

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20090214-CA
v.	)	
	)	F I L E D
Benjamin John Magness,	)	(December 31, 2009)
	)	
Defendant and Appellant.	)	2009 UT App 402

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Third District, Tooele Department, 081300502  
The Honorable Stephen L. Henriod

Attorneys: David J. Angerhofer, Sandy, for Appellant  
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake  
City, for Appellee

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Before Judges Bench, Orme, and McHugh.

PER CURIAM:

Pursuant to a plea agreement, Defendant Benjamin John Magness pleaded guilty to three amended counts of sexual abuse of a child, a second degree felony. The district court sentenced him to a term of one to fifteen years in the Utah State Prison on each count, with two prison terms to run consecutively and the third to run concurrently. Magness does not challenge the imposition of prison terms but claims that the court abused its discretion in ordering two consecutive prison terms.

Utah Code section 76-3-401(2) states that when considering whether to impose concurrent or consecutive sentences, the court "shall consider the gravity and circumstances of the offenses, the number of victims, and the history, character, and rehabilitative needs of the defendant." Utah Code Ann. § 76-3-401(2) (2008). Magness argues that the circumstances do not warrant consecutive sentences. In support of that argument, Magness notes that there was only one victim, that he had no other adult offenses, that he acknowledged his wrongdoing, and that he is in a "rehabilitative frame of mind as indicated by his acknowledgment of the offense and request for prison." Magness also contends that he should be sentenced to concurrent terms because there is a discrepancy between what he pleaded to and

what he was sentenced for, which he claims introduced the element of force and may have resulted in a harsher sentence.

We turn first to the claim that the district court abused its discretion by failing to consider all relevant sentencing factors before imposing two consecutive sentences is without merit. An abuse of discretion may be found (1) when the trial court "fails to consider all legally relevant factors," (2) when "the sentence imposed exceeds the limits prescribed by law," or (3) when the sentence is "inherently unfair." State v. Bluff, 2002 UT 66, ¶ 66, 52 P.3d 1210. The district court ordered a Presentence Investigation Report (PSI) for use at sentencing. The PSI accurately stated the facts of the offense, the impact on the victim, and Defendant's life history, including education, employment, and substance use. Magness's life history, his admitted conduct, and his desire and need for rehabilitation were discussed at sentencing. The district court was also aware of the extensive juvenile history, the absence of any adult offenses, and the fact that there was a single victim. There is no credible claim that the district court did not consider all legally relevant factors. Furthermore, the sentence imposed for the second degree felony offenses was within the statutory range of one to fifteen years. See Utah Code Ann. § 76-3-203(2) (2008).

The sentence was also not inherently unfair. Magness argues that a single victim was involved, that the victim did not ask him to stop the contact, and that he did not force her to have sexual relations. Given the age of the victim, these considerations are largely irrelevant in lessening the culpability of Magness, who was an adult when the sexual activity occurred. His admitted conduct was sexual intercourse, which would have supported the original charge of rape of a child, a first degree felony. The State persuasively argues that where the admitted conduct supported a lengthier sentence, it cannot be plausibly argued that "no reasonable [person] would take the view adopted by the trial court." State v. Gerrard, 584 P.2d 885, 887 (Utah 1978).

Both Magness's written statement in advance of his guilty pleas and the plea colloquy stated that Magness was pleading guilty to three counts of sexual abuse of a child. However, the PSI incorrectly stated that Magness was convicted of three counts of forcible sexual abuse, although the district court's referral for preparation of a PSI had correctly identified the charges as sexual abuse of a child. The signed judgment and sentence later mislabeled the offenses as "forcible sex abuse." Magness contends that the inaccurate description of the offenses as forcible sex abuse may have suggested to the sentencing court that force was used in commission of the offenses and have

resulted in a harsher sentence through the imposition of two consecutive sentences. We thus remand to the district court for the limited purpose of considering whether improper inclusion of the "forcible" characterization of Magness's conduct influenced the decision to run two of the three sentences consecutively.

We reverse the sentence and remand to the district court for the limited purpose of considering whether the improper description of the offenses to which Magness entered guilty pleas as forcible sexual abuse contained in both the PSI and the written judgment and sentence influenced the district court's decision to run two of the three sentences consecutively. If the district court concludes it was influenced by that error, it may reconsider the sentences imposed, particularly the running of two of the sentences consecutively. In any event, the district court shall resentence Magness on three counts of sexual abuse of a child, a second degree felony, after completion of the proceedings on remand in accordance with this decision.

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Russell W. Bench, Judge

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Gregory K. Orme, Judge

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Carolyn B. McHugh, Judge