

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20030996-CA
v.	)	
	)	
Michael Fisher,	)	F I L E D
	)	(December 1, 2005)
	)	
Defendant and Appellant.	)	<u>2005 UT App 512</u>

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Fifth District, St. George Department, 031500169  
The Honorable James L. Shumate  
The Honorable G. Rand Beacham

Attorneys: Margaret P. Lindsay, Orem, for Appellant  
Mark L. Shurtleff and Erin Riley, Salt Lake City, for Appellee

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Before Judges Bench, Davis, and Orme.

BENCH, Associate Presiding Judge:

Defendant Michael Fisher appeals his various felony and misdemeanor convictions, contending that the trial court erred in sentencing him to consecutive sentences. "We review sentencing decisions under an abuse of discretion standard." State v. Hammond, 2001 UT 92, ¶8, 34 P.3d 773.

Fisher argues that Judge Beacham erred by not upholding an alleged sentencing agreement entered into by Judge Shumate prior to his recusal. When Fisher refused to name the person responsible for providing drugs at a work facility, Judge Shumate stated, "I have got three felony matters here. They can be served consecutively or concurrently at my discretion. You've got to decide what's more important to you." Fisher therefore asserts that Judge Shumate assured him of concurrent sentences if he disclosed the person responsible for providing the drugs. However, the record does not support Fisher's claim that the court entered into a binding agreement. Defense counsel argued before Judge Beacham that "Judge Shumate implied" and "gave a strong indication it's going to be run concurrent if Mr. Fisher cooperated." The words "implied" and "indication" do not denote an agreement. Judge Shumate himself stated that he did not

consider his statement to Fisher "as binding . . . as to what Fisher's sentence would or would not be."

Judge Beacham reviewed the dialogue between Judge Shumate and Fisher and the evidence that Fisher cooperated with the court. After considering all of the relevant factors, Judge Beacham sentenced Fisher to consecutive sentences. See Utah Code Ann. § 76-3-401 (2003). Judge Beacham reasonably concluded that Judge Shumate merely reminded Fisher that sentencing was "at [the court's] discretion" and that Fisher's cooperation could be a factor in sentencing. Judge Beacham therefore did not abuse his discretion in sentencing Fisher to consecutive sentences. See State v. Montoya, 929 P.2d 356, 358 (Utah Ct. App. 1996) ("An appellate court may only find abuse if it can be said that no reasonable person would take the view adopted by the trial court." (quotations, citation, and alteration omitted)).

Fisher also asserts that Judge Shumate abused his discretion by recusing himself prior to sentencing or, in the alternative, that his recusal was plain error. Canon 3 of Utah's Code of Judicial Conduct provides that a judge "shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned." Utah Code of Judicial Conduct, Canon 3E(1). Judge Shumate did not abuse his discretion or plainly err in recusing himself where he concluded that his conversation with the parole board regarding Fisher's case might raise reasonable questions about his partiality.<sup>1</sup>

We therefore affirm.

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Russell W. Bench,  
Associate Presiding Judge

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WE CONCUR:

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James Z. Davis, Judge

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Gregory K. Orme, Judge

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<sup>1</sup>Our affirmance should not be read as an approval of either the in-court colloquy conducted by Judge Shumate or his ex parte communication, which prompted the need for recusal.