

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20050013-CA
v.	)	
	)	F I L E D
Robert Craig Thomas,	)	(March 16, 2006)
	)	
Defendant and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2006 UT App 106</span>

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Third District, Salt Lake Department, 041905292  
The Honorable Leslie A. Lewis

Attorneys: John P. Pace and Catherine E. Roberts, Salt Lake City, for Appellant  
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

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Before Judges Billings, McHugh, and Thorne.

McHUGH, Judge:

Robert Craig Thomas appeals his sentence of two indeterminate prison terms of zero to five years and two jail terms of twelve months, all to be served consecutively. Thomas pleaded guilty to possession of a controlled substance, theft by deception, attempted unlawful use of a transaction card, and attempted forgery. Thomas argues that the trial court abused its discretion by (1) failing to order a diagnostic evaluation and probation and (2) ordering that the sentences be served consecutively rather than concurrently.<sup>1</sup> We affirm.

The record reveals that Thomas's crimes stem from a lengthy methamphetamine addiction. The presentence report stated that Thomas had been imprisoned several times in the past for drug-related crimes and had completed several treatment programs. The report also stated that Thomas was still using drugs

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<sup>1</sup>The State argues that Thomas failed to preserve either of his arguments. After reviewing the record, we conclude that both issues were sufficiently addressed by the trial court and should be resolved on the merits by this court.

regularly despite receiving treatment. The report recommended more prison time.

At the sentencing hearing, the trial court heard statements from several victims of Thomas's crimes. The court also heard from defense counsel, who stated that the prosecution had agreed to probation if Thomas could enter an intensive inpatient program such as the Odyssey House. The judge noted that although she was disinclined to order probation, it would be possible only if Thomas first underwent a diagnostic evaluation. The following exchange then occurred:

THE COURT: I'll be frank with you, [defense] counsel, and indicate to you that I'm doing the diagnostic evaluation because I believe in looking at all alternatives, but frankly at this point I'm inclined to send him to prison. But we will see how he performs in the diagnostic unit, and whatever the penalty is going to be it's going to involve a significant amount of time behind bars.

You need to be prepared for that. It's not going to be a month or two. And so I'd put your best foot forward, sir, at the diagnostic center, and if you do treat this as a joke, or flippantly, . . . the consequences will be real and significant. Do you understand me?

THE DEFENDANT: Yes, your honor.

THE COURT: All right. Forthwith--and we'll set this ninety days hence. I think I'm going to ask for a ninety-day diagnostic evaluation.

THE DEFENDANT: Just send me to prison, then.

THE COURT: You'd just like to go to prison?

THE DEFENDANT: Just send me to prison. I ain't doing no evaluation. I ain't wasting ninety days.

. . . .

THE COURT: So why don't you want to do it?

THE DEFENDANT: Because they're going to recommend prison automatic. Every--your honor, every time I've been in front of anybody, I went straight to prison. They

send me to prison. I don't get no chance in there.

I'm a drug addict. I'm sorry for what I did to them people. You think I like what I do? No, I don't like doing it. I want to go to Odyssey House where I can get some help. . . . No matter what I say, no matter what I do in diagnostic, they're going to send me to prison. . . . The board's going to look at that ninety days, and they're going to go, "So what?"

The trial court subsequently offered Thomas a chance to confer with his attorney, after which the court stated, "Mr. Thomas, your attitude has had an impact on me. I'm inclined to do what you've asked . . . and that is sentence you to prison." Thomas replied, "Okay, your honor. Thank you." The court then imposed the maximum sentences allowed by statute and ordered that they run consecutively. Thomas later filed a Motion for Relief from Judgment, which was denied.

Thomas asserts the trial court misconstrued his comments as exhibiting a poor attitude when in actuality he was merely expressing his desire to overcome his drug addiction. He contends that the court then retaliated against him for his comments by sentencing him to consecutive prison terms rather than probation.

"We review the sentencing decisions of a trial court for abuse of discretion." State v. Montoya, 929 P.2d 356, 358 (Utah Ct. App. 1996) (quotations and citation omitted). Abuse of discretion may be manifest if the judge acts with inherent unfairness in sentencing, imposes a clearly excessive sentence, or fails to consider all legally relevant factors. See id. "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." Id. (alteration in original) (quotations and citation omitted).

Thomas first contends the trial court should have ordered an evaluation and probation. "Whether or not the judge elects to order an evaluation before passing sentence is clearly within [her] discretion, based on [her] own judgment of the case before [her]." State v. Gerrard, 584 P.2d 885, 887 (Utah 1978). Moreover, the granting of "[p]robation is not a matter of right," but involves "considering intangibles of [the defendant's] character, personality[,], and attitude, of which the cold record gives little inkling." State v. Sibert, 6 Utah 2d 198, 310 P.2d 388, 393 (1957). For this reason, the decision whether to grant probation necessarily rests with the trial court. See id.; see

also State v. McClendon, 611 P.2d 728, 730 (Utah 1980) (same); State v. Rhodes, 818 P.2d 1048, 1049 (Utah Ct. App. 1991) (same). A trial court abuses its discretion if a defendant "clearly show[s] that the trial judge would have granted probation except for some wholly irrelevant, improper[,] or inconsequential consideration." Sibert, 310 P.2d at 393.

Here, the trial court did not abuse its discretion when it ordered prison time rather than a diagnostic evaluation or probation. We cannot know from the cold record on appeal, see id., the attitude Thomas exhibited to the trial court. Furthermore, at the outset, the judge stated that she planned to sentence Thomas to significant prison time. She also expressed uncertainty as to whether a diagnostic evaluation would accomplish anything. We cannot conclude that the trial judge would have granted probation absent some wholly improper consideration. See id.

Thomas's second argument is that the trial court abused its discretion by failing to consider all of the necessary factors before imposing consecutive sentences. Utah Code section 76-3-401 states:

(1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. . . .

. . . .

(2) In determining whether state offenses are to run concurrently or consecutively, 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(1), (2) (2003). "Concurrent sentences are favored over consecutive ones." State v. Perez, 2002 UT App 211, ¶43, 52 P.3d 451.

Thomas argues that because the trial court did not make findings on the record regarding the gravity and circumstances of his offense, the number of victims, and his history, character, and rehabilitative needs, it failed to consider these statutory factors and, thus, improperly imposed consecutive sentences. This argument is foreclosed by State v. Helms, 2002 UT 12, 40 P.3d 626, in which the Utah Supreme Court, considering a similar issue, stated: "[A]s a general rule [we] uphold[] the trial

court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings." Id. at ¶11 (quotations and citation omitted). This assumption should not be made, though, when "(1) an ambiguity of facts makes the assumption unreasonable, (2) a statute explicitly provides that written findings must be made, or (3) a prior case states that findings on an issue must be made." Id. "Absent these circumstances, we will not assume that the trial court's silence, by itself, presupposes that the court did not consider the proper factors as required by law." Id. Neither case law nor statute requires a trial court to make specific findings of fact in a sentencing order. Thus, an ambiguity of facts would be the only circumstance in which record findings need be made. See id.

Here, the record supports a conclusion that the trial court considered these factors even though it did not make formal findings on the record. The presentence report contained detailed information about Thomas's criminal history, his past attempts at rehabilitation, and the circumstances of the offenses. The judge referred to specific parts of the presentence report before sentencing and asked counsel for both sides whether any changes needed to be made to the report. The judge clearly relied on the information in the report in determining Thomas's sentence. The court also heard from several victims of Thomas's crimes before imposing the sentence. Therefore, it is apparent that the trial court considered the statutory factors. We see no ambiguity of facts that would have necessitated record findings.

Thomas also asserts that the court ignored the presentence report's recommendation of concurrent sentences. However, a trial court is not required to follow the recommendations of a presentence report. See State v. Thurston, 781 P.2d 1296, 1300 (Utah Ct. App. 1989) ("The entire sentencing process is a search for truth and an evaluation of alternatives. Therefore, the recommendations of the prosecutor or any other party are not binding upon the court." (citation omitted)). The sentence was within the statutory guidelines, see Utah Code Ann. §§ 76-3-203(3), -204 (2003), and, thus, was not clearly unfair or excessive. Thomas has provided nothing that would support a

conclusion that the trial court abused its discretion when it sentenced him.

Affirmed.

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Carolyn B. McHugh, Judge

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WE CONCUR:

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Judith M. Billings, Judge

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William A. Thorne Jr., Judge