IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Gregory D. Lineberry, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080461-CA F I L E D (May 14, 2009) 2009 UT App 127

Third District, West Jordan Department, 071400456
The Honorable Royal I. Hansen

Attorneys: Linda M. Jones, Salt Lake City, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee

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Before Judges Greenwood, Orme, and Davis.

DAVIS, Judge:

Defendant Gregory D. Lineberry appeals the trial court's denial of his motion for a reduction in judgment of his conviction of one count of possession of a prohibited item in a correctional facility, a second degree felony, see Utah Code Ann. § 76-8-311.3(4)(c) (2008). "'We traditionally afford the trial court wide latitude and discretion in sentencing. . . . An appellate court will set aside a sentence imposed by the trial court if the sentence represents an abuse of discretion.'" State v. Boyd, 2001 UT 30, ¶ 31, 25 P.3d 985 (omission in original) (quoting State v. Woodland, 945 P.2d 665, 671 (Utah 1997)).

Lineberry argues that the trial court should have reduced his conviction under Utah Code section 76-3-402, which provides as follows:

> If at the time of sentencing the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, and after having given any victims present at the sentencing and the prosecuting attorney an opportunity to be heard, concludes it would be unduly harsh to record the conviction as being for that

> degree of offense established by statute, the court may enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

Utah Code Ann. § 76-3-402(1) (2008) (emphasis added). Even assuming that all of Lineberry's claims of error are preserved and that he is entitled to relief under this section under any circumstances, we do not see that the trial court abused its discretion under the facts of this case.

First, regarding the nature and circumstances of the offense, Lineberry suggests that the crime was established only by his reckless possession of the handcuff key. The jury determined, however, that Lineberry "intentionally, knowingly, or recklessly" possessed the handcuff key. (Emphasis added.) Although Lineberry testified that he was unaware of the key in the waistband of the pants he was wearing and argues that he was set up by a fellow inmate, there was also evidence before the trial court that would support the opposite conclusion. For example, there was evidence that Lineberry was never out on recreation that day, which is where he claimed to have borrowed the pants from some unidentified inmate. Also, there was evidence that he later released the pants with other of his personal belongings to his mother when he was transferred to maximum security, which supports the inference that the pants were indeed his. Second, although no one was actually injured before the key was recovered, the trial court was also aware of the danger involved in this offense because there was discussion at sentencing of the serious security risk posed by an inmate having a handcuff key in his possession, which risk included possible assault on correctional officers at the prison. And third, regarding Lineberry's history and character, the trial court was aware that this event took place in a correctional facility where Lineberry was serving time on a sentence of five years to life. Considering such facts, we cannot say that the trial court abused its broad discretion in refusing to reduce Lineberry's conviction.

Other facts that Lineberry raises as pertinent to the trial court's reduction determination--specifically, the facts that he refused an offer from the State to plead to a class A misdemeanor because he maintained his innocence, that he was moved to a more restrictive unit in prison after this incident, and that because of his prior charge the Board of Pardons already has discretion to keep him for life regardless of the charge here--speak to neither the nature and circumstances of the offense nor Lineberry's history and character, which are the relevant factors under section 76-3-402, see id. Further, we are not convinced, and Lineberry points to no authority suggesting, that these facts would support the conclusion that the sentence of one to fifteen years was unduly harsh for the crime for which Lineberry was found guilty.

Lineberry also claims that the trial court committed plain error "[i]n the event that" it based its decision on unreliable information presented by the prosecutor regarding Lineberry's plans for the handcuff key. The first requirement of showing plain error is showing that an error occurred. See State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993) ("In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant . . . ."). Lineberry's unfounded assertion that the trial court may have relied on unreliable information simply does not meet this requirement. And there is absolutely nothing in the record to suggest that the trial court placed any weight on this information when arriving at its decision. Indeed, the prosecutor himself clarified that he was not certain of the truthfulness of the information: "There was information that we had that Mr. Lineberry was trying to get this key to Troy [Kell] on death row. Whether that be true or not, obviously having a handcuff key is very serious." Thus, the prosecutor was not asserting that this was Lineberry's intention in possessing the key; instead, the prosecutor's point was simply that, regardless of Lineberry's intention, this was a serious offense. Moreover, even if the trial court had accepted the unreliable information as true, we do not see that it would be harmful error, i.e., we do not see that the trial court would have likely reduced Lineberry's conviction had it thought that Lineberry was in possession of the key for his own or some other inmate's possible escape attempt, as opposed to planning to give it to a death row inmate.

Affirmed.

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James Z. Davis, Judge

WE CONCUR:

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Pamela T. Greenwood,
Presiding Judge

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Gregory K. Orme, Judge