

1987

# West Valley City v. Frank Ronald Borrego : Brief of Appellant

Utah Court of Appeals

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Gregory J. Sanders; Kipp & Christian; attorneys for respondent.

Ronald E. Kunz; Cook & Wilde; attorneys for appellant.

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BRIEF

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DOCKET NO. 870360-CA IN THE COURT OF APPEALS  
STATE OF UTAH

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WEST VALLEY CITY,	)	
	)	
Plaintiff and Respondent,	)	
	)	
vs.	)	Case No. 870360-CA
	)	
FRANK RONALD BORREGO,	)	
	)	
Defendant and Appellant.	)	
	)	

---

BRIEF OF APPELLANT

---

Appeal from a finding of Contempt  
from the Fifth Circuit Court, West Valley Department  
Honorable Tyrone E. Medley

---

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Attorneys for Fifth Circuit Court

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IN THE COURT OF APPEALS

STATE OF UTAH

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WEST VALLEY CITY,	)	
	)	
Plaintiff and Respondent,	)	
	)	
vs.	)	Case No. 870370-CA
	)	
FRANK RONALD BORREGO,	)	
	)	
Defendant and Appellant.	)	
	)	

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Attorneys for Fifth Circuit Court

### LIST OF PARTIES

This appeal arises out of a criminal proceeding in the Fifth Circuit Court, West Valley Department, before the Honorable Tyrone E. Medley. The original parties were West Valley City as plaintiff, and Frank Ronald Borrego as defendant. Mr. Borrego is appealing a finding of contempt by Judge Medley and the Fifth Circuit Court has responded to the appeal by Mr. Borrego.

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12. Utah Code Annotated §77-18-1(4) (1953) . . . . .	2,9

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STATEMENT OF JURISDICTION  
AND  
NATURE OF THE PROCEEDINGS

This appeal is brought pursuant to Utah Code Ann., §77-35-26 (1953), granting jurisdiction to this Court to hear and decide appeals from Circuit Courts which affect the substantial rights of a defendant. Appellant is appealing a finding of contempt by the Fifth Circuit Court, West Valley City Department, during sentencing in a criminal action.

ISSUES PRESENTED FOR REVIEW

1. Did appellant's conduct during the sentencing procedure fall within the protection of his constitutional right to free speech and right to counsel, which would nullify a finding of contempt?

2. Does the Court have a duty to warn a person that his conduct is not acceptable and if continued, will result in a finding of contempt?

3. Is there sufficient evidence in the record that appellant in fact interrupted the due course of the proceedings of the Court?

APPLICABLE CONSTITUTIONAL PROVISIONS  
AND STATUTES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the



government for a redress of grievances."  
U.S. Const. Amend 1.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Const. Amend VI.

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witness in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. Const. of Ut. Sec. 12.

No law shall be passed to abridge or restrain the freedom of speech or of the press....Const. of Ut. Sec. 15.

The following acts or omissions in respect to a court or proceedings therein are contempts of the authority of the Court: (1) Disorderly, contemptuous or insolent behavior towards the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding. Utah Code Ann., §78-32-1(1) (1953).

...At the time of sentencing, the court shall hear any testimony or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony or information shall be presented in open court on record and in the presence of the defendant. Utah Code Ann., §77-18-1(4) (1953).

### STATEMENT OF THE CASE

Appellant (Mr. Borrego) was found guilty of possession of drug paraphernalia, disorderly conduct, terroristic threats and public intoxication on June 19, 1987. Mr. Borrego represented himself at the trial and after having been found guilty, requested that the Court provide him with an attorney before sentencing.

Mr. Borrego appeared with court-appointed counsel for sentencing on July 16, 1987. During the course of the sentencing proceedings, Mr. Borrego had several discussions with his attorney on the record, as well as one conversation off the record. The Court, after pronouncing sentence on the original charges, indicated that he found Mr. Borrego to be in contempt of court for having used profanity in his courtroom, which tended to interrupt the orderly proceedings of the sentencing hearing. Judge Medley consequently sentenced Mr. Borrego to serve 30 days in the county jail for his contempt.

Pursuant to the instructions of the Court, Mr. Borrego, who was in custody at the time due to a commitment he was serving from another Court, was placed sitting down in the jury box, still in handcuffs and shackles. A microphone was placed directly in front of

him. (Transcript page 11, hereafter abbreviated as T.) Counsel then addressed the Court at the podium in the middle of the courtroom. During the sentencing proceeding, Mr. Borrego's court-appointed counsel made a motion for a new trial and presented argument thereon. The Court, after considering the motion, denied the motion and counsel made the statement to the Court that he was not aware of any legal reason why sentencing should not proceed. At that time, Mr. Borrego, who was seated across the room from his attorney, spoke up with the statement, "Pardon me." (T at 6). The Court then indicated, "Just a second, Mr. Borrego." id. After a brief discussion between the Court and counsel, the Court stated the following:

**The Court:** I'll allow you to conference with Mr. Borrego, since he has his hand raised. Go ahead, sir.

**Mr. Kunz:** Thank you.

**Mr. Borrego:** How about lack of due process?

**Mr. Kunz:** Shhh, Okay.

**Mr. Borrego:** Goddamit, I was kept in a goddam holding cell four-and-a-half hours while people went to lunch and came back, and he went to lunch and came back, and goddamit, I didn't have lunch.

**Mr. Kunz:** Shhh.

(Conference off the record between counsel  
and his client)

**Mr. Borrego:** Goddamit. I want this goddam  
judge dismissed for prejudice.  
(T at 6 and 7).

Mr. Borrego's counsel then made further argument to the Court on his motion for a new trial, and there occurred further dialogue between counsel and the Court pertaining to the arguments raised. (T at 7, 8 and 9). The argument asserted by counsel on behalf of Mr. Borrego was that Mr. Borrego was denied due process in that he was held in a holding cell from approximately 9:00 A.M. until his trial began at 1:30 in the afternoon, and Mr. Borrego was not allowed to eat lunch or have any sort of snack. Counsel argued that other people visiting the Court had such freedom and the Court responded as follows:

**The Court:** Do you know why you probably have that freedom, Mr. Kunz? And let me state this as well. As you noticed within your conversation with Mr. Borrego, he used profanity which I find extremely offensive--

**Mr. Borrego:** I find your court profane.

**The Court:** And as you see, he is acting in the manner that he's currently acting in, is in essence the same way on which he was acting on that particular day.

**Mr. Borrego:** It's not an act.

**The Court:** When a defendant acts in that particular manner, of course, in order to continue with the Court's business in an orderly manner, we take them out of the Courtroom. Now, I am confident that that was one of the reasons why Mr. Borrego was held in the holding cell versus sitting in the jury box, as he is right now. (T at 7).

Further dialogue continued, wherein Mr. Borrego made various statements, with the permission of his counsel and with the permission of the Court. The Court even indicated at one point that the proceedings which were taking place where Mr. Borrego was being allowed an opportunity to speak with the Court on the record, was proper unless there was some valid reason for the proceedings not to be recorded. (T at 11) After the Court pronounced that it was proper for conversation to be on the record, Mr. Borrego was allowed to speak 28 times, without interruption by the Court, and without any indication at all from the Court that he was not allowed to speak, except for one point where the Court asked Mr. Borrego not to interrupt him, and Mr. Borrego obliged the Court without any interruption. (T at 13)

Following the pronouncement of sentence on the four

charges to which Mr. Borrego had previously been found guilty of, the Court stated the following:

**The Court:** I personally feel as if I have been rather patient with Mr. Borrego. Based on his outbursts in which, on a number of times here in this courtroom this morning, he used profanity, I think Mr. Borrego is keenly aware that this is improper conduct in this particular Court... I am satisfied that his conduct is designed to prevent and interfere with the orderly process of this particular Court. (T at 17).

The Court subsequently found Mr. Borrego in contempt of court and sentenced him to spend 30 days in the Salt Lake County Jail, which 30 days was to run consecutive to the time that Mr. Borrego was spending on a commitment from another Court. The 30 days jail sentence is the maximum allowed by statute for contempt. Utah Code Ann., §78-32-1(1)(1953).

Although the Court stated at one point that he found the use of profanity offensive to him, (T at 9) the Court at no time discouraged the appellant from discussing matters pertaining to his appearance with his attorney in open court, nor did the Court provide any warning to Mr. Borrego that if any further outbursts or use of profanity continued, that he would be found in contempt of court.

### SUMMARY OF ARGUMENTS

I. Mr. Borrego had a right to provide testimony or information to the Court which concerned an appropriate sentence. Even though he had counsel appointed to speak for him, he was not precluded from speaking himself and in fact the Court gave him permission to speak during the proceeding. Even though Mr. Borrego did use profanity in the courtroom, the use of profanity was not intended to insult or degrade the Court, nor was it intended to obstruct the judicial process.

II. During the sentencing proceeding, Mr. Borrego was expressly given permission by the Court to speak. At no time did the trial court warn Mr. Borrego that he was out of line or that his language was such that it was interfering with the orderly process of the proceeding. The Court should give a warning to an individual that his conduct is contumacious, unless the conduct is so far out of line that the resort to criminal contempt is the only way to restore order to the courtroom.

III. Contemptuous acts under state law or those acts which tend to interrupt the due course of a trial or other judicial proceeding. No evidence is found in the record that Mr. Borrego's conduct was in disobedience to the Court or in any way interrupted the judicial proceeding.

## ARGUMENT

### **I. MR. BORREGO'S COMMENTS TO THE COURT DURING HIS SENTENCING HEARING ARE PROTECTED BY HIS CONSTITUTIONAL RIGHTS OF FREE SPEECH AND TO APPEAL AND DEFEND IN PERSON AND BY COUNSEL.**

Utah Code Ann. §77-18-1(4) (1953), provides that a defendant in a criminal proceeding shall be allowed to provide any testimony or information to the court which concerns an appropriate sentence. The Sixth Amendment to the United States Constitution guarantees the person accused of a crime, assistance of legal counsel at all critical stages of the proceeding. United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 192 (1967). The Constitutional right to assistance of legal counsel does not preclude a defendant from speaking to sentence himself, nor does it prohibit him from communicating with legal counsel during the proceeding. Const. of Ut. Sec. 12. Mr. Borrego did not have benefit of legal counsel during his trial, and his court-appointed lawyer did not have the benefit of reading a transcript of the actual trial proceeding. (T at 2). It was therefore necessary that Mr. Borrego be allowed to speak during the sentencing process and make comments to his attorney. Since Mr. Borrego was not allowed to stand next to his attorney at the podium while addressing the Court, it



became necessary that Mr. Borrego speak to his attorney from across the room. Counsel for Mr. Borrego questioned whether or not it was proper procedure for Mr. Borrego to speak loudly in the courtroom as he was addressing his attorney, and the Court indicated to counsel that it was proper and that all of Mr. Borrego's comments would be made part of the record, since a microphone had been placed in front of him, unless there was a valid reason to the contrary. (T at 10 and 11).

Mr. Borrego's rights to freedom of speech guaranteed him by the First Amendment to the United States Constitution and Section 15 of the Constitution of Utah, are susceptible to restriction only to prevent grave and immediate danger to interests which a state may lawfully protect. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178, 147 ALR 674 (1943). The Utah State Legislature, in order to preserve the dignity and order in our state courtrooms, gave the power to our judges to punish "disorderly, contemptuous or insolent" behavior toward the judge while holding the Court, tending to interrupt the due course of trial or the judicial proceeding. Utah Code Ann., §78-32-1(1) (1953). Thus, courts are obligated to balance the defendant's rights to express himself freely

in a criminal proceeding, and yet still maintain order and dignity in the courtroom. The United States Court of Appeals, Seventh Circuit, has established four elements which are required in order to support a contempt conviction.

(1) The conduct at issue must constitute misbehavior, (2) the misbehavior must rise to level of an obstruction of the administration of justice, (3) conduct must be in courts presence or so proximate that it obstructs the administration of justice, and (4) there must be some sort of intent to obstruct. United States v. Seale, 461 F.2d 345 (7th Cir. 1972).

Mr. Borrego's comments to the Court and to his attorney during the sentencing proceeding were made with the encouragement of the court and counsel, and were certainly not intended to disrupt the orderly procedure of the court. The mere use of profanity in the courtroom should not constitute contempt of court, unless such profanity is used to insult or degrade the court, or is used with the intent to obstruct the judicial process. Gordon v. United States, 592 F.2d 1215 (1st Cir. 1979). There is nothing in the record that would indicate that Mr. Borrego intended to either insult the Court or to obstruct the judicial process in his use of profanity, and therefore his comments do not justify a finding of contempt.

## ARGUMENT

### **II. A JUDGE IS REQUIRED TO FOREWARN A PERSON THAT HIS CONDUCT IS CONTUMACIOUS BEFORE A FINDING OF CONTEMPT IS MADE.**

A judge's power to punish contempt committed in his presence should be exercised with patience and self-restraint, and "judges must be cautious to avoid over-reacting when persons not familiar with court procedures, through ignorance or frustration, unintentionally cause minor commotions." Thrap v. People, 558 P.2d 576 (Colo., 1977). Judge Medley, during the sentencing process indicated that Mr. Borrego had appeared before him several times and that he assumed that Mr. Borrego was familiar with the rules and conduct which was expected of him in the courtroom, and that during previous confrontations, the solution was to have defendants removed from the courtroom until such time as their case is called before the Court. (T at 9). Thus, it is obvious from the record that Judge Medley was not in the habit of citing individuals for contempt and, in fact, had established a pattern for dealing with unruly behavior in his courtroom. In the case of In the Matter of David Dellinger, et al. 370 F.Supp. 1304 (N.D. Ill. 1973), a Federal District Court ruled that a defendant can not be cited for contempt for borderline

conduct, unless he had been first warned that such conduct will be regarded as contumacious, and that differences in language patterns between different social, ethnic and political groups are relevant to the issue of intent in contempt prosecution. The duty to warn a defendant before contempt is found has also been upheld by the Supreme Court of Colorado in People v. Ellis, 540 P.2d 1082 (Colo., 1975) and by Mr. Justice Powell in a concurring opinion in the case of Eaton v. City of Tulsa, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974), when he said:

I place a high premium on the importance of maintaining civility and good order in the courtroom. But before there is resort to the summary remedy of criminal contempt, the court at least owes the party concerned some sort of notice or writing.

The record is void of any warning by the Court to Mr. Borrego that if he continued with his conduct, he would be found in contempt of court. The Court did indicate that he found the use of profanity in his courtroom offensive, but the statement that he found profanity extremely offensive was made to Mr. Borrego's attorney and not to Mr. Borrego directly, and no direction was given to counsel to warn Mr. Borrego. In his explanation that he found profanity offensive, Judge Medley continued to explain to counsel that Mr. Borrego

had acted in a similar manner on the day of trial and that the remedy with such a defendant acting in that way was to simply take him out of the courtroom until his case was called. (T at 9). The record also reflects that at one point, the Court, while making a statement to counsel, asked Mr. Borrego not to interrupt him, and there was no subsequent interruption by Mr. Borrego. (T at 13).

The finding of contempt was not warranted because no warning was given and the trial judge acted precipitously in finding Mr. Borrego in contempt, only after he had pronounced sentence for the charges for which Mr. Borrego was convicted at trial.

#### ARGUMENT

### **III. THE RECORD OF PROCEEDINGS IS VOID OF ANY INTERRUPTION TO THE DUE COURSE OF THE PROCEEDINGS OF THE COURT.**

One of the elements of contempt by statute is that there be an interruption of the due course of a trial or other judicial proceeding. Utah Code Ann.

§78-32-1(1)(1953). Mr. Borrego was appearing before Judge Medley on the 16th day of July, 1987, to be sentenced on crimes which he was found guilty of at trial. The comments made by Mr. Borrego on the record were made with the purpose of providing information

to the Court which pertained to sentencing and motions for new trial and for recusal of the Court, which were being argued to the Court by counsel. Although Judge Medley, in his written findings, stated that the use of profanity tended to disrupt the proceedings of the Court, there is no specific reference to how the sentencing proceeding was delayed or duly interrupted by Mr. Borrego's comments. In the case of Eaton v. City of Tulsa, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974), the use of a street variety expletive, in answer to a question on cross-examination was declared to be insufficient to support a finding of contempt. In that case, the Court held:

In using the expletive in answering the question on cross-examination, 'it is not charged that [petitioner] here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties.' Holt v. Virginia, 381 U.S. 131, 136, 85 S.Ct. 1375, 1377, 14 L.Ed.2d 290 (1965); see also In re Little, 404 U.S. 553, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972). In the circumstances, the use of the expletive thus cannot be used to 'constitute an imminent . . . threat to the administration of justice.'

Before Judge Medley's finding of contempt can be upheld on appeal, it must be shown by the record that Mr. Borrego's conduct was in disobedience to any valid court order, that it was loud, boisterous, or that Mr. Borrego attempted to prevent the judge or any other officer of

the Court from carrying on his court duties. His comments were loud and on the record because the Court said it was proper for him to speak to his attorney on the record.

### CONCLUSION

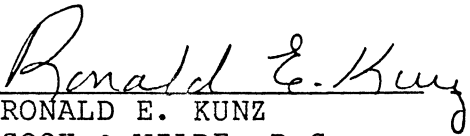
There is a very fine line between the Court's interest in an orderly and dignified courtroom, and a citizen's First Amendment right to free speech. In balancing these two concerns, the Court must exercise its power of contempt with patience and self-restraint, being cautious to avoid over-reacting to behavior which, although may be deemed offensive, does not seriously affront or disrupt the judicial process. This is especially important in criminal proceedings, where a person, such as Mr. Borrego, is already incarcerated and appears before the Court in handcuffs and shackles. Unless circumstances exist where comments made by a defendant are egregious as to justify a summary response by the judge without specific warning, a judge should issue a warning to the individual before finding contempt. The facts in this case certainly are not so egregious.

Appellant seeks to have the finding of contempt reversed for reasons that he did not intend to disrupt

the sentencing process, and that his use of profanity in the courtroom, although offensive to the Court, was not disobedient, boisterous, or prevented any officer of the court from carrying on his court duties.

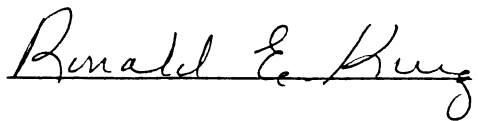
DATED this 18 day of November, 1987.

Respectfully Submitted.

  
RONALD E. KUNZ  
COOK & WILDE, P.C.  
Attorney's for Appellant

#### CERTIFICATE OF MAILING

I hereby certify that on the 18 day of November, 1987, a true and correct copy of the foregoing instrument was mailed, postage pre-paid to Gregory J. Sanders, 175 East 400 South, #300, Salt Lake City, Utah 84111.





CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, WEST VALLEY DEPARTMENT

WEST VALLEY CITY,	:	
	:	
Plaintiff,	:	
	:	FINDINGS AND ORDER OF CONTEMPT
vs.	:	
	:	CASE NO. 871001094MS
FRANK RONALD BORREGO,	:	871001095MS
DOB: 6/9/43	:	
Defendant.	:	
	:	

FINDINGS

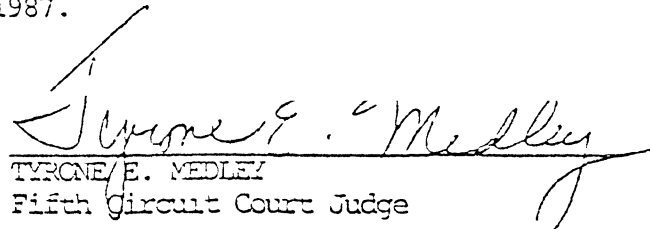
The Defendant in the above entitled matters appeared before this Court for sentencing on July 16, 1987. The Defendant was represented by counsel Mr. Ronald Kun. During the course of sentencing Defendant became loud and boisterous, using profanity which tended to interrupt the due course of the sentencing hearing. The Defendant was requested by this Court to refrain from interrupting the Court while the sentence was being pronounced, however, Defendant failed to honor this request and responded with loud, boisterous profanity, demonstrating contemptuous or insolent behavior toward this Court. The above described behavior continued repeatedly during the course of the sentencing hearing.

ORDER

Based upon the foregoing, Defendant's conduct is determined to be contemptuous and tended to interrupt the sentencing hearing, therefore, IT IS HEREBY ORDERED that the Defendant is found in Contempt of this Court and committed to the Salt Lake County Jail for a period of thirty (30) days to run consecutively with all other commitments pursuant to Utah Code Annotated

78-32-3 as amended.

DATED this 16th day of July, 1987.

  
TYRONE E. MEDLEY  
Fifth Circuit Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the Finding and Order of Contempt to Ronald E. Kunz, Attorney for the Defendant, 6925 Union Park, Suite 449, Midvale, Utah 84047.

DATED this 16th day of July, 1987.

---

vidence — Proof nec-

n, since the purpose of the "overt  
ment is to show that a conspiracy  
nd is not solely in the minds of the  
. State v. Miller (Utah 1984) 677 P

accomplice, etc.

hat fact, the evidence was held to  
to sustain a conviction. State v.  
Utah 1983) 674 P 2d 117.  
ion of two accomplices was suffi-  
ict a defendant as an accomplice in  
obbery and theft, even though the  
sented alibi testimony. State v.  
1 1985) 706 P 2d 1052.

tate v. Bailey, 712 P.2d 281 (Utah  
v. Schreuder, 726 P.2d 1215 (Utah

of jurors, etc.

Juror's reading of newspaper ac-  
l in state criminal case during its  
ground for mistrial, new trial, or  
A.L.R.4th 11.

on — Oath of officer

ground for mistrial, new trial, or  
A.L.R.4th 11.

CHAPTER 18  
THE JUDGMENT

Section		Section	
77-18-1.	Suspension of sentence — Probation — Supervision — Presentence investigation — Confidential — Terms — Restitution — Extension or revocation — Hearings.	77-18-2.	Expungement and sealing of records.
		77-18-5.5.	Judgment of death — Defendant to select firing squad or lethal injection.
		77-18-6.	Judgment to pay fine or restitution constitutes a lien.

77-18-1. Suspension of sentence — Probation — Supervi-  
sion — Presentence investigation — Confidential  
— Terms — Restitution — Extension or revoca-  
tion — Hearings.

(1) (a) On a plea of guilty or no contest or conviction of any crime or of-  
fense, the court may suspend the imposition or execution of sentence and  
place the defendant on probation. Supervised probation by the depart-  
ment may not be imposed by the court in cases of class C misdemeanors or  
infractions. The jurisdiction of all probationers referred to the Depart-  
ment of Corrections is vested in the court having jurisdiction; custody is  
with the Department of Corrections.

(b) The legal custody of all probationers not referred to the department  
is vested as ordered by the court having jurisdiction of the defendant. The  
court has continuing jurisdiction over all probationers.

(2) (a) The Department of Corrections shall establish supervision and pre-  
sentence investigation standards for all individuals referred to the de-  
partment. These standards shall be based on the type of offense, the  
demand for services, the availability of agency resources, and other crite-  
ria established by the Department of Corrections to determine what level  
of services shall be provided.

(b) Proposed supervision and investigation standards shall be submit-  
ted to the Judicial Council and Board of Pardons for review and comment  
prior to adoption by the Department of Corrections.

(3) Notwithstanding other provisions of law, the Department of Corrections  
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 super-  
vise the probation of class B misdemeantants in accordance with department  
standards.

(4) Prior to the imposition of any sentence, the court may, with the concur-  
rence of the defendant, continue the date for the imposition of sentence for a  
reasonable period of time for the purpose of obtaining a presentence investiga-  
tion report from the Department of Corrections or information from other  
sources about the defendant. The presentence investigation report shall in-  
clude a specific statement of pecuniary damages, accompanied by a recom-  
mendation from the Department of Corrections regarding the payment of

restitution by the defendant. The contents of the report are confidential and not available except for purposes of sentencing as provided by rule of the Judicial Council and for use by the Department of Corrections. At the time of sentence, the court shall hear any testimony or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony or information shall be presented in open court on record and in the presence of the defendant.

(5) While on probation, and as a condition of probation, the defendant may be required to perform any or all of the following:

- (a) pay, in one or several sums, any fine imposed at the time of being placed on probation;
  - (b) pay amounts required under Chapter 32a, Title 77, Defense Costs;
  - (c) provide for the support of others for whose support he is legally liable;
  - (d) participate in available treatment programs;
  - (e) serve a period of time in the county jail not to exceed one year;
  - (f) serve a term of home confinement;
  - (g) participate in community service restitution programs;
  - (h) pay for the costs of investigation, probation, and treatment services;
- and
- (i) make restitution or reparation to the victim or victims in accordance with Subsections 76-3-201 (3) and (4).

(6) The Department of Corrections is responsible for the collection of fines and restitution during the probation period in cases where the court orders supervised probation by the department. The prosecutor shall provide notice of the restitution order to the clerk of the court. The clerk shall place the order on the civil docket and shall provide notice of the order to the parties. The order is considered a legal judgment under which the victim may seek civil remedy.

(7) (a) Upon completion without violation of 18 months' probation in felony or class A misdemeanor cases, or six months in class B misdemeanor cases, the probation period shall be terminated, unless earlier terminated by the court.

(b) The Department of Corrections shall notify the sentencing court and prosecuting attorney in writing 45 days in advance in all cases where termination of supervision will occur by law. The notification shall include a probation progress report and complete report of details on outstanding fines and restitution orders.

(c) At any time prior to the termination of probation, upon a minimum of five days' notice and a hearing or upon a waiver of the notice and hearing by the probationer, the court may extend probation for an additional term of 18 months in felony or class A misdemeanors or six months in class B misdemeanors if fines or restitution or both are owing.

(8) (a) All time served without violation while on probation applies to service of the total term of probation but does not eliminate the requirement of serving 18 consecutive months without violation in felony or class A misdemeanor cases, or six consecutive months without violation in class B misdemeanor cases. 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

78-32-1. Acts and omissions constituting contempt.—The following acts or omissions in respect to a court or proceedings therein are contempts of the authority of the court:

(1) Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

(2) Breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

(3) Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, or other person appointed or elected to perform a judicial or ministerial service.

(4) Deceit, or abuse of the process or proceedings of the court, by a party to an action or special proceeding.

(5) Disobedience of any lawful judgment, order or process of the court.

(6) Assuming to be an officer, attorney or counselor of a court, and acting as such without authority.

(7) Rescuing any person or property in the custody of an officer by virtue of an order or process of such court.

(8) Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial.

(9) Any other unlawful interference with the process or proceedings of a court.

(10) Disobedience of a subpoena duly served, or refusing to be sworn or to answer as a witness.

(11) When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, concerning the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

(12) Disobedience by an inferior tribunal, magistrate or officer of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-32-1.

**Compiler's Notes.**

Except for the substitution of "court" for "court of justice" in the introductory clause, this section is identical to former section 104-45-1 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

**Cross-References.**

Bastardy proceedings, default in payments. 77-60-11.

Criminal Code not to affect contempt power, 76-1-107, 76-3-201.

Discovery, sanctions for noncompliance with order compelling discovery, Rules of Civil Procedure, Rule 37(b)(D).