

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20070838-CA	
v.)		
)	F I L E D	
Frank Steven Warby,)	(January 2, 2009)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2009 UT App 6</td></tr></table>	2009 UT App 6
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Third District, Salt Lake Department, 061905649
The Honorable Deno Himonas

Attorneys: Lori J. Seppi and Brennon L. Fuelling, Salt Lake City, for Appellant
Mark L. Shurtleff and Brett J. DelPorto, Salt Lake City, for Appellee

Before Judges Thorne, Davis, and Orme.

THORNE, Associate Presiding Judge:

Defendant Frank Steven Warby appeals the district court's imposition of consecutive sentences for his two convictions of first degree felony sodomy on a child. We review a district court's imposition of consecutive sentences for an abuse of discretion. See State v. Fedorowicz, 2002 UT 67, ¶ 63, 52 P.3d 1194. "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(2) (2003).

Defendant argues that the court erred in sentencing him to serve two consecutive terms of fifteen years to life without properly calculating the number of victims and without adequately considering Defendant's rehabilitative needs. Defendant first argues in his brief that his claim that the court erred by improperly calculating the number of victims was preserved at the sentencing hearing and that the court erred when it concluded that by running the sodomy on a child counts consecutively, it

was imposing one consecutive count for each victim.¹ Defendant bases this argument on his own interpretation of the court's reference to multiple victims in its decision to impose a consecutive sentence. However, we decline to address this argument because we have reviewed the sentencing transcript and have found no record evidence that Defendant raised this issue below or that the court intended to allocate a consecutive count for each victim. Moreover, Defendant does not demonstrate that there is a legal requirement that the court in imposing a consecutive sentence allocate one consecutive count for each victim. As such, we decline to review Defendant's number of victims argument. See State v. Pinder, 2005 UT 15, ¶ 45, 114 P.3d 551 ("Under ordinary circumstances, we will not consider an issue brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist." (internal quotation marks omitted)).

Defendant next argues that the court failed to consider his rehabilitative needs by depriving the Board of Pardons of its discretion to take into account Defendant's possible progress toward rehabilitation. Defendant argues that when the court imposed the two fifteen-years-to-life terms consecutively it essentially sentenced Defendant to a minimum mandatory life sentence, which as a practical matter provides no viable discretion to the Board of Pardons.

In support of this argument, Defendant relies primarily on State v. Smith, 909 P.2d 236 (Utah 1995). In Smith, the supreme court determined that a defendant's consecutive sentences were inappropriate under the circumstances. The supreme court recognized that four consecutive terms of fifteen-year-to-life carried an effective minimum sentence of sixty years, which was tantamount to a minimum mandatory life sentence and deprived the Board of Pardons of discretion to take into account defendant's future conduct and possible progress toward rehabilitation. See id. at 244-45. Smith, however, is distinguishable in that the court limited its ruling to the facts of that case and did not prohibit consecutive sentences for crimes with minimum mandatory terms. See id. at 245 ("We do not mean to imply by this ruling that consecutive sentences are never appropriate. Our ruling is limited to the facts of this case.").

The consecutive sentences in Smith resulted from a single criminal episode with a single victim not previously known to Smith, unlike Defendant's crimes spanning more than three years and involving two victims with whom he occupied a position of trust. Moreover, since Smith was decided, the legislature has

¹Both of the sodomy counts pertained to the same victim.

changed various rules, including a repeal of some minimum mandatory sentences and amendments to parole proceeding rules. If the legislature had wanted to codify Smith as a general rule or clarify a limit upon the court's consecutive sentencing discretion, and thereby preserve a greater role for the Board of Pardons by prohibiting consecutive sentences such as the one in this case, it easily could have done so. Other than Defendant's citation to Smith, he provides no other pertinent cases or rules to support his assertion that the legislature has limited a trial court's statutory consecutive sentencing discretion.

Based on our analysis, we conclude that the district court did not abuse its discretion, and we affirm the court's imposition of consecutive sentences for Defendant's two first degree felony counts of sodomy on a child. Affirmed.

William A. Thorne Jr.,
Associate Presiding Judge

WE CONCUR:

James Z. Davis, Judge

Gregory K. Orme, Judge