

2007

Utah v. Williams : Brief of Appellant

Utah Court of Appeals

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Debra M. Nelson; Stephen W. Howard; Salt Lake Legal Defender Association; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 CINDY WILLIAMS, : Case No. 20070722-CA
 :
 Defendant/Appellant. : Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (2003); Illegal Poss/Use of Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(I) (Supp. 2006); and False Personal Information to Police Officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Terry Christiansen, presiding.

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UTAH APPELLATE COURTS
JAN 25 2008

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
CINDY WILLIAMS, : Case No. 20070722-CA
Defendant/Appellant. : Appellant is incarcerated.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (2003); Illegal Poss/Use of Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(I) (Supp. 2006); and False Personal Information to Police Officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Terry Christiansen. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002). See Addendum A (Sentence, Judgment, and Commitment).

ISSUE AND STANDARD OF REVIEW

Point. Whether the trial court abused its discretion by failing to suspend the execution of Ms. Williams' sentence and place her on probation as recommended by the state.

Standard of Review: This Court reviews sentences for an abuse of discretion. State v. Wright, 893 P.2d 1113, 1120 (Utah Ct. App. 1995). ““An abuse of discretion may be manifest if the actions of the judge in sentencing were “inherently unfair” or if the judge imposed a “clearly excessive” sentence.”” State v. Elm, 808 P.2d 1097, 1099 (Utah 1991) (citation omitted).

Preservation: This issue was preserved below. R.114:7.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The text of the following relevant provision is provided in full in Addendum B:

Utah Code Ann. § 77-18-1 (2003).

STATEMENT OF THE CASE

On November 22, 2006, an Information was filed charging Ms. Williams with two counts of Forgery, third degree felonies, in violation of Utah Code Ann. § 76-6-501; two counts of Unlawful Possession of a Controlled Substance, third degree felonies, in violation of Utah Code Ann. § 58-37-8(2)(a)(i); Attempted Theft by Deception, a class B misdemeanor, in violation of Utah Code Ann. § 76-6-405; and False Identity to a Peace Officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507. R. 1-4.

On June 19, 2007, Ms. Williams entered a plea of guilty to Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (2003); Illegal Poss/Use of Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(I) (Supp. 2006); and False Personal Information to Police Officer, a class C misdemeanor,

in violation of Utah Code Ann. § 76-8-507 (2003), with the state's agreement to dismiss all other counts and recommend probation in lieu of prison. R. 68-84.

On July 31, 2007, the trial court sentenced Ms. Williams to two indeterminate terms of zero to five years in the Utah State Prison on the two third degree felonies and zero to ninety days on the class C misdemeanor. R. 89-90. The court ordered the terms to run concurrently to each other. R. 89-90. On August 8, 2007, a pro se notice of appeal was received by the district court. R. 100-02. On September 21, 2007, an amended notice of appeal was filed. R. 105-06.

STATEMENT OF FACTS

On June 19, 2007, Ms. Williams entered a plea of guilty to Forgery, a third degree felony, in violation of Utah Code Ann. § 76-6-501 (2003); Illegal Poss/Use of Controlled Substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(I) (Supp. 2006); and False Personal Information to Police Officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (2003), with the state's agreement to dismiss all other counts and recommend probation in lieu of prison. R. 68-84.

On July 31, 2007, a sentencing hearing was held for Ms. Williams. R. 114. During the sentencing hearing, defense counsel brought to the court's attention corrections that needed to be made to Ms. Williams' presentence report. R. 114:3. First, defense counsel noted that many of the aliases listed for Ms. Williams were actually past married names so the list was not as bad as it would appear. R. 114:3. Next, defense

counsel clarified that the charges showing for November 10, 2006 were declined and were “attributed to another individual [Ms. Williams] was with.” R. 114:3-4.

Defense counsel also clarified for the court that Ms. Williams had no recollection of the charges listed in her presentence report dated July 5, 1990 and that the state declined to prosecute the charges dated August 4, 1991 because “evidence . . . indicated that it was not her who was involved in” those offenses. R. 114:4. Defense counsel also asked the court not to consider the charges listed in the presentence report where the disposition was listed as unknown or dismissed. R. 114:4.

Defense counsel informed the court that Ms. Williams had been off of drugs since a week after this case arose in November 2006. R. 114:5. For three months Ms. Williams tried to stay clean on her own when she was booked into jail on February 4, 2007. R. 114:5. While she remained under the supervision of the jail until her sentencing hearing, Ms. Williams was released on the ankle monitor program and found employment. R. 114:5. On her own initiative, Ms. Williams contacted Assessment & Referral Services (A.R.S.) and had an evaluation completed on herself where they referred her to the First Step House for intensive out-patient treatment. R. 114:6. Defense counsel informed the court that funding for Ms. Williams would be available some time in October 2007, and that she would continue to stay under the supervision of the jail on the ankle monitor program through November 2007. R. 114:6. While awaiting placement in the First Step House for drug treatment, Ms. Williams attended an interim group which is a “free

pretreatment support group[] for persons awaiting county-funded treatment placement.”

R. 91; 114:7.

Defense counsel acknowledged Ms. Williams’ lengthy criminal record but noted that she has been off of drugs since November 2006. R. 114:7. Defense counsel asked the court to “give her the opportunity of probation, require that she complete the ankle monitor term . . . , [and] follow that up with First Step House intensive out-patient treatment program or any other treatment that was deemed to be appropriate at that point.” R. 114:7. Ms. Williams addressed the court, asking it to give her “the opportunity to continue [her] interim group, [her] ankle monitor, [and] enter First Step and prove herself.” R. 114:8.

As part of Ms. Williams’ plea agreement, the state did not recommend prison. R. 114:10. The state noted that its recommendation did not “obviate a need for jail, but since . . . she is [in] a program, her continued presence at that program will have an impact on the jail recommendation on the date of sentencing. R. 114:10. Citing Ms. Williams’ lengthy criminal record and the presentence report’s recommendation, the trial court imposed two zero to five years at the Utah State Prison for both third-degree felonies and zero to 90 days for the class C misdemeanor, all to run concurrently to each other but consecutively to any other sentence she may be serving. R. 114:13.

SUMMARY OF ARGUMENT

The trial court abused its discretion when it failed to suspend the execution of Ms.

Williams' sentence and place her on probation as recommended by the state and defense counsel. The state and defense counsel both recommended probation in lieu of prison given Ms. Williams efforts to overcome her drug addiction. Instead of following the state's and defense counsel's recommendation of probation, the trial court imposed and executed concurrent prison terms. The trial court's failure to consider Ms. Williams character, personality, attitude and rehabilitative needs before denying her the opportunity for probation was an abuse of discretion.

ARGUMENT

POINT. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO SUSPEND THE EXECUTION OF MS. WILLIAMS' SENTENCE AND PLACE HER ON PROBATION WITHOUT CONSIDERING HER CHARACTER, PERSONALITY, ATTITUDE OR REHABILITATIVE NEEDS.

A trial court "is empowered to place [a] defendant on probation if it thinks that will best serve the ends of justice and is compatible with the public interests." State v. Valdovinos, 2003 UT App 432, ¶23, 82 P.3d 1167. In determining whether to "grant[] or withhold[] probation involves considering intangibles of character, personality and attitude. . ." State v. Sibert, 6 Utah 2d 198, 310 P.2d 388, 393 (1957). Because consideration of these intangibles is necessary for a trial court to properly exercise its discretion, "the problem of probation must of necessity rest within the discretion of the judge who hears the case." Valdovinos, 2003 UT App 431 at ¶23 (citation omitted); see also Utah Code Ann. § 77-18-1(2)(a) (2003) (granting trial court the discretion to

“suspend the execution of the sentence and place defendant on probation”). In addition, in exercising its discretion properly, a trial court must give “adequate weight to certain mitigating circumstances.” State v. Helms, 2002 UT 12, ¶15, 40 P.3d 626 (quoting State v. Galli, 967 P.2d 930, 938 (Utah 1998)). A trial court’s “[a]buse of discretion “may be manifest if the actions of the judge in sentencing were ‘inherently unfair’ or if the judge imposed a ‘clearly excessive sentence.’”” State v. Schweitzer, 943 P.2d 649, 651 (Utah 1997)(citations omitted). This Court will find a trial court has abused its discretion when it concludes that “no reasonable [person] would take the view adopted by the trial court.” Id. (quotation and citation omitted).

In this case, the trial court abused its discretion by failing to adequately consider Ms. Williams’ character, personality and attitude before denying her the opportunity of probation. Both the state and defense counsel recommended that Ms. Williams be given the opportunity of probation, given that she has -on her own initiative- taken the necessary steps to stop using drugs and to fight her addiction. R. 114:5-8, 10-11. During the sentencing hearing, defense counsel informed the trial court that since November 2006, Ms. Williams had stopped using drugs and has been able to stay clean. R. 114:5. Defense counsel noted that this has been the longest Ms. Williams has been off of drugs in quite some time. R. 114:5. Impressively, Ms. Williams was attempting to stay clean completely on her own without the assistance of a drug program. R. 114:5.

Although Ms. Williams had been in custody since February 4, 2007, at least four

of the months, until her hearing in July, she was released on the ankle monitor program. R. 114:5. While on the ankle monitor program, Ms. Williams was able to obtain employment through Salt Lake City Corporation at Liberty Park, and even though the work caused her physical pain, she continued to work through the pain to maintain her job. R. 114:5, 9. Ms. Williams, determined to obtain the help she needed to overcome her years of drug addiction, contacted A.R.S. and had a substance abuse evaluation and a mental health assessment done on herself. R. 114:6; 91. The A.R.S. evaluation recommended that Ms. Williams receive “intensive outpatient substance abuse treatment” with First Step House. R. 91; 114:6. Defense counsel informed the trial court that Ms. Williams was on the waiting list for First Step House, anticipating funding for her some time in October. R. 114:6. Ms. Williams also participated in interim groups while awaiting a spot in the First House program as a way to maintain “and try to stay stable while she’s doing the ankle monitor program.” R. 114:7. Defense counsel reminded the court that the ankle monitor program keeps track of Ms. Williams very closely, performing urinary analysis on her, and that about the time she completes the ankle monitor program she will “be able to begin treatment with First Step House.” R. 114:6-7.

Ms. Williams addressed the court, asking it for the opportunity to continue her “interim group, . . . ankle monitor, enter First Step [House and] prove” herself. R. 114:8. Ms. Williams acknowledged to the court that she had “a bad history,” but emphasized that she has “never done as good as [she is] doing right now.” R. 114:9. Ms. Williams

told the court that her mother was not in good health and that she needed Ms. Williams to help care for her. R. 114:9. Ms. Williams further stated that she was

really trying to show that I'm serious. . . . I'm fifty years old, I'm tired of that lifestyle, I'm tired of those people. I don't really associate with anybody. I talked to people at work, you know, and I go to work, I come home. I go to bed at 9:00 o'clock at night and get up and go to work. And that's my life and I'm okay with that, you know.

. . . I enjoy spending time with my mom and I don't know how much longer I'm going to have her, you know. And I hope a long time, but you know, . . . it's just time to change, it's time - - I am so sick of that.

And that's why I've been doing everything I've been doing is to try to prove myself is because I know I have a bad past history, so I've been complying with everything and staying clean, I've been clean almost nine months. I've never done that before, you know, and I'm hoping that that is a little bit of proof that I am really trying and applying myself in every way that I possibly can, so I can be given a chance to prove I'm really going to do it.

R. 114:9-10.

The state recommended probation as part of the plea agreement and while noting that its recommendation did not "obviate a need for jail," stated that Ms. Williams' continued presence in the treatment program would have an impact on its jail recommendation. R. 114:10. The court then stated that it was trying "to decide why [it] shouldn't just put [Ms. Williams] back in prison. I mean, I've got a criminal record that goes back to 1982 and it's basically one crime after another and it's not getting any better." R. 114:11. Ms. Williams addressed the court stating

That was because of my drug use. I - it was like I said, I didn't think I could do life, I wanted to stay numb. And now that I have done it, being clean, it's great, you know, and I realize what I want to do with my life. And that I don't want to be involved with any of those people, or - and that - when I

got out of prison, that's exactly who I went around

R. 114:11-12.

These tremendous efforts made by Ms. Williams evidence her character, personality and attitude to staying off of drugs and bettering her life. Unlike any other time in her life, she was proving that this time she was attempting to get a hold on her drug addiction and was determined to overcome it by seeking and obtaining the help she required to ensure her success. The trial court's sole focus on Ms. Williams' criminal history was an abuse of discretion because the court failed to consider her rehabilitative needs, a mitigating factor, supporting probation. Ms. Williams has struggled with drug addiction for a long time and was in need of intensive drug treatment. Her actions of pursuing help and obtaining employment showed that not only was she serious about staying off of drugs but that she recognized that she needed the help of others to do so. Ms. Williams acknowledged her lengthy criminal history but reiterated that her record correlated with her years of being addicted to drugs. Furthermore, Ms. Williams was on the waiting list for the First Step program, an intensive drug treatment program that would have assisted her in her desires and efforts to stay off of drugs.


The record supports that Ms. Williams' character, personality, attitude and rehabilitative needs were conducive to granting probation. Rather than adequately considering these character traits and needs as required by Utah law before denying her the opportunity of probation, the trial court focused almost exclusively on her criminal

history which was a result of her struggle with drug addiction. The trial court's failure to suspend the execution of Ms. Williams' prison sentence and place her on probation was an abuse of discretion.

CONCLUSION

Appellant, Ms. Williams, respectfully asks this Court to remand for a new sentencing hearing.

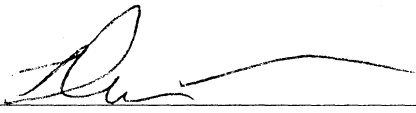
SUBMITTED this 25th day of January, 2008.



DEBRA M. NELSON
STEPHEN W. HOWARD
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 25th day of January, 2008


DEBRA M. NELSON

DELIVERED this _____ day of January, 2008

Tab A

STATE OF UTAH
COUNTY OF SALT LAKE) ss
I, the undersigned, Clerk of the Third District Court, State
of Utah, Salt Lake County, West Jordan Department, do
hereby certify that the foregoing is a true and correct copy
of an original document on file in this office.
Witness my hand and seal of said court this 11
day of October 2007

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
vs. :
CINDY WILLIAMS, : Case No: 061402468 FS
Defendant. : Judge: TERRY T CHRISTIANSEN
Custody: Bail : Date: July 31, 2007

PRESENT
Clerk: mindyg
Prosecutor: BOWN, CHRISTOPHER G
Defendant
Defendant's Attorney(s): HOWARD, STEPHEN W

DEFENDANT INFORMATION
Date of birth: February 5, 1957
Audio
Tape Number: 7146 Tape Count: 1118

CHARGES

1. FORGERY - 3rd Degree Felony
- Disposition: 06/19/2007 Guilty
3. ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE - 3rd Degree Felony
- Disposition: 06/19/2007 Guilty
6. FALSE PERSONAL INFORMATION TO PO - Class C Misdemeanor
- Disposition: 06/19/2007 Guilty

SENTENCE PRISON

Based on the defendant's conviction of FORGERY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Date: Jul 31, 2007

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Deft to serve 0-5 years at the Utah State Prison on counts I and II to run concurrent with each other and any other case. On count III deft to serve 0-90 days concurrent, Deft elects to serve at the USP. Court recommends deft to have drug treatment.

SENTENCE JAIL

Based on the defendant's conviction of FALSE PERSONAL INFORMATION TO PO a Class C Misdemeanor, the defendant is sentenced to a term of 0-90 day(s)

Dated this 31 day of July, 2007

By TERRY T. CHRISTIANSEN
District Court
STAMP USED AT DIRECTION OF JUDGE

Tab B

Utah Code Ann. § 77-18-1 (2003)

77-18-1. Suspension of sentence -- Pleas held in abeyance -- Probation -- Supervision -- Presentence investigation -- Standards -- Confidentiality -- Terms and conditions -- Termination, revocation, modification, or extension -- Hearings -- Electronic monitoring.

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2) (a) On a plea of guilty, guilty and mentally ill, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

(b) (i) The legal custody of all probationers under the supervision of the department is with the department.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.

(iii) The court has continuing jurisdiction over all probationers.

(3) (a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:

(i) the type of offense;

(ii) the demand for services;

(iii) the availability of agency resources;

(iv) the public safety; and

(v) other criteria established by the department to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the department is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions

or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(5) (a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.

(b) The presentence investigation report shall include a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family.

(c) The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act.

(d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

(6) (a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that the defendant:

(a) perform any or all of the following:

(i) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;

(iii) provide for the support of others for whose support he is legally liable;

(iv) participate in available treatment programs, including any treatment program in which the defendant is currently participating, if the program is acceptable to the court;

(v) serve a period of time, not to exceed one year, in a county jail designated by

the department, after considering any recommendation by the court as to which jail the court finds most appropriate;

(vi) serve a term of home confinement, which may include the use of electronic monitoring;

(vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 78-11-20.7;

(viii) pay for the costs of investigation, probation, and treatment services;

(ix) make restitution or reparation to the victim or victims with interest in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act; and

(x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997:

(i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or

(ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:

(A) a diagnosed learning disability; or

(B) other justified cause.

(9) The department shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest and any other costs assessed under Section 64-13-21 during:

(a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and

(b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection (10).

(10) (a) (i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.

(ii) (A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.

(B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court.

(b) (i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(11) (a) (i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12) (a) (i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) (i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c) (i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e) (i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation

term commence anew.

(iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(13) The court may order the defendant to commit himself to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:

(a) the defendant is appropriate for and can benefit from treatment at the state hospital;

(b) treatment space at the hospital is available for the defendant; and

(c) persons described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

(14) Presentence investigation reports, including presentence diagnostic evaluations, are classified protected in accordance with Title 63, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63-2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

(a) ordered by the court pursuant to Subsection 63-2-202(7);

(b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;

(c) requested by the Board of Pardons and Parole;

(d) requested by the subject of the presentence investigation report or the subject's authorized representative; or

(e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

(15) (a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).

(16) (a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

(b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

(i) the defendant to wear an electronic monitoring device at all times; and

(ii) that a device be placed in the home of the defendant, so that the defendant's

compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

(i) place the defendant on probation under the supervision of the Department of Corrections;

(ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and

(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.