*, 896 P.2d 1226, n. 5 (Utah 1995).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The text of relevant constitutional, statutory, or rule provisions pertinent to the resolution of the issues presented on appeal is contained in or appended to this brief, including:

Utah Code Ann. § 76-3-201 (1999);

Utah Code Ann. § 76-3-203 (1999);

Utah Code Ann. § 76-3-404 (1991) (each in **Add. A**).

STATEMENT OF THE CASE

Defendant was charged by information with theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1973). R. 1. At his arraignment hearing, defendant pleaded guilty as charged. R. 35-37. The trial court ordered the preparation of a presentence investigation report [PSI]. *Id.* During the initial sentencing hearing, defendant took issue with alleged errors in the PSI and the trial court postponed sentencing for 30 days and ordered the preparation of a diagnostic evaluation. R. 45. After examining the evaluation, taking into account alleged errors identified by defendant, and hearing from the parties, the judge sentenced defendant to an indeterminate term of zero-to-five years in the Utah State Prison for the third degree felony. R. 58, 61.

STATEMENT OF THE FACTS

Defendant and Lara Prather first met around the end of March 1999, at a bar in Moab, Utah.[1] R. 71:2. Upon learning that defendant was homeless and suffering from injuries, Prather invited defendant to stay at her home.[2] *Id.* While residing with Prather, Defendant and Prather had a sexual relationship which evolved into friendship. *Id.* Defendant prevailed upon Prather's generosity to receive food, drugs, alcohol and cigarettes. *Id.* Shortly thereafter, while under the influence of alcohol, defendant left Prather's home and stole her wedding ring to purchase additional alcohol. *Id.* at 2, 7. Defendant sold the ring for cash at a bar in Moab, Utah. *Id.* at 2

On April 29, 1999, Detective Steve White confronted defendant and obtained a confession. *Id.* Defendant was arrested and charged with theft, a third degree felony. *Id.* Defendant posted bail and then left the State, failing to appear at his preliminary hearing.[3] *Id.* Soon thereafter, defendant was arrested in California and brought back to Utah for arraignment. *Id.*

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[1]The facts are taken from the PSI, including both defendant's version and the official version of the events.

[2]Defendant claims he sustained injuries during a fight with some individuals in Moab, Utah. He suffered broken bones and other injuries. R.72: PE, p. 4 (*See supra.* note 5).

[3]Defendant claims that he was unable to attend the preliminary hearing due to his subsequent incarceration for a drug offense while in San Diego, California. R. 71:7-8; Br. of Aplt. at 2.

ARGUMENT SUMMARY

Point I: Defendant fails to establish that the sentencing court did not give full consideration to all relevant sentencing factors or that his sentence was "clearly excessive." All the mitigating factors identified by defendant were presented to the sentencing court through the PSI, the diagnostic evaluation, defendant, or defense counsel at the sentencing hearing. The court also had before it defendant's substantial criminal history including arrests for 12 different drug/alcohol-related offenses over the past seven years, his thirteen year drug and alcohol problem, his unsuccessful completion of a juvenile probation and two adult probations, his referral to a local residential treatment program and eligibility denial due to defendant's poor employment record, crime record and security risks, his unsuccessful completion of the court ordered Salvation Army ARC residential treatment program and the program's unwillingness to allow defendant to reenter, his admission of several violent encounters, his violent encounter with another inmate while in the Grand County Jail during the diagnostic evaluation, and his admission of previously living with and stealing from two other women who had also taken defendant into their homes. The record fully supports the lower court's determination to sentence defendant to the Utah State Prison.

Point II: There is no merit to defendant's claim that the sentencing judge violated Utah Code Ann. § 76-3-201(6) by failing to articulate the facts supporting imposition of the indeterminate prison term provided by statute for defendant's third degree felony

conviction. Section 76-3-201(6) applies to crimes punishable by minimum mandatory sentences and, hence, does not apply in this case.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING DEFENDANT TO THE INDETERMINATE STATUTORY TERM OF IMPRISONMENT IN LIEU OF AN *INPATIENT REHABILITATION PROGRAM*

Defendant asserts that the sentencing judge abused his discretion by failing to evaluate the aggravating and mitigating circumstances in this case and by failing to consider his need for alcohol rehabilitation. Br. of Aplt. at 4-18. Specifically, defendant contends that the judge considered only the alleged biases of the diagnostic evaluation and failed to mention Dr. Matthew Park's assessment and recommendations in defendant's psychological evaluation. *Id.* at 7-17. Defendant claims that the absence of any violent conduct in his criminal history, his age, the fact that the crimes he committed were alcohol-related incidents, together with his desire to obtain treatment for his alcoholism, deserve serious and careful consideration by the sentencing court. *Id.* at 6-13.

A. The Sentencing Decision

The PSI investigator listed relevant aggravating and mitigating circumstances as follows:

Aggravating Circumstances

-Established instances of repetitive criminal conduct.

-Victim was particularly vulnerable.
-Offender's attitude is not conducive to supervision in a less restrict setting.
-Offender continued criminal activity subsequent to arrest.

Mitigating Circumstances

-Offender is young.

R. 71:14. The PSI recommended that a diagnostic evaluation be performed to further determine defendant's needs. *Id.* at 9-10. At defendant's initial sentencing, defendant was allowed an opportunity to challenge the PSI, and the sentencing judge ordered that a diagnostic evaluation be done.[4] R. 45. The diagnostic evaluation warned that treatment programs would only provide defendant with psychological insights that would equip defendant in becoming a more skilled manipulator, and therefore recommended incarceration. R. 71:9-10. At defendant's final sentencing, both he and his counsel presented the court with the reasons they believed he should receive alcohol rehabilitation in lieu of incarceration. R. 78:8-10. In an expression nearly tantamount to invited error, defendant stated, "[m]y crimes are unjustifiable. If the courts feel safer with me being incarcerated, then so be it." *Id.* at 10. Thereafter, the court made the following ruling:

> I'm impressed with the report, that it's covered all of the necessary issues and that it's accurate. And that where the defendant takes issue with the report, that his position is incorrect. And [] it's really a very through [sic]

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[4]At defendant's initial sentencing, defendant alerted the court to certain alleged inaccuracies in the PSI.. R. 45. However, defendant does not appeal the trial courts treatment of his objections to the PSI. *See State v. Jaeger*, 973 P.2d 404 (Utah 1999) (Utah Code Ann. § 77-18-1 requires that the trial court make a determination of the accuracy of the PSI on the record).

well thought out and articulated report. I'm going to follow the recommendation.

Id. at 11 (in **Add. B**). The sentencing judge then imposed the indeterminate sentence prescribed by statute: zero-to-five years in prison. *Id.*; *See* Utah Code Ann. § 76-3-203(3). In his closing remarks, the judge explained that defendant would have an opportunity while incarcerated, to prove that he has changed. R. 78:11.

B. The Standard of Review

The sentencing decision "rests entirely within the discretion of the [trial] court, within the limits prescribed by law." *State v. Schweitzer*, 943 P.2d 649, 651 (Utah App. 1997) (additional quotations omitted). The decision is not to be reduced to a mathematical formula in which the number of circumstances determines the sentence. *See State v. Wright*, 893 P.2d 1113, 1120-21 (Utah App. 1995). Instead, it is the *weight* of the circumstances which is determinative of the sentencing decision. *See Wright*, 893 P.2d at 1120-21.

On appeal, sentencing decisions are reviewed for an abuse of discretion. *Id.* An abuse of discretion may occur if the actions of the sentencing judge were "inherently unfair," if the judge imposed a "clearly excessive sentence" or imposed a sentence without considering all the legally relevant factors, or if the sentence exceeds the legal limits. *Schweitzer*, 943 P.2d at 651; *see also State v. Gibbons*, 779 P.2d 1133, 1135 (Utah 1989); *State v. Montoya*, 929 P.2d 356, 358 (Utah App. 1996); *State v. Houk*, 906 P.2d 907, 909 (Utah App. 1995). An abuse of discretion may be found on appeal only if the

appellate court concludes that "'no reasonable [person] would take the view adopted by the trial court.'" *Schweitzer*, 943 P.2d at 651 (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)).

C. Reliance Upon the Diagnostic Evaluation and Determination of its Credibility Are within the Discretion of the Sentencing Court

Defendant contends that during sentencing, the trial court "endorsed" his diagnostic evaluation and ignored his accompanying psychological evaluation. Br. of Aplt. at 8-18. Specifically, defendant claims that the trial judge's decision was based upon a DE which is speculative and deficient in its conclusions and that the PE is a more correct document. Br. of Aplt. at 9-12.

Utah Code Ann. § 76-3-404 (1991) states that the trial court "may in its discretion" order a diagnostic evaluation for the purpose of obtaining more detailed information relevant to sentencing. The diagnostic evaluation is "a tool available the sentencing judge, if he 'desires more detailed information as a basis for determining the sentence to be imposed.'" *State v. Brown*, 771 P.2d 1067, 1067 (Utah 1989) (citing *State v. Carson*, 597 P.2d 862 (Utah 1979)). In the instant case, the trial judge properly relied upon the conclusions of the diagnostic evaluation in imposing sentence upon defendant.

The Recommendations contained in the diagnostic evaluation are not binding, and "the trial court may determine the extent to which conclusions in the report should be accorded weight in the pronouncement of the sentence." *Carson*, 597 P.2d at 864. A sentencing judge's discretion approaches error only if a sentencing decision is made in

"total ignorance" of the defendant's background. *Id.* The exercise of discretion "in a manner unfavorable to the defendant does not indicate an abuse of discretion[.]" *Id.* At sentencing, the judge found the diagnostic evaluation to be accurate and "a very thorough well thought out and articulated report." R. 78:11. Further, the trial judge found that where defendant pointed out speculation and deficiency issues with the diagnostic evaluation at the sentencing hearing, such position was incorrect. R. 78:4-8, 11. These statements illustrate that the sentencing judge was aware of defendant's background. Accordingly, the sentencing judge was within his discretion to determine the veracity of defendant's claims of speculation and deficiency, and to decide the appropriate weight given the conclusions and recommendations of the diagnostic evaluation. Even though the sentencing judge's decision was unfavorable toward the defendant, the decision was not an abuse of discretion.

The sentencing judge was not obligated to mention or rely on the psychological evaluation at sentencing. The psychological evaluation is merely an appendage to the diagnostic evaluation. *See* Utah Code Ann. § 76-3-404 (1991) (mentions diagnostic evaluation only). The "[d]iagnostic [e]valuation" is listed as the reason for referral on the psychological evaluation. R. 72:PE, p. 1.[5] Further, the psychological evaluation was submitted to the sentencing judge by the diagnostic investigator as a part of the diagnostic

[5]Citation herein to the psychological evaluation will be to the volume number stamped on the cover of the diagnostic evaluation, followed by a colon, the abbreviation "PE" and the internal page number, i.e., R. 72: PE, p. 4.

evaluation. R. 72:2; 72:PE, p. 4; Br. of Aplt. at 12. The trial judge was only under an obligation to be familiar with defendant's background at sentencing. *See Carson*, 597 P.2d at 864. The trial judge's remarks concerning the diagnostic evaluation implied his familiarity with defendant's background. R. 78:11. Thus, the fact that the psychological evaluation was not mentioned at sentencing is of no consequence.

Likewise, the fact that the diagnostic evaluation recommended incarceration whereas the psychological evaluation recommended treatment, is also of no importance. The trial judge is placed in the position of determining the proper weight to afford such evaluations. *Id.* Perhaps the trial judge recognized that the diagnostic evaluation is based upon various extended interactions with defendant during the ninety-day period, whereas the psychological evaluation is based only upon one interview. R. 72:PE, p. 4; 72:4-8. Additionally, the diagnostic evaluation is founded upon defendant's actions observed during the ninety-day evaluation, including an altercation between defendant and another inmate, conversations with previous treatment programs, and the PSI, which contains statements from defendant's past and present victims and defendant's criminal history as obtained from police records. R. 72:3, 7-8; 71:3-4, 8. A relatively brief interview with the defendant is the only source of information for the psychological evaluation. R. 72:PE, pp. 1-5. The trial judge was within his discretion in accepting the conclusions found in diagnostic evaluation and rejecting the conclusions in the accompanying psychological evaluation.

D. The Lower Court Properly Considered the Relevant Sentencing Factors

The sentencing judge considered all relevant circumstances. Although the judge did not articulate a list of the aggravating and mitigating circumstances, all the factors defendant identifies as being overlooked were presented to the sentencing judge through the PSI, the diagnostic evaluation, the psychological evaluation, defendant's counsel, and defendant himself.

Specifically, defendant claims that the sentencing court should have considered as a mitigating factor his alcoholism and his need for alcohol rehabilitation. Br. of Aplt. at 13-18. However, the evidence before the court at sentencing, in the PSI, diagnostic evaluation, and psychological evaluation, illustrates the following alcohol-related aggravating factors: defendant's substantial criminal history, including arrests for 12 different drug/alcohol-related offenses over the past seven years (R. 71:4; 72:3); his thirteen year drug and alcohol problem (R. 71:6-7; 72:2; 72:PE, p. 3); his failure to complete juvenile probation and two adult probations (R. 71:5; 72:4); his referral to a local residential treatment program and eligibility denial due to defendant's poor employment record, crime record and security risks (R. 72:8); his failure to complete the court-ordered Salvation Army ARC residential treatment program and the program's unwillingness to allow defendant to reenter because of his theft from other treatment residents (*id.*); his admission of several violent encounters (R. 71:1-3); his violent encounters with other inmates while in the Grand County Jail during the diagnostic

evaluation (R. 72:7); and his admission to previously living with and stealing from two other women who had also taken defendant into their homes (R. 72:3-4). The existence of studies touting the effectiveness of in-patient treatment for alcohol abuse does not change the fact that defendant has failed to complete such treatment in the past and merely used the treatment program as a forum for continued criminal activity. R. 72:8. Defendant's drug and alcohol problem has continued for thirteen years, yet his only interest in treatment recently came after he was caught committing a crime. Defendant has shown no personal motivation to obtain treatment.

Further, rehabilitation is not necessarily the primary consideration in sentencing, and the State is not prohibited from incarcerating defendants "'for purposes other than rehabilitation.'" *State v. Nuttall* 861 P.2d 454, 458 (Utah App. 1993) (quoting *State v. Bishop*, 717 P.2d 261, 268 (Utah 1986)). Other proper purposes include deterrence, punishment, restitution, incapacitation, and protection of society from an individual "deemed to be a danger to the community." *Nuttall*, 861 P.2d at 458; *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah App. 1991). While the sentence must be tailored to the particular defendant, it should also serve the interests of society as well, and those interests include halting a pattern of law-breaking. *State v. Taylor*, 818 P.2d 1030, 1034 (Utah 1991), *cert. denied*, 503 U.S. 966, 112 S. Ct. 1576 (1992). To this end, repetitive criminal conduct is viewed as a "serious aggravating circumstance." *State v. Elm*, 808 P.2d 1097, 1099 (Utah 1991).

Under the facts of this case, imprisonment serves the purposes of punishment and protection of society. Defendant's substantial criminal history and lengthy involvement with alcohol demonstrate that whenever he is not in prison, he regularly drinks and commits criminal acts. The record wholly supports the court's order favoring incarceration rather than rehabilitation. Defendant's personal statement at sentencing acknowledged to the court the nature of his crimes and acquiesced to the decision of the court, stating "[m]y crimes are unjustifiable. If the courts feel safer with me being incarcerated, then so be it." R. 78:10. The sentencing court listened as defendant expressed his need for rehabilitation, and then concluded that incarceration was a more appropriate remedy. *Id.* at 9-11. In adopting the recommendation of the diagnostic evaluation (*id.* at 11), the trial court affirmed the investigator's conclusion that, based upon defendant's criminal propensities to victimize susceptible individuals and his manipulative disposition, defendant is a threat to society. R. 72:8-9. Perhaps the most compelling evidence before the court were the statements of defendant's victims, expressing extreme fear of the defendant and their wishes that he be incarcerated. R. 71:3; 72:3.

Defendant admitted that all of his crimes were drug/alcohol-related. R. 72:2. Defendant's inability to control his actions in light of his habits presents a danger to society. Further, the number of years defendant has engaged in alcohol-related criminal activity, despite the availability of treatment, and the fact that treatment had proved

unsuccessful in the past, minimize his prospects for successful rehabilitation. *See Nuttall*, 861 P.2d at 457. On these facts, the trial court did not abuse its discretion in emphasizing societal protection over rehabilitation, especially when the latter is available in prison. *See Nuttall*, 861 P.2d at 458 (where the record did not show extreme youth or an absence of prior criminal behavior, the trial court could properly place more emphasis on punishment than rehabilitation).

Defendant's comparison of his case with *State v. Strunk* is misplaced. Br. of Aplt. at 8-12. *Strunk* involved a sixteen-year-old boy was convicted of child kidnapping and aggravated child sexual abuse, and sentenced to consecutive minimum mandatory terms of life imprisonment. *See State v. Strunk*, 846 P.2d 1297 (Utah 1993). *Strunk* was remanded because the sentencing court failed to consider the defendant's "extreme youth" as a mitigating factor. *Id.* at 1302. However, in this case, defendant was 24 years old when he committed theft. Br. of Aplt. at 9. As compared to a 16-year-old, a 24-year-old adult is not, for mitigating purposes, extremely youthful. *See In re G.T.K.*, 878P.2d 1189 (Utah Ct. App. 1994) (juvenile's age– less than 18-years-old, seen as mitigating factor); *State v. Russell*, 791 P.2d 188 (Utah 1990) (same). Additionally, as explained below, defendant's indeterminate sentence awarded under Utah Code Ann. § 76-3-203 (1999), is distinguishable from the minimum mandatory sentence awarded in *Strunk*.

In view of the weighty aggravating circumstances in this case, and the lack of mitigating circumstances, it cannot be said that "'no reasonable [person] would take the

view adopted by the trial court.'" *Schweitzer*, 943 P.2d at 651 (quoting *Gerrard*, 584 P.2d at 887). Accordingly, the trial court did not abuse its discretion by imposing imprisonment in lieu of inpatient alcohol treatment.

POINT II

BECAUSE DEFENDANT'S FELONY CONVICTION IS NOT PUNISHABLE BY A MINIMUM MANDATORY SENTENCE, THE SENTENCING JUDGE NEED NOT COMPLY WITH SECTION 76-3-201(6)

Defendant argues that the trial judge committed reversible error because he failed to include on the record his reasons "for imposing the maximum five-year penalty" for defendant's felony charge, as is required by Utah Code Ann. § 76-3-201(6) (1999).[6] Br. of Aplt. at 18-19. However, this statute does not apply to this case.

Utah Code Ann. § 76-3-201(6) provides:

> (6) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.
>
> . . .
>
> (d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.
>
> . . .

---

[6]Defendant cites to section 76-3-201(5) of the 1953 volume of the code. However, in 1993, a new subsection (5) was added. The challenged provision in the statute is now found in subsection (6), to which the State cites herein.

This statute does not apply to any indeterminate term of imprisonment, as defendant contends. Br. of Aplt. at 5. By its express terms, the statute applies only to offenses which are punishable by minimum mandatory prison terms. *See State v. Elm*, 808 P.2d 1097, 1098-99 (Utah 1991) (applying section 76-3-201(5) to sentencing under the minimum mandatory procedures). In contrast, defendant's offense is punishable by "a[n indeterminate] term not to exceed five years" in the state prison. Utah Code Ann. § 76-3-203(3) (1999). Accordingly, any failure of the sentencing court to comply with section 76-3-201(6) would not amount to error.

CONCLUSION

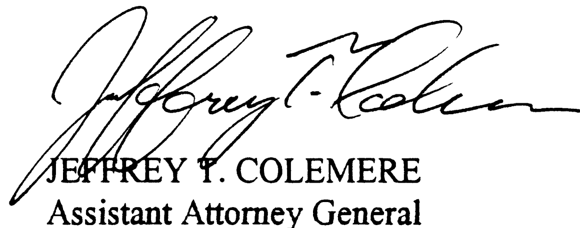
For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentences.

NO ORAL ARGUMENT OR PUBLISHED OPINION

Because this case presents no complex or novel questions, the State does not request that it be set for oral argument or that a published opinion issue.

RESPECTFULLY SUBMITTED this 26th day of September, 2000.

JAN GRAHAM
Attorney General



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MAILING CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed by first class mail, postage prepaid, to Happy J. Morgan, Grand County Public Defender, attorney for appellant, 8 South 100 East, Moab, Utah 84532, this 26th day of September, 2000.