IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. ROBERT BRIAN WALTON, Defendant/Appellant.	Case No. 20170977-CA

Reply Brief of Appellant

Appeal from order denying rule 22(e) motion for resentencing, in the Third Judicial District, Salt Lake County, the Honorable Paul B. Parker presiding.

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Pursuant to rule 24(b), Utah Rules of Appellate Procedure, Appellant Robert Brian Walton, through counsel, answers the facts and arguments raised in the Brief of Appellee as follows:

FACTS

The State's recitation of facts consists almost entirely of unproven allegations of the complaining witness, which do not support the plea agreements and have not been proven in court. Only those facts that support the plea agreements are pertinent to this appeal because Mr. Walton's sentence must be supported by facts as stated in the guilty pleas. *See, e.g.,* B*lakely v. Washington,* 542 U.S. 296, 304 (2004) ("exceptional" sentence was not justified "solely on the basis of the facts admitted in the guilty plea"). As stated in his opening brief, Mr.

Walton denied all allegations, entering his pleas under *Alford*.[1] 1R987, 1R994-95; 2R549, 2R555-56.

ARGUMENT

I. Mr. Walton challenges only his sentence, not the plea agreement.

The State argues that the permanent criminal stalking injunction is not part of the sentence. Br.Aple. at 13-15. In support, the State argues that the sentence consisted of only 330 days in jail and that the stalking injunction not only not a sentence, but the *sole* consideration. *Id.* at 14.

A. The permanent criminal stalking injunction is part of the sentence.

The State cites no authority to suggest that a permanent criminal stalking injunction—which imposes a lifelong restriction on a person's liberty—is not a sentence. As stated in Mr. Walton's opening brief, this Court has previously determined that a permanent criminal stalking injunction is a sentence. *See See* Br.Aplt. at 11; *State v. Kropf*, 2015 UT App 223, ¶ 23, 360 P.3d 1 (quoting Utah R. Crim. P. 22(e)) ("[W]e conclude that the district court's failure to enter the injunction amounted to an omission of 'a term required to be imposed by statute' as a consequence of Kropf's stalking conviction."). The State's failure to respond

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[1] In addition, Mr. Walton wants the court to know that apart from the charged conduct, he has not been charged with any incident involving K.B. Additionally, the allegations of Case No. 161907013 were the result of an invite by K.B. which Mr. Walton only responded to after he checked with police and learned there was no injunction in place. 2R45; 2R556-57. And, the injunction was not actually entered by the Court until July 5, 2016—days after the charged conduct. 2R45.

to this argument or to cite any authority to support its position that a permanent criminal stalking injunction is not a sentence is reason enough to vacate the illegal sentence. *See State v. Roberts*, 2015 UT 24, ¶ 20, 345 P.3d 1226 ("[A]n appellee who fails to respond to the merits of an appellant's argument will risk default."). [2]

B. The permanent criminal stalking injunction was only partial consideration.

This is not to say that the sentence, including the permanent criminal stalking injunction, was not part of the consideration. A sentence is generally part of the consideration in plea agreements. *See, e.g.,* M*anning v. State,* 2004 UT App 87, ¶ 32, 89 P.3d 196 ("[W]hether the defendant received the sentence bargained for as part of the plea" is part of analysis of plea agreement) (citation omitted).

That an illegal sentence is included in a plea agreement does not take the analysis outside of Rule 11(e). Mr. Walton is not challenging his conviction as the State asserts. *See* Br.Aple. at 15. He is not arguing a complete lack of

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[2] The State also argues that the permanent criminal stalking injunction is not part of the sentence because the trial court did not see it as such. Br.Aple. at 14. However, under Rule 22(e) challenge to an illegal sentence, conclusions of law are reviewed for correctness awarding no deference to the trial court. *See, e.g.,* S*tate v. Houston,* 2015 UT 40, ¶ 16, 353 P.3d 55; *State v. Prion*, 2012 UT 15, ¶ 13, 274 P.3d 919. The State cites no authority to support the trial court's reasoning as to the nature of the permanent criminal stalking injunction, so this Court should not consider it. *See Roberts*, 2015 UT 24, ¶ 20, 345 P.3d 1226

consideration or that the entire plea agreement is unconscionable as the State suggests. *See, e.g., Sosa v. Paulos*, 924 P.2d 357, 359 (Utah 1996) (citing *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 459-62 (Utah 1983)) ("[U]nder Utah law, an unconscionable agreement is not enforceable."); *Gen. Ins. Co. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 504 (Utah 1976)("Where consideration is lacking, there can be no contract."). Rather, as stated in his opening brief, Mr. Walton's argument is that the stalking injunction amounts to an illegal sentence, and should therefore be severed from the plea agreement. *See* Br.Aplt. at 14-16. The State fails to answer Mr. Walton's argument that even without the permanent criminal stalking injunction, there was adequate consideration—his third degree felony conviction and the more than 24 months he served in jail. *See* Br.Aplt. at 15; Br.Aple. at 14-15. The State also cites no authority to support its assertion that consideration for a plea agreement can consist entirely of "terms that fall outside" of the realm of a conviction or sentence, and counsel could find none. *See* Br.Aple. at 15.

This Court should "refuse to relieve the State of what it now considers a bad bargain where the plea agreement was the result of uninduced mistake as to the current provisions of Utah statute." *See, e.g., State v. Patience,* 944 P.2d 381, 388 (Utah Ct. App. 1997) (defendant entitled to resentencing under plea agreement that included illegal sentence). It should uphold the plea agreement while vacating the permanent criminal stalking injunction.

II. The permanent criminal stalking injunction is a sentence that is illegal under the circumstances.

The State argues that because there is no explicit statutory prohibition on issuing a permanent criminal stalking injunction for non-stalking convictions, such injunctions should be an allowed sentence for apparently any conviction. *See* Br.Aple. 16-17. The State further argues that this Court should consider a permanent criminal stalking injunction to be a civil penalty. *See Id.*

As an initial matter, the State cites no authority to support its argument that a sentence cannot be illegal so long as there is no express statutory bar on it. Nor does the State cite any authority from any jurisdiction allowing a permanent criminal stalking injunction to issue absent a stalking conviction. As a result, the State's argument is inadequately briefed the Court should not consider it. *See, e.g.,* B*roderick v. Apt. Mgmt. Consultants, L.L.C.,* 2012 UT 17, ¶ 10, 279 P.3d 391 ("[W]e expect that both appellants and appellees will adhere to the standard of legal analysis set forth in rule 24(a).").

In any event, the State's argument lacks merit. The Utah Criminal Code has specifically abolished common law crimes: "[N]o conduct is a crime unless made so by this code, other applicable statute or ordinance." Utah Code Ann. § 76-1-105. One of the core purposes of Utah's Criminal Code is to "[p]rescribe penalties which are proportionate to the seriousness of the offenses and which permit the recognition or differences in rehabilitation possibilities among individual offenders." *Id.* § 76-1-104(3). The Code also seeks to "[p]revent

arbitrary or oppressive treatment of persons accused or convicted of offenses." *Id.* § 76-1-104(4). Likewise, illegal sentences are those "'where the sentence does not conform to the crime of which the defendant has been convicted.'" *State v. Headley*, 2002 UT App 58U (quoting *State v. Parker*, 872 P.2d 1041, 1043 n.2 (Utah Ct. App. 1994)). The State cites no authority to suggest that a permanent criminal stalking injunction conforms to the crime of retaliation against a witness. Or that this Court should stray from its long-standing precedence of requiring a sentence to be authorized by code and proportionate to the offense. Instead, the State—again—without citing authority that Rule 11(e) should be limited only to length of incarceration.[3] None of these arguments rebuts Mr.

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[3] Indeed, ruling that parties can agree to any sentence that is not explicitly barred, even if not authorized by statute, would overrule a long line of cases holding otherwise. *See, e.g., Kropf,* 2015 UT App 223, ¶ 23 (holding permanent criminal stalking injunction could be imposed under Rule 11); *Patience*, 944 P.2d at 384 (sentencing a defendant according to felony statute was illegal when defendant should have been sentenced to a misdemeanor); *State v. Sinju*, 1999 UT App 150U, ¶ 6 (defendant entitled to resentencing where plea agreement did not support sentencing enhancement). The absence of an explicit bar does not mean a sentence can be agreed to. For example, although the indeterminate sentencing statutes use the word "may" rather than shall and do not exclude other sentences, it is generally accepted that the stated terms for each degree are the ranges allowed by statute, unless the statute otherwise provides. *See* Utah Code Ann. §§ 76-3-203, -204. Likewise, although the capital felony penalties provision does not specifically state that the death penalty "only" applies to capital cases, a prosecutor would be hard-pressed to argue in favor of the death penalty for a non-capital case. Although this is an extreme example, the State's advocacy of allowing parties, including unrepresented defendants, to stipulate to punishments that don't fit the crime would create a dangerous grey area for defendants who may be pressured into sentences that don't fit their crimes.

Walton's contention that a permanent criminal stalking injunction is an illegal sentence where there has been no stalking conviction.

Instead, the State suggests that this Court should consider a permanent criminal stalking injunction—which is referenced in only the criminal stalking statute—should be an allowable civil penalty. *See* Br.Aple. 17 n.8. The State also cites no authority to support its assertion that a permanent criminal stalking injunction is merely a civil penalty and that it therefore not an illegal sentence. *See* Br.Aple. 17 n. 8. This Court should therefore decline to consider it. *See, e.g.,* Broderick, 2012 UT 17, ¶ 10

In any event, this argument is not persuasive. Although it is true that a sentencing court may impose a civil penalty and include a civil penalty in a sentence, the State cites no authority to suggest that a permanent criminal stalking injunction is a civil penalty. The sentencing statute includes the phrase "any other civil penalty" after listing things such as dissolving a corporation, suspending or cancelling a license, or imposing a fine. *See* Utah Code Ann. § 76-3-201(3). Such penalties are civil because they are generally imposed in civil court. The State cites no case in which a permanent criminal stalking injunction was imposed in a civil case. Moreover, the term "civil penalty" is generally considered a fine. *See, e.g.,* Blacks Law Dictionary Eighth Edition 2004 at 1168 (defining "civil penalty" as "A fine assessed for a violation of a statute or regulation"); Law.com, dictionary.law.com (defining "civil penalty" as "fines or

surcharges imposed by a governmental agency to enforce regulations such as late payment of taxes, failure to obtain permit, etc."); *Id.* § 78B-6-1603 (imposing "civil penalty" of a fine for hosting underage drinking gathering); *id.* § 19-6-416.5 (imposing "civil penalty of $500 per [unpermitted] underground storage tank"); *id.* § 58-1-503 (allowing "civil penalty" of up to $2,000 per day for violating written order under DOPL statutes); *id.* § 10-3-703(2)(a) (with limited exception, allowing cities to impose "a civil penalty … by a fine not to exceed the maximum class B misdemeanor fine").[4] The State cites no authority to suggest that a permanent criminal injunction that is a mandatory part of a stalking sentence, never expires, and cannot be dissolved except on request by the victim should be considered a civil penalty. *See id.* § 76-5-106.5(12). Nor could it where civil penalties are generally either fines or otherwise time-limited. As a result, the State's argument lacks merit.

III. The State ignores Mr. Walton's jurisdictional argument with regard to his stalking conviction.

The State argues that because this Court generally lacks jurisdiction to consider a collateral attack on a guilty plea via a direct appeal, that it should decline to exercise jurisdiction over Mr. Walton's challenge to his sentence in

[4] The State's argument ignores that there are two avenues to obtain a stalking injunction—civil and criminal. Unlike a criminal stalking injunction, a civil injunction does not require a stalking conviction, expires after three years, and can be dissolved or modified by the respondent on a showing of good cause as well as on the petitioner's request. *See Id.* §§ 77-3a-101(9), (10), (13).

Case No. 161907013.[5] Br.Aple. at 18-19. However, if the stalking injunction is vacated, Mr. Walton's conviction for violating the injunction would be void *ab initio*. *See, e.g., Class v. United States,* 138 S. Ct. 798, 805 (2018) (citations omitted) (direct appeal not barred where challenge to guilty plea that calls "into question the Government's power to 'constitutionally prosecute'" a defendant). Thus, as with any jurisdictional challenge this Court may consider Mr. Walton's challenge to his plea in Case No. 161907013. *See, e.g., Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1337 (Utah Ct. App. 1991) ("[A] judgment can be attacked for lack of subject matter jurisdiction at any time.").

CONCLUSION

For the reasons stated herein and as stated in the Brief of Appellant, Mr. Walton respectfully requests that in Case No. 121903179, the Court vacate the criminal stalking injunction as an illegal sentence. In Case No. 16190713, Mr. Walton respectfully requests that his conviction and sentence be vacated as *void ab initio*.

DATED this 29th day of April 2019.

/s/ Deborah L. Bulkeley
Counsel for Appellant

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[5] Mr. Walton concedes that his notice of appeal in Case No. 161907013 was untimely and notices the court that the contrary statement in his opening brief was due to an inadvertent error by counsel in reviewing the record. However, this does not change the analysis of whether this Court should exercise jurisdiction to vacate the stalking conviction as *void ab initio*.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(a)(11),Utah Rules of Appellate Procedure, this reply brief contains 2,321 words, excluding the table of contents, table of authorities and addenda, and that it complies with rule 21, Utah Rules of Appellate Procedure, governing private records. In compliance with rule 27(b), Utah Rules of Appellate Procedure, this brief has been prepared using the proportionally spaced Georgia 13-point font.

/s/ Deborah L. Bulkeley
Counsel for Appellant

CERTIFICATE OF SERVICE

In accordance with Utah Supreme Court Standing Order 11, I certify that on April 29, 2019, I caused electronic copies of the Reply Brief of Appellant to be delivered by email to the following:

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Within seven days, printed copies will be delivered by hand or U.S. Mail to the above.

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