

IN THE UTAH COURT OF APPEALS

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Mike Weaver,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Petitioner and Appellant,)		
)	Case No. 20080864-CA	
v.)		
)	F I L E D	
Steven Turley,)	(January 29, 2009)	
)		
Respondent and Appellee.)	<table border="1"><tr><td>2009 UT App 21</td></tr></table>	2009 UT App 21
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Third District, Salt Lake Department, 070917601
The Honorable Deno M. Himonas

Attorneys: Mike Weaver, Draper, Appellant Pro Se
Mark L. Shurtleff and Brett J. DelPorto, Salt Lake
City, for Appellee

Before Judges Thorne, Bench, and Orme.

PER CURIAM:

Appellant Mike Weaver appeals the denial of a petition for post-conviction relief. This case is before the court on a sua sponte motion for summary disposition.

Weaver challenged his convictions and sentence under rule 65C of the Utah Rules of Civil Procedure. After reviewing the transcript of the change of plea hearing, the district court concluded that Weaver was properly advised of his rights and "unequivocally waived them." It was also determined that Weaver was advised of the elements of each crime to which he pleaded guilty and "assented to the factual basis for each criminal count." Accordingly, the district court concluded that the pleas were knowingly and voluntarily entered and that Weaver "was advised and understood that prison was a distinct possibility."

The district court also ruled that trial counsel was not ineffective at sentencing, noting this court's previous holding that Weaver's claim that trial counsel was ineffective in not challenging unspecified errors in the presentence investigation report (PSI) was without merit. See State v. Weaver, 2007 UT App 207U (mem.)(per curiam). The district court further concluded that Weaver's claim that he was denied his right to appeal by

trial counsel had to be asserted by an appropriate motion pursuant to State v. Manning, 2005 UT 61, ¶ 42, 122 P.3d 628, in the underlying criminal cases. In sum, the district court dismissed all claims for post-conviction relief from the convictions and sentence.

The district court reserved a ruling on Weaver's claim that omissions in his PSI adversely affected his eligibility for parole because the Board of Pardons will rely on the PSI. Weaver stipulated to the dismissal of the claim without prejudice to the assertion of these claims in a petition under rule 65B of the Utah Rules of Civil Procedure.

Weaver did not file a response to the sua sponte motion here. Therefore, we consider only the issues raised in his docketing statement. Weaver's claim that Adult Probation and Parole (APP) breached the plea agreement is without merit. APP was not bound to recommend probation, and, in turn, any recommendation made by APP was not binding on the sentencing judge. The district court accepting Weaver's guilty pleas advised Weaver of the possible prison sentences and the maximum possible sentence for the combined offenses. On that basis, the district court determining the post-conviction petition ruled that Weaver's guilty pleas were knowing and voluntary. Weaver has not demonstrated error in that ruling, and his claim that the plea agreement was breached is meritless.

Weaver contends that his trial counsel breached the plea agreement by failing to "use every resource available for sentencing." The transcripts of the change of plea hearing and the sentencing hearing demonstrate vigorous advocacy by trial counsel. At sentencing, counsel made a detailed argument for probation based upon Weaver's efforts at rehabilitation, offering the testimony of Weaver's therapist. However, after sentencing Weaver to the maximum sentence, the court noted:

[y]our extensive criminal history and the multiplicity of actions just cries out for such serious sanction. . . . He is going to be committed to the Utah State Prison for 1-30 years.

I also want to state on the record the basis for the consecutive finding. The extensive criminal history as well as the fact that we are dealing with multiple different criminal episodes in this matter.

Given the sentencing court's reasoning, Weaver cannot demonstrate prejudice from counsel's performance at sentencing.

Accordingly, we affirm the district court's ruling on the post-conviction petition. To the extent that Weaver still claims his counsel was ineffective in failing to pursue an appeal, he must pursue that claim by a motion in the criminal case under Manning. We note that Weaver pursued a direct appeal to a decision in State v. Weaver, 2007 UT app 207U (mem.)(per curiam), and he would not be entitled to another appeal in that criminal case. Finally, to the extent that Weaver reasserts a claim that the Board of Pardons and Parole improperly used the PSI, he stipulated to the dismissal of that claim without prejudice to an appropriate petition for relief under rule 65B of the Utah Rules of Civil Procedure. See generally Utah R. Civ. P. 65B. Therefore, we do not consider that claim further.

William A. Thorne Jr.,
Associate Presiding Judge

Russell W. Bench, Judge

Gregory K. Orme, Judge