IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Clinton Royce Senior, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040538-CA F I L E D (September 15, 2005) 2005 UT App 389

Second District, Farmington Department, 031700879
The Honorable Michael G. Allphin

Attorneys: Robert M. Archuleta, Salt Lake City, for Appellant
Mark L. Shurtleff and Erin Riley, Salt Lake City, for Appellee

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Before Judges Greenwood, McHugh, and Thorne.

GREENWOOD, Judge:

Defendant Clinton Royce Senior appeals his sentence following guilty pleas to two counts of sexual abuse of a child, second degree felonies, see Utah Code Ann. § 76-5-404.1(1) (2003), and one count of attempted sexual exploitation of a minor, a third degree felony. See id. § 76-5a-3 (2003). Defendant argues that the trial court violated the Due Process Clause of the Utah Constitution, see Utah Const. art. I, § 7, by failing to consider all relevant information prior to sentencing, to wit, a partial psychosexual evaluation (the Evaluation). We affirm.

"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). "'[T]he exercise of discretion in sentencing necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if it can be said that no reasonable [person] would take the view adopted by the trial court.'" Id. (second alteration in original) (quoting State v. Gerrard, 584 P.2d 885, 887 (Utah 1978)).

"Due process applies to sentencing procedures." State v. Howell, 707 P.2d 115, 117 (Utah 1985). "The 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." Id. at 118. While this discretion may be based on several sources of information, "in cases in which the trial judge is different from the sentencing judge, it is incumbent on the judge who imposes sentence to be familiar with the pre-sentence report and any pre-sentence evaluations that are available." State v. Carson, 597 P.2d 862, 865 (Utah 1979).

Additionally, Utah Code section 77-18-1(7) mandates: "At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant." Utah Code Ann. § 77-18-1(7) (2003).

Defendant first asserts that he is entitled to relief under these principles because "[i]t is patently clear that [the trial court] did not read the [Evaluation]." However, contrary to Defendant's assertions, the trial court indicated that it "read the information that's been supplied to the Court . . . [and] it's so serious that it justifies the recommendation of [Adult Probation & Parole (AP&P)], with or without the [Evaluation]."[1] Thus, it appears from the record that the trial court did read and examine the Evaluation, but that it considered other factors, such as the facts of the case and AP&P's recommendation for prison time, to be more persuasive. This is a "personal judgment" within the trial court's sound discretion. Nuttall, 861 P.2d at 456.

However, even if the trial court did not physically read the Evaluation, there was no prejudice to the Defendant because both Defendant and his counsel were allowed to address the trial court prior to sentencing, in compliance with section 77-18-1(7), see

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[1]Defendant asserts, in connection with this claim, that the video tape of the sentencing proceedings shows that the trial court never read the Evaluation. However, Defendant neglected to make this video tape a part of the record. "[Defendant] is ultimately responsible for ensuring that [the appellate court] receive[s] all portions of the record necessary to his arguments on appeal." State v. Penman, 964 P.2d 1157, 1162 (Utah Ct. App. 1998). Facing "an [in]adequate record on appeal, [the appellate court] must assume the regularity of the proceedings below." Id. (first alteration in original) (quotations and citation omitted).

Utah Code Ann. § 77-18-1(7), and Defendant's counsel thoroughly apprised the trial court of the relevant portions of the Evaluation prior to the imposition of sentence. Indeed, the record indicates that the Evaluation was one of the most discussed issues at sentencing. Moreover, the trial court had the presentence investigation report, the recommendation of AP&P, and the plea statement, which included Defendant's acknowledgment of the facts relevant to his crimes. Accordingly, there was no abuse of discretion because the court was "'sufficiently apprised of the pertinent background facts concerning [Defendant] to impose sentence.'" State v. Thorkelson, 2004 UT App 9,¶11, 84 P.3d 854 (quoting State v. Brown, 771 P.2d 1067, 1068 (Utah 1989)).[2]

For these reasons, we affirm Defendant's sentence.

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Pamela T. Greenwood, Judge

WE CONCUR:

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Carolyn B. McHugh, Judge

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William A. Thorne Jr., Judge

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[2]Defendant also makes a somewhat cumbersome argument that the trial court was required to follow the Evaluation because completion of the Evaluation was part of Defendant's plea agreement with the State. This argument is without merit because the plea agreement indicates, in boldfaced type, that the "trial judge [is] not bound" by the agreement. See State v. Gladney, 951 P.2d 247, 248 (Utah Ct. App. 1998) (indicating that a trial court is not bound by the plea agreement where it "specifically state[s] that the judge was not bound by any sentencing recommendations.").