

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	Case No. 20050706-CA
)	F I L E D
v.)	(November 3, 2005)
)	
Ellen Marie Willard,)	2005 UT App 473
)	
Defendant and Appellant.)	

Seventh District, Monticello Department, 051700052
The Honorable Lyle R. Anderson

Attorneys: William L. Schultz, Moab, for Appellant
Mark L. Shurtleff and Matthew D. Bates, Salt Lake
City, for Appellee

Before Judges Billings, Bench, and Greenwood.

PER CURIAM:

Ellen Marie Willard appeals her sentence after pleading guilty to charges of possession of a controlled substance and reckless endangerment.

"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). The "'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. (alteration in original) (quoting State v. Gerrard, 584 P.2d 885, 887 (Utah 1978)). An abuse of discretion may be found "if the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence." Id.

Willard asserts that the trial court erred because it failed to consider mitigating factors and erroneously considered aggravating factors without sufficient proof. "[A]ny mitigating

or aggravating circumstance found by the trial court must be supported by evidence, and the proponent of the circumstance bears the burden of proving its existence by a preponderance of the evidence." State v. Moreno, 2005 UT App 200, ¶13, 113 P.3d 992. A determination of aggravating or mitigating circumstances is a factual finding, and will not be reversed unless clearly erroneous. See id. at ¶¶12-13. Based on the burden of proof combined with the clearly erroneous standard, "the trial court's assessment is entitled to deference by the appellate court and will generally be sustained." Id. at ¶13. Furthermore, a trial court is permitted "a great deal of discretion in determining the relative weight of competing aggravating and mitigating circumstances." Id. at ¶9.

Here, the trial court's determination of aggravating factors was not clearly erroneous. Willard violated her parole on another charge four times and eventually served out her sentence while incarcerated. The frequent violations support the aggravating factor of "repeat violator on supervision." The violations also support the aggravating factor of "attitude is not conducive to supervision in a less restrictive setting," based on her apparent unwillingness to comply with terms of parole. The trial court noted that the four violations provided "quite a strong point, when someone wants the privilege of probation" and they could not complete parole. Because the aggravating factors are supported in the record, the trial court did not err in considering them.

Additionally, the trial court considered the mitigating factors presented at sentencing. The primary mitigating argument offered at sentencing was based solely on Willard's representation that she was going to New Mexico to leave "the drug life" and get treatment. This representation is weakened by the fact that she was using drugs on her trip. Also, there was nothing to support her assertion that she had qualified for treatment. The trial court gave little weight to Willard's assertions, noting, "your words don't carry much weight with me, because your acts are so loud."

Willard also asserts that the trial court failed to consider particular mitigating factors listed on the presentence report form but not checked. However, those specific factors were not raised at sentencing and are waived as a result. "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. § 77-18-1(6)(b) (2003). Willard agreed with the accuracy of the presentence report and pointed out no errors at sentencing. Therefore, she cannot raise these issues on appeal.

The trial court properly considered aggravating factors and was within its discretion in weighing aggravating and mitigating factors. The sentence was also within the statutory limits. Willard has not shown that the trial court abused its discretion in sentencing her. Accordingly, her sentence is affirmed.

Judith M. Billings,
Presiding Judge

Russell W. Bench,
Associate Presiding Judge

Pamela T. Greenwood, Judge