1998

State of Utah v. Paul Lynn Grindberg : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ATE OF UTAH, Plaintiff/Appellee, v. PAUL LYNN GRINDBERG, Defendant/Appellant.	DOCKET NO. 981184 Case No. 981184-CA (Priority No. 3)

BRIEF OF APPELLANT

This is an appeal from an order rescinding and vacating a prior order terminating Mr. Grindberg's probation entered in the First District Court in and for Cache County, State of Utah, before the Honorable Clint S. Judkins, presiding.

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Utah Code Ann. §77-18a-1 and Utah Rule of Criminal Procedure 26(2)(b) provided Mr. Grindberg's right to appeal from the post-judgment order of the trial court affecting his substantial rights.

Utah Code Ann. §78-2a-3(2)(e) provides this Court's jurisdiction over this appeal from a district court in a criminal case not involving a first degree felony.

The trial court signed and filed the order appealed from on March 18, 1998 (R. 71), and Mr. Grindberg filed a timely notice of appeal on March 26, 1998 (R. 74-75).

STATEMENT OF ISSUE, PRESERVATION OF ISSUE, AND STANDARD OF REVIEW

Did the trial court have jurisdiction to rescind its previous order terminating Mr. Grindberg's probation?

Trial counsel did not raise this issue in the trial court. However, because the matter involves a flaw in the trial court's jurisdiction, the error is not subject to waiver. See e.g.

State ex rel. E.G.T., 808 P.2d 138, (Utah App. 1991)("[A] jurisdictional defect cannot be waived.").

In raising the issue for the first time on appeal,[1] Mr. Grindberg will rely on the plain error and ineffective assistance of counsel doctrines.

To warrant relief under the plain error doctrine, Grindberg must show that the trial court's error should have been plain at the time that it was made, and that the error affected Grindberg's substantial rights. See e.g. State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 493 U.S. 814 (1989). The first requirement, that the error should have been obvious to the trial court, can be dispensed with by this Court, to insure that justice is done. 773 P.2d at 35 n.8.

The relevant standards governing the ineffective assistance of counsel claim are set forth in State v. Dunn, 850 P.2d 1201 (Utah 1993), as follows:

> To show ineffective assistance of counsel, a defendant must (i) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under all the attendant circumstances, and (ii) demonstrate that counsel's error prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant. This prejudice test is equivalent to the harmfulness test we apply in determining plain error, or reversible error.
>
> In determining whether counsel's performance is constitutionally deficient, we presume that counsel has rendered adequate assistance. Thus, if the

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[1] Mr. Grindberg did raise the issue in a petition for post-conviction relief (R. 81-112). However, the trial court ruled that the petition was premature and struck the petition pending resolution of this appeal (R. 150-151).

> challenged act or omission might be considered sound trial strategy, we will not find that it demonstrates inadequacy of counsel. Moreover, when confronted with a claim of ineffective assistance, we may choose not to consider the adequacy of counsel's performance if we determine that any claimed error was not harmful.

Id. at 1225 (citations omitted).

The question before the Court, involving the trial court's authority over probation revocation, involves a question of law, to be reviewed without any particular deference. See State v. Grate, 947 P.2d 1161, 1164 (Utah App. 1997).

CONTROLLING STATUTE, RULES AND CONSTITUTIONAL PROVISIONS

The following statute, rule and constitutional provisions pertain, and are copied in the addendum to this brief:

Constitution of Utah, Article I, §7

United States Constitution, Amendment XIV, §1

Utah Code Ann. §77-18-1

Utah Rule of Civil Procedure 60

Utah Rule of Criminal Procedure 30

Utah Rule of Professional Conduct 1.4.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDING, AND DISPOSITION

The State of Utah charged Mr. Grindberg by information with possession of a dangerous weapon, a third degree felony, possession of a controlled substance, a third

degree felony, possession of drug paraphernalia, a class B misdemeanor, driving on suspension, a class C misdemeanor, driving without headlights, a class C misdemeanor, and improper registration, a class C misdemeanor (R. 28).

The trial court appointed David Perry to represent Grindberg in the trial court (R. 8).

Grindberg waived the preliminary hearing, and was bound over as charged (R. 28).

In the district court, Grindberg pled guilty to possession of a controlled substance and possession of paraphernalia, and the remaining charges were dismissed pursuant to the plea bargain (R. 32, 39).

On June 17, 1996, Judge Clint S. Judkins sentenced Mr. Grindberg to serve zero to five years in the Utah State Prison for the conviction of possession of a controlled substance and a concurrent term for the conviction of possession of paraphernalia (R. 39-40). He suspended the prison sentence and placed Grindberg on probation (R. 39-40). The minute entry for the final sentencing hearing indicates in relevant part,

> Court: On possession of a c/s Def to serve not more than 5 yrs USP. Stayed. Def placed on probation with APP. To spend indeterminate time CCJ. Review after 130 days. Def to receive credit of 10 days towards time. Fine $925 incl surcharge. $200 recoupment fee. Def to enroll and complete substance abuse counseling at his own expenses. Other standard terms and conditions of probation. No alcohol clause. If Def accepted into a program he may be released to go to program and receive credit for time served. On the charge of possession of drug paraphernalia Def to serve indeterminate time CCJ. Same terms [a]nd conditions of probation. Fine $400 including surcharge.

(R. 39-40).

The original judgment, sentence and commitment, signed June 20, 1996, listed numerous conditions of probation, including,

> 1. The Defendant shall be incarcerated in the Cache County Jail for an indeterminate period of time, with credit for ten (10) days served. A review date will be set after the Defendant has served one-hundred and thirty (130) days in the Cache County Jail. The Defendant can enter into an inpatient care program after he had served at least sixty (60) days in jail or fifty (50) days plus ten (10) days credit for time served. If the defendant is accepted in an inpatient care program, the Defendant will be returned to the Cache County Jail upon completion of the inpatient care program.

(R. 65-67).

On June 27, 1996, Grindberg signed a probation agreement, agreeing to numerous conditions, including his payment of various fines and fees prior to the termination of his probation (R. 44).

Judge Judkins ordered Mr. Grindberg released to an inpatient program on August 10, 1996 (R. 46).

On September 26, 1996, Judge Judkins signed an order drafted by the prosecution terminating Mr. Grindberg's probation. The order stated, "Upon the recommendation of Adult Probation and Parole, and upon the Court's review of the Defendant's probation, it is hereby ordered that probation is terminated." (R. 49). The order was sent to trial counsel, Mr. Perry, but was not sent to Mr. Grindberg (R. 49). This order is in the addendum to this brief.

Subsequent to the termination of Grindberg's probation, Adult Probation and Parole filed an Affidavit of Probation Violation on February 20, 1997, alleging that Grindberg had

failed to report to AP&P and had failed to make payment on his fines and fees, and Judge Judkins issued a bench warrant and order to show cause why probation should not be revoked or modified (R. 50-54).

On March 5, 1997, Grindberg appeared without counsel and pled guilty to being in violation of the conditions of his probation (R. 55).[2] On March 24, 1997, Judge Judkins revoked Grindberg's probation and sent him to prison to serve the original sentences (R. 60-62, 63-64).[3]

Apparently at the behest of personnel at the prison, on March 18, 1998, Judge Judkins held a hearing and determined that the order terminating probation, dated September 26, 1996, was entered in error, and on March 18, 1998, he entered an order rescinding and vacating the order terminating probation (R. 71-72).

At the hearing on March 18, 1998, Mr. Grindberg was again represented by Mr. Perry (T. 3/18/1998 at 3).[4] The prosecutor indicated that the order requesting termination of Grindberg's probation must have been drafted erroneously by his office, and signed

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[2] As of the filing of the opening brief of appellant, the transcript of the March 5, 1997 hearing has not been prepared. While the transcript of that hearing does not appear necessary to the appeal, out of an abundance of caution, counsel is pursuing the preparation of that transcript, and will request supplemental briefing should it become necessary.

[3] At the hearing on March 24, 1997, Mr. Grindberg initially indicated that he desired to be represented by counsel, but then indicated that he wished to get the hearing over with if he was going to prison, and that he did not feel it would be at all beneficial to have an attorney (R. 57 at 3).

[4] There is no record stamp or number on this transcript.

erroneously by the court (T. 3/18/1998 at 2-4). The trial court observed that there was no recommendation from AP&P to support the probation termination (T. 3/18/1998 at 4). The prosecutor twice indicated that if the court had intended to terminate probation, there would have been no jurisdiction to revoke Grindberg's probation (T. 3/18/1998 at 2-4). The trial court indicated that he did not know why the order was drafted or signed, but surmised that a secretary at the prosecutor's office had erroneously prepared a termination order when Mr. Grindberg's supervision was transferred to Salt Lake City (T. 3/18/1998 at 5). The judge then indicated,

> I prepared an order that indicates that this matter was entered in error. Now, if the Department of Corrections down there, if they feel it appropriate, they can release the guy. That's out of my hands. I don't want to bind their hands by saying that there was an order that had been entered in error. So I'm going to relieve them of that order and then they can do with him whatever they want to at this point in time.

(T. 3/18/1998 at 5).

Mr. Perry did not object to the trial court's lack of jurisdiction, or to the court's entry of the order rescinding and vacating the prior order terminating Grindberg's probation (T. 3/18/1998 at 1-5).

The order subject to appeal states,

> This matter came on for hearing on March 18, 1998. The Court, finds that the Order Terminating Probation on September 26 1996 was entered in error.
>
> IT IS HEREBY ORDERED, that the Order Terminating Probation is hereby rescinded and vacated.

(R. 71). This order is in the addendum to this brief.

Mr. Grindberg filed a notice of appeal from this order on March 26, 1998 (R. 74-75). Grindberg simultaneously filed a petition for extraordinary relief in the trial court, (R. 76-112), and Judge Judkins struck the petition as prematurely filed until this appeal is disposed of (R. 150-151).

STATEMENT OF FACTS

Because there was no trial held, the relevant facts are those which have already been provided above, and are summarized here.

The trial court revoked Mr. Grindberg's probation on March 24, 1997 (R. 60-62, 63-64), after he had already signed an order terminating probation on September 26, 1996 (R. 49). The court then rescinded and vacated the order terminating Grindberg's probation, characterizing the termination order as some type of clerical error (T. 3/18/1998 at 3).

SUMMARY OF ARGUMENT

When the trial court signed the order terminating Mr. Grindberg's probation, the trial court lost jurisdiction over the case. The trial court had no authority to enter the order vacating and rescinding the termination order, and this action violated the probation statute and Mr. Grindberg's rights to due process of law.

The termination order was clear and unambiguous and signed by the trial court, and was not properly corrected as a mere clerical error.

This Court should correct the errors which occurred below, despite the absence of proper objections in the trial court, because Mr. Grindberg is currently being held at the

prison on the basis of an order entered by the trial court when the trial court had no jurisdiction. If necessary, the plain error and ineffective assistance of counsel doctrines may assist the Court in reaching the issues.

ARGUMENT

I
THE TRIAL COURT HAD NO AUTHORITY TO RESCIND THE TERMINATION ORDER BECAUSE THE TRIAL COURT LOST JURISDICTION WHEN HE TERMINATED GRINDBERG'S PROBATION.

The trial court had full authority to terminate Mr. Grindberg's probation. See Utah Code Ann. §77-18-1(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.").

As the prosecutor implicitly twice recognized during the last hearing before the termination order was vacated and rescinded, when the trial court signed the order terminating probation, the trial court lost jurisdiction over Mr. Grindberg. See T. 3/18/1998 at 2-4).

Numerous Utah cases in analogous circumstances recognize that trial courts lose jurisdiction over their probationers when probation terminates before probation revocation or extension proceedings are commenced. See State v. Green, 757 P.2d 462, 465 (Utah 1988)(court reversed probation revocation which was initiated after probation expired, holding that trial court's jurisdiction to revoke probation ceases with the termination of

probation); State v. Rawlings, 829 P.2d 150, 153 (Utah App. 1992)(trial court has jurisdiction to extend probation if probation extension proceedings commence prior to the termination of probation); Smith v. Cook, 803 P.2d 788, 794-96 (Utah 1990)(unless probationer is seeking to avoid supervision, order to show cause must be filed prior to expiration of probation to preserve trial court's jurisdiction to revoke probation); State v. Reedy, 937 P.2d 152 (Utah App. 1997)(trial court maintained authority to revoke probation by issuing order to show cause during period of probation; particularly given the defendant's absconding from the jurisdiction, there was no requirement that he be served the order to show cause prior to termination of probation); State v. Kahl, 814 P.2d 1151, 1153 (Utah App.)(trial court maintained jurisdiction to revoke probation, where revocation proceedings were initiated prior to expiration of probation, where defendant fled from the jurisdiction), cert. denied, 843 P.2d 516 (Utah 1992); State v. Moya, 815 P.2d 1312, 1318 (Utah App. 1991)(efforts to revoke or extend probation, which were initiated after probation terminated eighteen months after its imposition, were untimely, and probation and parole were ordered extinguished); State v. Grate, 947 P.2d 1161, 1168 (Utah App. 1997) (trial court had no jurisdiction to revoke probation, which terminated before defendant was charged with probation violation).

Utah Courts have consistently been strict in requiring trial courts to act within legislative parameters in revoking probation, and there is certainly nothing in the probation

revocation statute, Utah Code Ann. §77-18-1, which provides or even implies authority in the trial courts to revoke probation once it has terminated. See e.g. Green, *supra*.

Under the foregoing precedents, the trial court's jurisdiction to revoke Mr. Grindberg's probation ended upon the court's signing of the order terminating probation. See e.g. Green.

In revoking Grindberg's probation when the trial court had no jurisdiction, the trial court also violated Mr. Grindberg's rights to due process of law. See e.g. Christiansen v. Harris, 163 P.2d 314 (Utah 1945)(including in the list of fundamentals of due process of law which must be afforded in depriving one of liberty "the existence of a competent person, body, or agency authorized by law to determine the questions").

II
THE TERMINATION ORDER DID NOT CONSTITUTE A CLERICAL ERROR WHICH WAS SUBJECT TO CORRECTION UNDER UTAH RULE OF CRIMINAL PROCEDURE 30(b).

At the hearing which preceded the entry of the order vacating and rescinding the order terminating Grindberg's probation, the trial court indicated that the order terminating probation was the result of some kind of clerical error (T. 3/18/1998 at 3). He also indicated that it would be nice if the court were to review all the court orders which came before the court (T. 3/18/1998 at 3), implying that the court signed the termination order without reviewing the matter carefully.

Utah law on point demonstrates that the order terminating probation did not constitute a clerical error that was subject to correction.

Utah Rule of Criminal Procedure 30(b) governs the correction of clerical errors in judgments, and provides,

> (b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

"A clerical error, as contradistinguished from judicial error, is not 'the deliberate result of the exercise of judicial reasoning and determination.'" State v. Lorrah, 761 P.2d 1388, 1389 (Utah 1988). Put another way,

> The distinction between a judicial error and a clerical error does not depend upon who made it. Rather, it depends on whether it was made in rendering the judgment or in recording the judgment as rendered. 46 Am. Jur. 2d Judgments §202.
>
> The correction contemplated by Rule 60(a) must be undertaken for the purpose of reflecting the actual intention of the court and parties. 6A Moore's Federal Practice para. 60.60[1] (2d ed. 1983). Rule 60(a) is not intended to correct errors of a substantial nature, particularly where the claim of error is unilateral. The fact that an intention was subsequently found to be mistaken would not cause the mistake to be "clerical."

Lindsay v. Atkin, 680 P.2d 401, 402 (Utah 1984)(citation omitted).[5]

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[5] Lindsay is decided under rule of civil procedure 60(a), which provides,

> (a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending

The order at issue here did not involve any clerical error in the recording of the court's intent. It was drafted and submitted by the prosecution, and signed by the hand of the trial court, and simply stated, "Upon the recommendation of Adult Probation and Parole, and upon the Court's review of the Defendant's probation, it is hereby ordered that probation is terminated." (R. 49). While the trial court may have been mistaken in signing the order, his mistake did not constitute a clerical error. Lindsay.

Utah appellate courts recognize that such unambiguous orders in criminal cases are not subject to later corrections which contradict the unambiguous orders. See State v. Moya, 815 P.2d 1312, 1317 and n.12 (Utah App. 1991)(citing State v. Denney, 776 P.2d 91, 93 (Utah App.), cert. denied, 779 P.2d 688 (Utah 1989) for the propositions that "unambiguous criminal order cannot be later modified to match 'what the judge may have intended'" and that "[d]eferential review of the propriety of Rule 60(a) orders would be inappropriate, . . . if the record unambiguously expressed a judgment contrary to that stated in the Rule 60(a) order of clerical revision.").[6]

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may be so corrected with leave of the appellate court.
This Court has noted that rule 60(a) is substantially the same as Utah Rule of Criminal Procedure 30(b). See State v. Moya, 815 P.2d 1312, 1314 n.3 (Utah App. 1991).

[6] In Moya, the parties briefed the issue under Utah Rule of Civil Procedure 60(a). The Moya Court recognized that the civil rule is "nearly textually identical to" Utah R. Crim. P. 30(b), which would have been the more appropriate rule to argue in Moya, a criminal case. Moya, 815 P.2d 1312 at 1314 n.3. Because the Court found the substantive sentence improper in Moya, the Court found that review under either rule would end in the same result. Id.

Because the order terminating probation did not involve clerical error, the trial court had no authority vacating or rescinding the order. E.g. Moya.

III
THIS COURT SHOULD CORRECT THE ERRORS DESPITE THE ABSENCE OF OBJECTIONS IN THE TRIAL COURT.

While it is certainly true that Mr. Grindberg pled guilty to being in violation of his probation after his probation was terminated by the trial court (R. 55), his actions in so doing should not be viewed as a waiver of the unrecognized flaw in the trial court's authority to revoke probation, because jurisdictional issues are not subject to waiver. See State ex rel. E.G.T., 808 P.2d 138, (Utah App. 1991)("[A] jurisdictional defect cannot be waived."); James v. Galetka, 965 P.2d 567 (Utah App. 1998)("Jurisdiction of the subject matter is derived from the law. It can neither be waived nor conferred by consent of the accused. Objection to the jurisdiction of the court over the subject matter may be urged at any stage of the proceedings, and the right to make such an objection is never waived."). Cf. State v. Jennings, 875 P.2d 566, 567 n.1 (Utah 1994)(entry of guilty plea results in waiver of all non-jurisdictional pre-plea issues).

If necessary, the Court may rely on the plain error and ineffective assistance of counsel doctrines in reaching the issues.

To warrant relief under the plain error doctrine, Grindberg must show that the trial court's error should have been plain at the time that it was made, and that the error affected Grindberg's substantial rights. See e.g. State v. Eldredge, 773 P.2d 29, 35 (Utah), cert.

denied, 493 U.S. 814 (1989). The first requirement, that the error should have been obvious to the trial court, can be dispensed with by this Court, to insure that justice is done. 773 P.2d at 35 n.8.

The trial court's error in signing the order rescinding and vacating the order terminating probation should certainly have been plain to him, for the law indicating that his jurisdiction over the case ended when the probation terminated was abundantly clear at the time of the trial court's action in March of 1998. See See State v. Green, 757 P.2d 462, 465 (Utah 1988); State v. Rawlings, 829 P.2d 150, 153 (Utah App. 1992; Smith v. Cook, 803 P.2d 788 (Utah 1990); State v. Reedy, 937 P.2d 152 (Utah App. 1997); State v. Kahl, 814 P.2d 1151, 1153 (Utah App.), cert. denied, 843 P.2d 516 (Utah 1992); State v. Moya, 815 P.2d 1312, 1318 (Utah App. 1991); and State v. Grate, 947 P.2d 1161, 1168 (Utah App. 1997), *supra*.

The trial court should have been aware of this law, particularly given that the prosecutor twice indicated at the hearing regarding the termination order that if the court had intended to terminate probation, there would have been no jurisdiction to revoke Grindberg's probation (T. 5/18/1998 at 2-4).

The law indicating that judicial mistakes are not subject to correction as clerical errors was also abundantly clear at the time of the trial court's order in March of 1998. See State v. Lorrah, 761 P.2d 1388, 1389 (Utah 1988); Lindsay v. Atkin, 680 P.2d 401, 402 (Utah

1984); State v. Moya, 815 P.2d 1312, 1317 and n.12 (Utah App. 1991); and State v. Denney, 776 P.2d 91, 93 (Utah App.), cert. denied, 779 P.2d 688 (Utah 1989), *supra.*

The trial court's error certainly affected Grindberg's substantial rights, for in the absence of the order, the order terminating Grindberg's probation would be in full force and effect, and Grindberg would not be in prison as a result of the probation revocation which occurred after the termination.

The relevant standards governing the ineffective assistance of counsel claim are set forth in State v. Dunn, 850 P.2d 1201 (Utah 1993), as follows:

> To show ineffective assistance of counsel, a defendant must (i) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under all the attendant circumstances, and (ii) demonstrate that counsel's error prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant. This prejudice test is equivalent to the harmfulness test we apply in determining plain error, or reversible error.
>
> In determining whether counsel's performance is constitutionally deficient, we presume that counsel has rendered adequate assistance. Thus, if the challenged act or omission might be considered sound trial strategy, we will not find that it demonstrates inadequacy of counsel. Moreover, when confronted with a claim of ineffective assistance, we may choose not to consider the adequacy of counsel's performance if we determine that any claimed error was not harmful.

Id. at 1225 (citations omitted).

Trial counsel should have informed Mr. Grindberg of the court's order terminating his probation. See e.g. Utah Rule of Professional Conduct 1.4 (" (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable

requests for information."). It was certainly objectively deficient performance for trial counsel to fail to object to the trial court's entry of the order rescinding and vacating the order terminating Grindberg's probation, when the order terminating the probation also terminated the trial court's jurisdiction and fundamental authority to continue the imprisonment of Mr. Grindberg. See ABA Standards for Criminal Justice, "The Defense Function," Standard 4-3 (1979 & Supp. 1986)(trial attorneys have the obligation to make proper objections and motions to protect the rights of the accused). See also e.g. Green, *supra*.

This conduct was prejudicial, resulting in the imprisonment of Mr. Grindberg, despite the absence of a proper jurisdictional basis for the order revoking Grindberg's probation and imposing the sentence of imprisonment. See e.g. Green, *supra*.

CONCLUSION

This Court should reverse the trial court's order rescinding and vacating the order terminating Mr. Grindberg's probation, and should order Mr. Grindberg's probation terminated.

RESPECTFULLY SUBMITTED this 22 day of March 1999.

CANDICE A. JOHNSON
Attorney for Defendant/Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, to Jan Graham, Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, and Scott L. Wyatt, Cache County Attorney, 110 North 100 West, Logan, Utah 84321, on the 22 day of March 1999.

CAJ\P\441

ADDENDUM

COLLATERAL REFERENCES

Utah Law Review. — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.
Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.
Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.
Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.
C.J.S. — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.
A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.
Key Numbers. — Constitutional Law ⇐ 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.
Compiler's Notes. — Laws 1983, Senate Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.
Regulation of right to bear arms.

Prospective application.
The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P.2d 296 (Utah 1985).

Regulation of right to bear arms.
This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. State v. Beorchia, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.
Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4.
C.J.S. — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.
A.L.R. — Gun control laws, validity and construction of, 28 A.L.R.3d 845.
Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.
Key Numbers. — Constitutional Law ⇐ 82; Weapons ⇐ 1, 3, 6 et seq.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.
Cross-References. — Eminent domain generally, § 78-34-1 et seq.

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

12TH DOCUMENT of Level 1 printed in FULL format.

*** THIS SECTION CURRENT THROUGH THE 1998 SUPPLEMENT ***
*** (1998 GENERAL SESSION) ***

TITLE 77. UTAH CODE OF CRIMINAL PROCEDURE
CHAPTER 18. THE JUDGMENT

Utah Code Ann. @ 77-18-1 (1998)

@ 77-18-1. Suspension of sentence -- Pleas held in abeyance -- Probation -- Supervision -- Presentence investigation -- Standards -- Confidentiality -- Terms and conditions -- Restitution -- 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 suspend the imposition or execution of 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. 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 describing the effect of the crime on the victim and the victim's family. The victim impact statement shall:

(i) identify the victim of the offense;

(ii) include a specific statement of the recommended amount of complete restitution as defined in Subsection 76-3-201(4), accompanied by a recommendation from the department regarding the payment of court-ordered restitution as defined in Subsection 76-3-201(4) by the defendant;

(iii) identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(iv) describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) contain any other information related to the impact of the offense upon the victim or the victim's family that is relevant to the trial court's sentencing determination.

(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 Subsection 76-3-201(4).

(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 defendant:

(a) may be required to 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;

(v) serve a period of time in the county jail not to exceed one year;

(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 Subsection 76-3-201(4); and

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

(b) if convicted on or after May 5, 1997, shall be required to:

(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, upon order of the court, shall collect and disburse fines, restitution with interest in accordance with Subsection 76-3-201(4), 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 77-18-1(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) If the defendant, upon expiration or termination of the probation period, owes outstanding fines, restitution, or other assessed costs, the court may retain jurisdiction of the case and continue the defendant on bench probation or place the defendant on bench probation for the limited purpose of enforcing the payment of fines, restitution, including interest, if any, in accordance with Subsection 76-3-201(4), and other amounts outstanding.

(iii) Upon motion of the prosecutor or 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 or why the suspended jail or prison term should not be imposed.

(b) The department shall notify the sentencing court and prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law. The notification shall include a probation progress report and complete report of details on outstanding fines, restitution, and other amounts outstanding.

(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) Restitution imposed under this chapter and interest accruing in accordance with Subsection 76-3-201(4) is considered a debt for willful and malicious injury for purposes of exceptions listed to discharge in bankruptcy as provided in Title 11 U.S.C.A. Sec. 523, 1985.

(14) The court may order the defendant to commit himself to the custody of the Division of 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-12-209(2)(g) are receiving priority for treatment over the defendants described in this Subsection (14).

(15) 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.

(16) (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 (17).

(17) (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.

HISTORY: C. 1953, 77-18-1, enacted by L. 1980, ch. 15, @ 2; 1981, ch. 59, @ 2; 1982, ch. 9, @ 1; 1983, ch. 47, @ 1; 1983, ch. 68, @ 1; 1983, ch. 85, @ 2; 1984, ch. 20, @ 1; 1985, ch. 212, @ 17; 1985, ch. 229, @ 1; 1987, ch. 114, @ 1; 1989, ch. 226, @ 1; 1990, ch. 134, @ 2; 1991, ch. 66, @ 5; 1991, ch. 206, @ 6; 1992, ch. 14, @ 3; 1993, ch. 82, @ 7; 1993, ch. 220, @ 3; 1994, ch. 13, @ 24; 1994, ch. 198, @ 1; 1994, ch. 230, @ 1; 1995, ch. 20, @ 146; 1995, ch. 117, @ 2; 1995, ch. 184, @ 1; 1995, ch. 301, @ 3; 1995, ch. 337, @ 11; 1995, ch. 352, @ 6; 1996, ch. 79, @ 103; 1997, ch. 392, @ 2; 1998, ch. 94, @ 10.

NOTES:
AMENDMENT NOTES. --The 1993 amendment by ch. 82, effective May 3, 1993, added Subsection (2) and redesignated former Subsections (2) through (13) as Subsections (3) through (14).

The 1993 amendment by ch. 220, effective May 3, 1993, added "and any other costs assessed under Section 64-13-21" in Subsection (8), substituted "owes" for "has" and "or other assessed costs" for "owing" and added "and other amounts outstanding" in Subsection (9)(a)(ii), substituted "and other amounts outstanding" for "orders" in Subsection (9)(b), and made stylistic changes.

The 1994 amendment by ch. 13, effective May 2, 1994 substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsections (1)(c) and (4)(b); substituted "Title 77, Chapter 2a, Pleas in Abeyance" for "Sections 77-2a-1 through 77-2a-4" in Subsection (2); substituted "Subsection (4)(a)" for "Subsection (a)" in Subsection (4)(d); and made stylistic changes.

The 1994 amendment by ch. 198, effective May 2, 1994, added Subsection (6)(a)(ii), renumbering former Subsections (6)(a)(ii) and (iii) as (iii) and (iv), and made a stylistic change.

The 1994 amendment by ch. 230, effective May 2, 1994, deleted former Subsection (1) which defined "confidential"; inserted "and Parole" in Subsection (3)(b); added Subsection (6); designated former Subsection (6)(b) as Subsection (7); deleted former Subsection (6)(c) pertaining to the disposition of the presentence investigation report after the sentencing; deleted former Subsection (14), relating to disclosure of presentence diagnostic evaluation and investigation reports; added Subsection (15); and made related and other stylistic changes.

The 1995 amendment by ch. 20, effective May 1, 1995, substituted "Subsections 76-3-201(4) and (5)" for "Subsections 76-3-201(3) and (4)" in Subsection (8)(i) and replaced "Chapter 1" with "Chapter 2" in Subsection (15).

The 1995 amendment by ch. 117, effective May 1, 1995, added references to "interest in accordance with Subsection 76-3-201(4)" in Subsections (5)(c), (8)(i), (9)(a), (10)(a)(ii), and (13), deleted a reference to Subsection 76-3-201(3) in Subsection (8)(i), corrected a reference in Subsection (15), and made stylistic changes throughout the section.

The 1995 amendment by ch. 184, effective May 1, 1995, deleted a requirement of a "recommendation from the Department of Corrections regarding the payment of restitution by the defendant" in Subsection (5)(b)(ii); rewrote Subsection (6), making significant stylistic changes, decreasing the time that the presentence investigation must be available before trial, which had been ten days, and adding the possibility of a ten-day period to correct inaccuracies in the report; and added "and disbursement" after "collection" in Subsection (9)(a).

The 1995 amendment by ch. 301, effective May 1, 1995, substituted "the recommended amount of complete restitution" for "pecuniary damages," inserted "as defined in Subsection 76-3-201(4)" twice and inserted "court-ordered" in Subsection (5)(a) and rewrote Subsection (9).

The 1995 amendment by ch. 337, effective May 1, 1995, added "which may include the use of electronic monitoring" at the end of Subsection (8)(f), added Subsections (16) and (17), and corrected a statutory reference in Subsection (15).

The 1995 amendment by ch. 352, effective May 1, 1995, inserted "if the defendant is not represented by counsel" in the first sentence of Subsection (6), substituted "protected" for "private" and "Chapter (2)" for "Chapter (1)" in the first sentence of Subsection (15), added Subsection (15)(e), and made related stylistic changes.

The 1996 amendment, effective April 29, 1996, substituted "protected" for "confidential" in Subsection (5)(d).

The 1997 amendment, effective May 5, 1997, subdivided Subsection (8), made related designation changes, and added Subsection (8)(b).

The 1998 amendment, effective May 4, 1998, substituted "compensatory" for "community" twice in Subsection (8)(a)(vii), and made minor stylistic changes in Subsections (8)(b)(ii) and (14)(c).

COMPILER'S NOTES. --Laws 1994, S.J.R. 6 proposed amending Utah Const., Art. I, Sec. 12 and proposed adding a new Sec. 28 to that article. These proposals were approved by the voters, the changes to take effect on January 1, 1995. Laws 1994, ch. 198, which amended this section to add the requirement of a victim impact statement, provides in @ 16 that the Legislature intends the act to serve as the implementing legislation of those constitutional amendments.

COORDINATION CLAUSE. --Laws 1995, ch. 184, @ 5 directs that the amendments in that act to Subsection (6)(a) of this section shall supersede the amendments to the sme subsection in L. 1995, ch. 352.

Laws 1995, ch. 301, @ 6 provides that the amendments in that act to Subsections (5)(b)(ii) and (9)(a) supersede the amendments to the same subsections by ch. 184.

SEVERABILITY CLAUSES. --Section 3 of Laws 1983, Chapter 85 provided: "If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act shall be given effect without the invalid provision or application."

CROSS-REFERENCES. --Indecent public display, incarceration without suspension of sentence, @ 76-10-1228.

Payment of costs of defense as condition of probation or suspension, @ 77-32a-6.

Presentence investigation reports, Rules 4-607, 6-301, Rules of Judicial Administration.

Rules of Evidence inapplicable to sentencing and probation proceedings, Rules of Evidence, Rule 1101.

Voluntary commitment to Division of Mental Health, @ 62A-12-228(3).

NOTES TO DECISIONS

ANALYSIS

447 (Utah 1993); Putvin v. Thompson, 878 P.2d 1178 (Utah Ct. App. 1994); Ron Shepherd Ins. v. Shields, 882 P.2d 650 (Utah 1994); Commercial Inv. Corp. v. Siggard, 936 P.2d 1105 (Utah Ct. App. 1997); PDQ Lube Ctr., Inc. v. Huber, 329 Utah Adv. Rep. 20 (Utah Ct. App. 1997); PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792 (Utah Ct. App. 1997).

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

C.J.S. — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

A.L.R. — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 A.L.R.5th 699.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding

was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
(Amended effective April 1, 1998.)

Advisory Committee Note. — The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in conflict with rules permitting service by means other than personal service.

Amendment Notes. — The 1998 amendment deleted the former fourth ground for a motion in Subdivision (b), as described in the Advisory Committee Note above, and renumbered the grounds accordingly.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

NOTES TO DECISIONS

"Any other reason justifying relief."

Subdivision (b)(7) embodies three requirements: First, that the reason be one other than those listed in Subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable

available only after a judge has been assigned to the case for trial. A notice of change may not be filed prior to or during a preliminary examination.

(b) *Time.* The notice shall be filed no later than 7 days after notice of assignment or reassignment of judge. Failure to file a timely notice precludes any change of judge under this rule.

(c) *Assignment of action.* Upon the filing of a notice of change, the assigned judge shall take no further action in the case. The presiding judge shall promptly determine whether the notice is proper and, if so, shall reassign the action. If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the Chief Justice, who shall determine whether the notice is proper and, if so, shall reassign the action.

(d) *Nondisclosure to court.* No party shall communicate to the court, or cause another to communicate to the court, the fact of any party's seeking consent to a notice of change.

(e) *Rule 29 unaffected.* This rule does not affect any rights under Rule 29. (Added effective April 15, 1992; amended effective May 1, 1993; November 1, 1996.)

Amendment Notes. — The 1996 amendment deleted "circuit" after "district" near the beginning of Subdivision (a).

Compiler's Notes. — In a minute entry dated January 21, 1993, the Utah Supreme Court provided that this rule, "originally adopted on an emergency basis effective April 15, 1992, has now been published for public comment. The Advisory Committee proposed amendments to paragraph (b). Those amendments are adopted, effective May 1, 1993."

Rule 30. Errors and defects.

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

Cross References. — Arraignment, necessity of objection to preserve error, U.R.Cr.P. 10. Indictments and informations, harmless errors, U.R.Cr.P. 4.

NOTES TO DECISIONS

Admission of photographic evidence.
Clerical mistakes.
—Defendant's right of allocution.
Harmless error.
Minor defect.
Substantial right affected.
—State's burden of persuasion.
Variances.
Cited.

Admission of photographic evidence.

Even though admission of photographs of manslaughter victim served only to create emotional impact on jury, their admission was not reversible error; they were not so gruesome or offensive that their absence would have resulted in a more favorable outcome for defendant. State v. Wells, 603 P.2d 810 (Utah 1979).

Clerical mistakes.

—Defendant's right of allocution.

The defendant's due process right of allocution was satisfied at a sentencing hearing held in his presence, where he was addressed by the judge and elected to speak, and an amended judgment subsequently entered by the trial court, at which the defendant was not present nor represented by counsel, reflected only a correction of a clerical mistake in his sentence. State v. Lorrah, 761 P.2d 1388 (Utah 1988).

Harmless error.

In prosecution for having carnal knowledge of female under age of 18 years, although it was error to allow prosecutrix to testify to acts of sexual intercourse after one relied on for conviction, such error was not prejudicial to defendant so as to require reversal. State v. Mattivi, 39 Utah 334, 117 P. 31 (1911).

Where defendant in murder prosecution contested every step taken by state during progress of trial and was afforded every opportunity to defend charge, and his counsel insisted upon every right to which the law entitled him, mere fact that defendant's plea of not guilty was received on legal holiday did not constitute prejudicial error. State v. Estes, 52 Utah 572, 176 P. 271 (1918).

glect a legal matter entrusted to him." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law." DR 7-101(A)(1) provided that a lawyer "shall not intentionally ... fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules ...." DR 7-101(A)(3) provided that a lawyer "shall not intentionally ... [p]rejudice or damage his client during the course of the professional relationship ...."

COLLATERAL REFERENCES

A.L.R. — Negligence, inattention, or professional incompetence of attorney in handling client's affairs in personal injury or property damage actions as ground for disciplinary action — modern cases, 68 A.L.R.4th 694.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in criminal matters as ground for disciplinary action — modern cases, 69 A.L.R.4th 410.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in bankruptcy matters as ground for disciplinary action — modern cases, 70 A.L.R.4th 786.

Legal malpractice in handling or defending medical malpractice claim, 78 A.L.R.4th 725.

Rule 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

Comment. — The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case shall promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information, whether written or oral, consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Model Code Comparison. — Rule 1.4 has no direct counterpart in the Disciplinary Rules of the Code. DR 6-101(A)(3) provided that a lawyer shall not "[n]eglect a legal matter entrusted to him." DR 9-102(B)(1) provided that a lawyer shall "[p]romptly notify a client of the receipt of his funds, securities, or other properties." EC 7-8 stated that a lawyer "should exert his best efforts to insure that decisions of his

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. PAUL LYNN GRINDBERG, Defendant.	ORDER FOR PROBATION TERMINATION Case No. 961000056

Upon the recommendation of Adult Probation and Parole, and upon the Court's review of the Defendant's probation, it is hereby ordered that probation is terminated.

Ordered this 26th day of September, 1996.

BY THE COURT:

District Court Judge

FIRST DIST. CACHE CO. UT
96 SEP 17

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the above was delivered this date to Dave Perry, Attorney for Defendant, at his box in District Court, Logan, UT.

DATED this 17th day of September, 1996.

Legal Assistant

DATE 10-1-96

ROLL NUMBER: 63

No. 961056
SEP 27 1996 #09

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IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. PAUL LYNN GRINDBERG, Defendant.	:	ORDER Case No. 961100056 FS

This matter came on for hearing on March 18, 1998. The Court, finds that the Order Terminating Probation on September 26 1996 was entered in error.

IT IS HEREBY ORDERED, that the Order Terminating Probation is hereby rescinded and vacated.

DATED THIS 18th day of March, 1998.

BY THE COURT:

CLINT S. JUDKINS
DISTRICT COURT JUDGE

STATE OF UTAH
FIRST DISTRICT COURT
CACHE COUNTY

Case No. 9611-56

MICRO FILMED
DATE: 3-19-98
ROLL NUMBER: 77

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