

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20040663-CA
v.)	Case No. 20040664-CA
)	
George Issac Hernandez,)	F I L E D
)	(November 3, 2005)
)	
Defendant and Appellant.)	2005 UT App 476

Second District, Farmington Department, 031700197, 031701275
The Honorable Michael G. Allphin

Attorneys: Scott L. Wiggins, Salt Lake City, for Appellant
Mark L. Shurtleff, Marian Decker, and Jeffrey S.
Gray, Salt Lake City, for Appellee

Before Judges Billings, Bench, and Greenwood.

PER CURIAM:

George Issac Hernandez appeals the sentence on convictions for theft, a third degree felony, in two separate cases.¹ The State filed a responsive brief in Case No. 20040663-CA, but filed a motion to remand, in lieu of a brief, in Case No. 20040664-CA. In both appeals, the State requests a remand to the district court with directions to resolve alleged inaccuracies in the presentence investigation report (PSI).

Hernandez makes two claims on appeal. First, he claims that the district court failed to resolve claimed inaccuracies in the PSI on the record, as required by Utah Code section 77-18-1(6)(a), see Utah Code Ann. § 77-18-1(6)(a) (Supp. 2005), and State v. Jaeger, 1999 UT 1, 973 P.2d 404. Second, he claims that

¹The Second District Court conducted a single sentencing hearing in its Case No. 031700197 and its Case No. 031701275, which are the subjects of our Case No. 20040663-CA and our Case No. 20040664-CA, respectively. Due to the identity of the issues and parties, we consolidate the appeals for purposes of decision. See Utah R. App. P. 3(b).

his trial counsel was ineffective by failing to request that the trial court utilize its fact finding function to resolve the alleged inaccuracies in the PSI and, accordingly, denied him a fair sentencing hearing.

While the State concedes that the district court failed to comply with section 77-18-1(6)(a) by not resolving the claimed inaccuracies on the record, the State does not concede that Hernandez was thereby prejudiced at sentencing. Accordingly, the State requests this court to affirm the sentences prior to remanding the cases. In Case No. 20040664-CA, Hernandez objects to the remand motion, contending that the district court abused its discretion at sentencing by failing to comply with section 77-18-1(6)(a) and by failing to consider all legally relevant factors at sentencing.

In Jaeger, the Utah Supreme Court held that "section 77-18-1(6)(a) 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." 1999 UT 1 at ¶44. However, the supreme court noted that "because Jaeger does not contend that such error affected his sentence, this error does not require reversal." Id. at ¶45. Accordingly, "the proper remedy is to remand this case to the trial court with instructions to the trial court that it expressly resolve Jaeger's objections in full compliance with section 77-18-1(6)(a)." Id. In contrast, Hernandez claims that the district court abused its discretion in sentencing him without resolving the alleged inaccuracies and without considering their relevance to his sentence.

In State v. Maroney, 2004 UT App 206, ¶31, 94 P.3d 295, we held that the district court erred in failing to resolve Maroney's objections to the sentencing reports, and we remanded to allow the court to resolve the objections on the record. We further held that "[i]f resolution of the objections affects the trial court's view of the appropriate sentence, the trial court may then revise the sentence accordingly." Id. This disposition is appropriate in the present cases because Hernandez challenges his sentences. Allowing the district court to revisit the sentences as it deems necessary, after resolving the alleged inaccuracies in the PSI and after considering the relevancy of that information to the sentence imposed, gives appropriate deference to the district court's sentencing function. Accordingly, we accept the State's request for remand, but reject its request that we affirm the sentences prior to remand.

Based upon our review of the records and the State's concession, we remand the case so "the sentencing judge can consider the objections to the presentence 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 sentencing." Jaeger, 1999 UT 1 at ¶44. Based upon the resolution of the objections, the district court may revise the sentences as it deems appropriate. Our disposition makes it unnecessary to consider alternative arguments alleging ineffective assistance of trial counsel.

Judith M. Billings,
Presiding Judge

Russell W. Bench,
Associate Presiding Judge

Pamela T. Greenwood, Judge