

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20080785-CA
v.)	
)	F I L E D
Brandon Michael Gibbons,)	(September 17, 2009)
)	
Defendant and Appellant.)	2009 UT App 261

Third District, Salt Lake Department, 081901519
The Honorable William W. Barrett

Attorneys: Deborah Katz Levi and Michael A. Peterson, Salt Lake City, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

Before Judges Bench, Orme, and McHugh.

BENCH, Judge:

Defendant Brandon Michael Gibbons appeals the trial court's sentence of fifteen years to life for aggravated kidnapping. Gibbons argues that the trial court erred by (1) failing to make a determination on the record regarding alleged inaccuracies in the presentence investigative report (the PSI report); (2) failing to provide a sentencing statement, in violation of Gibbons's due process rights; and (3) imposing an excessive sentence, in violation of the state and federal constitutions.

"Whether the trial court properly complied with a legal duty to resolve on the record the accuracy of contested information in the sentencing reports is a question of law that we review for correctness." State v. Scott, 2008 UT App 68, ¶ 5, 180 P.3d 774 (internal quotation marks omitted). At the sentencing hearing, Gibbons's counsel indicated that the PSI report erroneously stated that Gibbons had two prior felony convictions. Gibbons's counsel also indicated that Gibbons expressed pride in having completed a drug rehabilitation program, whereas the PSI report inaccurately indicated that he expressed pride in having pleaded a felony charge down to a misdemeanor. The trial court did not make any findings in regard to the PSI report's alleged

inaccuracies prior to imposing the presumptive sentence for the crime of aggravated kidnapping. See Utah Code Ann. § 76-5-302(4)(a) (2008) (stating that the presumptive prison term for aggravated kidnapping is fifteen years to life).

Utah statute requires the trial court to "make a determination of relevance and accuracy on the record" once inaccuracies in the PSI report are brought to its attention. Utah Code Ann. § 77-18-1(6)(a) (2008). Compliance with this statute "requires the sentencing judge to consider the party's objections to the 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 the issue of sentencing." State v. Jaeger, 1999 UT 1, ¶ 44, 973 P.2d 404. The trial court here failed to resolve Gibbons's objections to alleged factual inaccuracies in the PSI report. We therefore must remand the case for resolution of Gibbons's objections to the alleged inaccuracies in the PSI report. See State v. Maroney, 2004 UT App 206, ¶ 29, 94 P.3d 295.

Gibbons next asserts that the trial court violated his due process rights when it failed to provide a sentencing statement. This issue was not preserved. However, Gibbons argues that this issue is reviewable on appeal under rule 22(e) of the Utah Rules of Criminal Procedure or, alternatively, under the plain error doctrine.

A sentence is reviewable under rule 22(e) if it "'is a 'patently' illegal sentence[] or a 'manifestly' illegal sentence.'" State v. Garner, 2008 UT App 32, ¶ 17, 177 P.3d 637 (quoting State v. Thorkelson, 2004 UT App 9, ¶ 15, 84 P.3d 854). Patently illegal sentences usually occur in two situations: "(1) where the sentencing court has no jurisdiction, or (2) where the sentence is beyond the authorized statutory range." Id. (internal quotation marks omitted). "[R]un-of-the-mill" errors are not reviewable under rule 22(e) and include errors such as the "denial of due process resulting from a trial court's failure to consider mitigating evidence." Id. Gibbons asserts a "run-of-the-mill" error that is not reviewable under rule 22(e).

Under the plain error doctrine, Gibbons must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993). In order for plain error to be established, all three of the above elements must be met. See id. at 1209. There was no error in this case because the aggravated kidnapping statute does not require a trial court to explain imposition of the presumptive term of fifteen years to life. See Utah Code Ann. § 76-5-302(4)(a). Because there was no

error, let alone an obvious one, review under the plain error doctrine is inapplicable.

Lastly, Gibbons argues that his sentence is excessive under the state and federal constitutions and that this unpreserved claim is also reviewable as plain error. Gibbons's sentence of fifteen years to life is not presumptively excessive. See, e.g., Ewing v. California, 538 U.S. 11, 28-30 (2003) (rejecting an Eighth Amendment challenge to Ewing's "three strikes sentence of 25 years to life" for the "offense of shoplifting three golf clubs" (internal quotation marks omitted)); United States v. Angelos, 433 F.3d 738, 750-53 (10th Cir. 2006) (rejecting an Eighth Amendment challenge to a fifty-five year prison sentence mandated for the defendant's conviction on three separate offenses). In addition, Gibbons's sentence did not exceed the statutory range; indeed, he received the presumptive sentence. Therefore, no error should have been obvious to the trial court, and the plain error doctrine is inapplicable. See generally State v. Ross, 951 P.2d 236, 239 (Utah Ct. App. 1997) ("Utah courts have repeatedly held that a trial court's error is not plain where there is no settled appellate law to guide the trial court.").

Accordingly, we remand for the trial court to make findings on the record regarding the alleged inaccuracies in the PSI report. "If resolution of the objections affects the trial court's view of the appropriate sentence, the trial court may then revise the sentence accordingly." State v. Maroney, 2004 UT App 206, ¶ 31, 94 P.3d 295.

Russell W. Bench, Judge

WE CONCUR:

Gregory K. Orme, Judge

Carolyn B. McHugh, Judge