

1999

Utah v. Christopher Cannoles : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
	:	Case No. 990085-CA
v.	:	
CHRISTOPHER CANNOLES,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM ORDER REVOKING PROBATION AFTER
CONVICTION FOR RECEIPT OF A STOLEN CAR, A SECOND
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. 41-1a-
1316 (1998), IN THE FIFTH JUDICIAL DISTRICT COURT IN AND
FOR WASHINGTON COUNTY, STATE OF UTAH, THE
HONORABLE JAMES L. SHUMATE, JUDGE, PRESIDING.

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FILED
Utah Court of Appeals

SEP 11 2000

Paulette Stagg
Clerk of the Court

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order revoking probation. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

ISSUE ON APPEAL AND STANDARD OF REVIEW

Did the trial court commit error in revoking defendant's probation where defendant failed to complete one of the terms of probation because of his misbehavior while in jail?

A trial court's revocation decision will be reversed "only if the evidence is so deficient as to render the court's action an abuse of discretion." *State v. Maestas*, 2000 UT App 22, ¶ 12, 388 Utah Adv. Rep. 35, *cert. denied*, 4 P.3d 1289 (Utah 2000).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statutory provision is attached at Addendum A:

Utah Code Ann. § 77-18-1 (Supp. 1998).

STATEMENT OF THE CASE

On February 27, 1998, defendant was charged by information with one count each of aggravated robbery, receiving a stolen vehicle, and providing false information to a police officer (R. 1-2). On March 12, 1998, defendant pleaded guilty to one count of receiving a stolen vehicle; the two other counts were dismissed (R. 20-25, 65). Defendant received a suspended sentence of one to fifteen years (R. 35-37, 39-43). He was then ordered to serve six months in jail and to complete thirty-six months of probation (R. 35-37, 39-43).

At a review hearing held January 6, 1999, defendant admitted to a probation violation (R. 50-51). As a result, the trial court revoked defendant's probation and lifted the stay on his original sentence (R. 52-54). Defendant timely appealed (R. 56).

STATEMENT OF THE FACTS

On February 26, 1998, defendant drove a juvenile to an Albertson's parking lot in Washington County, where the juvenile shoplifted several items (R. 65:5, 8). When store personnel attempted to apprehend the juvenile, the juvenile ran to defendant's car, jumped in the door, and told defendant to "Go, go, go" (R. 65:8). Defendant then stepped on the

gas, running over the foot of one of the store employees, before the employees were able to pull the car keys out of the ignition (R. 65:8). The car was a stolen vehicle with Minnesota license plates (R. 65:8). Defendant is originally from Wisconsin (R. 65:3).

Defendant was subsequently charged with aggravated robbery, receiving a stolen vehicle, and providing false information to a police officer (R. 1-2). Pursuant to a plea agreement, defendant pleaded guilty to one count of possession of a stolen vehicle and the remaining charges were dismissed (R. 20-25, 65).

Prior to sentencing, a pre-sentence investigation report and a seventy-day diagnostic evaluation were completed (R. 27-30; 65:3). The pre-sentence investigation report indicated that defendant had “a couple” of prior felony convictions in Wisconsin, for which defendant had spent approximately four months incarcerated (R. 65:9, 12).

The diagnostic evaluation disclosed that defendant had broken several of the prison’s rules while undergoing evaluation and awaiting sentencing (R. 66:12-13; Eval. at 2-3). The evaluation also indicated that “defendant has the capability to function in treatment, with added assistance, if he chooses to do so” (Eval. at 2). At defendant’s original sentencing hearing, defendant did not challenge any of the information in the diagnostic evaluation (R. 66). In fact, defense counsel acknowledged: “I understand he messed up while he was there. He certainly should not have breached any of the rules down there” (R. 66:12-13).

The trial court ordered that defendant serve one to fifteen years in Utah State Prison but stayed that sentence and placed defendant on thirty-six months' probation (R. 66:16). The terms of the probation included serving six months in the Washington County Jail, during which time defendant was "to take each and every class available" (R. 66:17). The court specifically told defendant "[i]t is essential that before you are released from Washington County Jail, you will take and complete the Life Skills course offered by that facility. I want you to take everything you can get your hands on, but that one definitely" (R. 66:19). Defendant was also ordered to undergo a medical evaluation and to take any medications prescribed to meet his psychological needs (R. 66:17). In conclusion, the trial court stated: "When you get back to jail, get to work. Use your time productively. Get on some medication, because if you do anything silly at this jail, I'll change my mind and [the review hearing in] December won't be a good time" (R. 66:21).

At a review hearing held January 6, 1999, the State presented the trial court with a progress/violation report and a motion for an order to show cause from the probation department (R. 76:3). The progress/violation report stated that defendant "has disregarded the rules and regulations of the Jail" and, as a result, "has been placed in lockdown on at least seven occasions" (Report at 2). It further stated that defendant "had the opportunity and time to complete [the Life Skills] program and chose to continuously violate the jail rules which placed him into the position to be locked down" (Report at 2).

The Affidavit in Support of Order to Show Cause identified defendant's failure to complete the Life Skills program as the probation violation at issue (Aff. in Support at 2).

At the January 6, 1999 hearing, the trial court issued the requested order to show cause and set the matter for hearing on January 13, 1999 (R. 76:3; Order to Show Cause at 1-2). Defendant, however, indicated that he wanted to settle the matter at the present hearing and admitted that he had violated the term of his probation requiring completion of the Life Skills class during his incarceration (R. 76:3-4). As defendant's counsel explained, defendant did not complete the class because he had been subjected to lock-downs while in jail "because of some behaviors he had there" (R. 76:6). Defendant did not challenge the information provided in the progress/violation report or the Affidavit in Support of Order to Show Cause (R. 76).

Based on defendant's conduct, the trial court revoked defendant's probation and ordered that the stay on defendant's prison sentence be lifted (R. 76:6).

SUMMARY OF ARGUMENT

Defendant's challenge to the trial court's probation revocation order must fail. His claim that notice of the revocation hearing was deficient fails where the trial court offered defendant additional time to prepare and defendant rejected that offer. His claim that the trial court should have required the State to present evidence of a probation violation fails because defendant himself admitted the violation. Finally, his claim that the trial court failed to consider whether defendant's violation was willful fails because defendant never

raised that issue below and because the record clearly supports the finding that defendant's conduct was willful.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN REVOKING DEFENDANT'S PROBATION WHERE DEFENDANT WAIVED HIS RIGHT TO A FUTURE HEARING ON THE MATTER AND ADMITTED, WITHOUT OBJECTION, TO VIOLATING THE TERMS OF HIS PROBATION

Defendant asserts that the trial court erred in revoking his probation because he "was not given proper notice" of the motion for order to show cause why his probation should not be revoked. *Aplt. Br. at 6.* He further asserts that the trial court erred in failing to require the State to prove a probation violation by a preponderance of the evidence. *See Aplt. Br. at 7.* Finally, defendant claims that the trial court erred because it "failed to make findings of fact" and it failed to "inquire into the 'wilfulness' of [defendant's] alleged violation." *Aplt. Br. at 7-9.*

- A. Defendant waived any right to "proper notice" of his probation revocation hearing when he declined the trial court's offer to set the matter for hearing at a future date and indicated that he preferred to have the matter addressed immediately.**

Section 77-18-1(12) of the Utah Code sets forth the procedure which a trial court must follow to initiate a probation revocation proceeding. *See Utah Code Ann. § 77-18-1(12) (1999).* Once a trial court determines there is probable cause to believe a violation has occurred, the trial court "shall cause to be served on the defendant . . . an order to

show cause why his probation should not be revoked.” *Id.* § 77-18-1(12)(b)(ii). “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.” *Id.* § 77-18-1(12)(c)(i).

Here, defendant claims that the trial court erred in revoking defendant’s probation at the January 6, 1999 hearing “because appellant was not given proper notice” and because “[t]here is no waiver from appellant of time in which to prepare for an order to show cause and return to court at another date for the revocation [hearing].” *Aplt. Br.* at 6. However, the record discloses that defendant in fact affirmatively waived his right to formal notice of the revocation proceeding and his right to additional time to prepare for a revocation hearing when he declined the court’s offer to set the matter for future hearing and asked the court to consider the issue when it was first raised. Thus, any error on the trial court’s part was invited, and defendant cannot now raise the error on appeal.¹

The “invited error” doctrine provides that “a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.” *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993). Thus, any error that occurs after the trial court has given the defendant “ample opportunity” to exercise his rights and the

¹Defendant’s assertion that he “did not receive written notice of the ground upon which revocation was sought,” *Aplt. Br.* at 6, is belied by the record. *See* R. 76:3 (discussing delivery of copy of progress/violation report and motion for order to show cause to defense counsel). Despite his claim otherwise, *see Aplt. Br.* at 6, both the progress/violation report and the order to show cause are included in the record. *See* Sealed Envelope.

defendant has “failed to do so,” is invited error which will not be addressed on appeal. *State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996) (finding invited error where “the trial court gave defendant ample opportunity to object to jury instruction 27, and he failed to do so”); *see also State v. Parsons*, 781 P.2d 1275, 1284-85 (Utah 1989) (refusing to reach issue under “invited error” doctrine where defendant was “alleging on appeal prejudicial error which was affirmatively, knowingly, and intentionally waived at the sentencing proceeding”).

In this case, the trial court was presented with a progress/violation report at defendant’s January 6, 1999 review hearing (R. 76:3; Report). After reviewing the report, the trial court ordered that an order to show cause should issue and that the matter would be set for hearing on January 13, 1999 (R. 76:3; Order to Show Cause). Thus, the trial court followed the proper procedures under section 77-18-1(12). However, defendant then indicated that he wanted to settle the matter at the present hearing (R. 76:3). In doing so, defendant waived any right he had to service of formal notice of the revocation hearing or additional time to prepare for such hearing.

Because defendant invited the very error he now claims occurred, this Court should refuse to address it.

B. The State has no duty to present evidence of a probation violation where defendant admits the violation at his revocation hearing.

Defendant claims that the trial court erred in failing to require the State to carry its burden of proving, by a preponderance of the evidence, that defendant violated his probation. *See* Aplt. Br. at 7.

However, defendant cites to no authority requiring the State to affirmatively prove a probation violation that defendant himself admits. *See* Utah R. App. P. 24(a)(9) (providing that argument section of appellant's brief must "contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on"); *see also State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (holding that "rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority"); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) (holding that brief "must contain some support for each contention"). Thus, this Court should decline to reach defendant's claim. *See Wareham*, 772 P.2d at 966 (refusing to address claim on appeal where defendant's brief "wholly [lacked] legal analysis and authority to support his argument"); *State v. Bryant*, 965 P.2d 539, 548-549 (Utah App. 1998) (same); *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992) (same).

Moreover, defendant here admitted that he had failed to complete the term of his probation requiring completion of the Life Skills class while in jail (76:3-4). In addition, although he had been warned by the court at the time he was originally sentenced that

misbehavior in jail could result in the revocation of his probation, defendant admitted that he had failed to complete the class because he had been placed in lock-down several times for breaking jail rules (R. 76:6). This evidence was sufficient to establish by a preponderance of the evidence that defendant had committed a probation violation. The State therefore had no duty to present additional evidence on that issue. *See Utah Code Ann. § 77-18-1(12)(ii)* (“*If defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.*” (emphasis added)).

C. The transcript of defendant’s probation revocation hearing is sufficient to conclude that the trial court found, by a preponderance of the evidence, that defendant wilfully violated the terms of his probation.

To revoke a defendant’s probation, a trial court must find both that a probation violation has occurred and, as a general rule, that the violation was willful. *See State v. Archuleta*, 812 P.2d 80, 83 n.5 (Utah App. 1991); *State v. Hodges*, 798 P.2d 270, 275 (Utah App. 1990).

1. Specific findings are not required where the evidence supporting revocation is undisputed.

Section 77-18-1(12)(e)(i), which address probation revocation hearings, requires only that the trial court “shall make findings of fact” to support its decision. This Court has interpreted that provision as requiring only that the record disclose “the evidence relied on and the reasons for revoking probation.” *See Hodges*, 798 P.2d at 274. *Cf. Morishita v. Morris*, 702 F.2d 207, 210 (10th Cir. 1983) (holding that written findings are

necessary “only if the transcript and record before the judge do not enable a reviewing court to determine the basis of the judge’s decision to revoke probation”).

Here, the evidence presented at defendant’s probation revocation hearing was provided solely by defendant and was undisputed. Under such circumstances, the record adequately discloses both “the evidence relied on and the reasons for revoking probation.” *See Hodges*, 798 P.2d at 274. Thus, the trial court did not err in failing to make specific findings concerning its revocation decision.

- 2. The record supports a finding of willfulness where report indicated defendant was capable of completing treatment program, where defendant was warned to behave in jail and where it was his misbehavior that led to an inability to complete the Life Skills class.**

Defendant also claims that the trial court failed to “inquire into the ‘wilfulness’ of [defendant’s] alleged violation.” *Aplt. Br.* at 6. However, the trial court had no duty to inquire into the willfulness of defendant’s violation where his willfulness was evident on the record.

- a. Defendant waived this claim by failing to raise it below.**

“A general rule of appellate review in criminal cases in Utah is that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim on appeal.” *State v. Tillman*, 750 P.2d 546, 551 (Utah 1988). “One of the primary reasons for [this rule] is to assure that the trial court has the first opportunity to address a

claim that it erred.” *State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1992). Thus, “[t]he objection must be specific enough to give the trial court notice of the very error of which counsel complains.” *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998) (citation and internal quotation marks omitted). Otherwise, “that issue is not properly preserved for appeal.” *State v. Larsen*, 865 P.2d 1355, 1363 n.12 (Utah 1993)); Utah R. Crim. P. 20.

Here, defendant never asked the trial court to consider whether defendant’s probation violation was willful. Thus, he has waived that claim for purposes of appeal. *See State v. Jameson*, 800 P.2d 798, 801 (Utah 1990) (holding that failure to raise claim at probation revocation hearing constitutes waiver).

b. The undisputed evidence demonstrates that defendant’s conduct was willful.

In any case, the record clearly supports a finding that defendant’s violation was willful. As stated above, to revoke a defendant’s probation, a trial court must find both that a probation violation has occurred and, as a general rule, that the violation was willful. *See State v. Archuleta*, 812 P.2d 80, 83 n.5 (Utah App. 1991); *State v. Hodges*, 798 P.2d 270, 275 (Utah App. 1990). However, “[a] finding of wilfulness merely requires a finding that the probation did not make bone fide efforts to meet the conditions of his probation.” *State v. Maestas*, 2000 UT App 22, ¶ 24, 388 Utah Adv. Rep. 35 (quoting *State v. Peterson*, 869 P.2d 989, 991 (Utah App. 1994) (quoting *Archuleta*, 812 P.2d at 84)), *cert. denied*, 4 P.3d 1289 (Utah 2000). In the context of a probation

violation, “‘willful’ . . . does not mean ‘intentional.’” *Id.* (citations and internal quotation marks omitted).

At defendant’s original sentencing, the trial court addressed defendant’s troublesome behavior at the prison while he was undergoing a pre-sentence psychiatric evaluation (R. 66:12-13). Specifically, the trial court placed defendant on probation but warned him that “if you do anything silly at this jail, I’ll change my mind and [the review hearing in] December won’t be a good time” (R. 66:21). Thus, defendant was put on specific notice that failing to behave in jail could result in the revocation of his probation. *Cf. Hodges*, 798 P.2d at 277 (suggesting that failure to follow rules after being told that probation depended upon it was evidence of willfulness); *see also State v. Ruesga*, 851 P.2d 1229, 1232 (Utah App. 1993) (holding that failure to sign probation agreement after trial court warned that defendant either signed or went to jail, could serve as basis for revocation).

Defendant nonetheless misbehaved while in jail at least seven times, and, as a result, did not complete the Life Skills class that was a term of his probation (Progress/Violation Report at 1). This evidence—to which defendant offered no rebuttal—is sufficient to establish both that defendant had violated his probation and that the violation was wilful. *See Jameson*, 800 P.2d at 804 (holding that evidence that defendant failed to cooperate with therapists at treatment center where completion of program was term of probation was sufficient to support revocation where only evidence

presented by defendant “was his testimony that he made a good faith attempt to complete his program and only refused to participate in certain aspects of his therapy”).

The willfulness of defendant’s misbehavior is further supported by defense counsel’s statements at defendant’s original sentencing. There, counsel acknowledged: “I understand he *messed up* [by misbehaving] while he was there [for the psychiatric evaluation]. He certainly *should not have* breached any of the rules down there” (R. 66:12-13 (emphasis added)).

Finally, because defendant failed to present *any* evidence to support a contention that his violation was not done willfully, his case is distinguishable from *Hodges*, the case upon which he relies. In *Hodges*, as here, defendant failed to complete a treatment program that was included as a term of his probation. However, in *Hodges*, although there was “some evidence to support a finding that appellant willfully violated the conditions of his probation, [the record] also strongly suggest[ed] that appellant’s probation was revoked because of problems not within his control.” *Hodges*, 298 P.2d at 275. Here, there was no evidence that defendant’s probation violation was caused by “problems not within his control.” Thus, the record supports the trial court’s finding that defendant’s violation was willful.

Consequently, defendant’s claim fails.

CONCLUSION

In light of the foregoing, the State respectfully asks this Court to affirm the trial court's probation revocation order.

RESPECTFULLY SUBMITTED 11 September 2000.

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CERTIFICATE OF MAILING

I certify that on 11 September 2000, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this **BRIEF OF APPELLEE** to Kenneth L. Combs, Sherri Palmer & Associates, 285 West Tabernacle, Suite 306, St. George, Utah 84770, Attorney for Appellant.

Karen A. Klucznik

Addendum A

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 mali-

cious 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.