

1999

# Utah v. Christopher Cannoles : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jan Graham; Office of the Attorney General; Attorney for Appellee.

Kenneth L. Combs; Sherri Palmer and Associates; Attorney for Appellant.

---

## Recommended Citation

Brief of Appellant, *Utah v. Cannoles*, No. 990085 (Utah Court of Appeals, 1999).

[https://digitalcommons.law.byu.edu/byu\\_ca2/2021](https://digitalcommons.law.byu.edu/byu_ca2/2021)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,  
Plaintiff and Appellee

v.s.

CHRISTOPHER CANNOLES,  
Defendant and Appellant

**BRIEF OF APPELLANT**

Case No. 990085-CA

Priority No. 02

---

**BRIEF OF APPELLANT**

Appeal from a sentence after revocation of probation for: Receiving Stolen Motor Vehicle, a Second Degree Felony; in the Fifth Judicial District Court in and for Washington County, State of Utah, the Honorable James L. Shumate, Judge, presiding.

**JAN GRAHAM**

Office of the Attorney General  
160 East 300 South - 6th Floor  
P.O. Box 140854-0854  
Salt Lake City, UT 84114-0854

Attorney for Appellee

**KENNETH L. COMBS, #7486**  
**SHERRI PALMER & ASSOCIATES**  
285 W. Tabernacle, Ste #306  
St George, UT 84770

Attorney for Appellant

**FILED**

Utah Court of Appeals

JUN 10 2000

Julia D'Alesandro  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,  
Plaintiff and Appellee

v.s.

CHRISTOPHER CANNOLES,  
Defendant and Appellant

**BRIEF OF APPELLANT**

Case No. 990085-CA

---

**BRIEF OF APPELLANT**

Appeal from a sentence after revocation of probation for: Receiving Stolen Motor Vehicle, a Second Degree Felony; in the Fifth Judicial District Court in and for Washington County, State of Utah, the Honorable James L. Shumate, Judge, presiding.

**JAN GRAHAM**  
Office of the Attorney General  
160 East 300 South - 6th Floor  
P.O. Box 140854-0854  
Salt Lake City, UT 84114-0854

Attorney for Appellee

**KENNETH L. COMBS, #7486**  
**SHERRI PALMER & ASSOCIATES**  
285 W. Tabernacle, Ste #306  
St George, UT 84770

Attorney for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....2

JURISDICTIONAL STATEMENT.....3

STATEMENT OF THE ISSUES.....3

STANDARDS OF REVIEW.....4

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.....4

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS.....4

STATEMENT OF THE FACTS.....4,5

SUMMARY OF THE ARGUMENT.....5

ARGUMENT

    POINT I.    DID THE COURT ERR IN SENTENCING  
                  APPELLANT TO THE UTAH STATE PRISON?.....5-10

CONCLUSION.....11

ADDENDUM STATEMENT.....11

**TABLE OF AUTHORITIES  
CITES**

	<u>Page</u>
<u>Baine v Beckstead</u> , 347 P.2d 554, 559 (1959)	6,7
<u>State v Bonza</u> , 150 P.2d 970 (1944)	7
<u>State v Cloud</u> , 722 P.2d 750, 752 (Utah 1986)	4
<u>State v Cowdell</u> , 626 P.2d 487 (1981)	4,6
<u>State v Hodges</u> , 798 P.2d 270 (Utah App. 1990)	8-10
<u>State v Verde</u> , 770 P.2d 116, 120 (Utah 1989)	4
<u>Anders v California</u> , 386 U.S. 738 (1967)	5
<u>Bearden v Georgia</u> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)	8
<u>Gagnon v Scarpelli</u> , 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)	9

**JURISDICTIONAL STATEMENT**

The Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(e) Utah Code Ann. 1953, as amended.

**STATEMENT OF THE ISSUES**

1. Did the court err in sentencing Appellant to the Utah State Prison?

## STANDARD OF REVIEW

The standard for review concerning evidentiary rulings and sentencing is abuse of discretion standard. State v Cloud, 722 P.2d 750, 752 (Utah 1986). Further, the decision to revoke probation is a discretionary matter. State v Cowdell, 626 P.2d 487 (1981). There is abuse of discretion where there is harmful error. State v Verde, 770 P.2d 116, 120 (Utah 1989).

## STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Page

Section 77-18-1 (12)(e) of the Utah Code of Criminal Procedure 9

## STATEMENT OF THE CASE

On March 12, 1998, Appellant pled guilty to the offense of Receiving Stolen Property, a vehicle, a Second Degree Felony. On July 29, 1998 and after a diagnostic evaluation the Court sentenced Appellant to the Utah State Prison for 1-15 years but stayed the sentence placing Appellant on 36 months supervised probation. An order to show cause was filed against Appellant alleging several violations. On Jan. 6, 1999 the court sentenced Appellant to the Utah State prison.

## STATEMENT OF FACTS

On March 12, 1998, Appellant pled guilty to the offense of Receiving Stolen Property,

a vehicle, a Second Degree Felony. T. 65. On July 29, 1998 and after a diagnostic evaluation the Court sentenced Appellant to the Utah State Prison for 1-15 years but stayed the execution of the sentence placing Appellant on 36 months supervised probation. T. 66. Two of the conditions of probation was that appellant be incarcerated for 6 months and then that he complete a Life Skills course during his incarceration. T. 66 pgs 16 & 19. A progress violation and motion for order to show cause was prepared against Appellant alleging that Appellant committed the violation of failure to complete the Life Skills course. T. 76. On April 6, 1999, the appellant admitted the violation and the court revoked the probation and sentenced Appellant to the Utah State prison. T. 76.

Appellant appeals from the entire judgment of the court.

### **SUMMARY OF THE ARGUMENT**

The issue raised by Appellant was previously, in counsel's opinion, without merit, and accordingly, counsel filed an Anders brief. This court struck the brief upon the State's motion. Upon counsel's reevaluation of the case it is his opinion that an Ander's brief should not be filed herein.

The trial court erred in sentencing the appellant to the Utah State prison because the court failed to afford appellant due process and failed to make findings of fact (and the record was otherwise inadequate), and the court revoked appellant's probation erroneously.

### **ARGUMENT**

#### **POINT I. DID THE COURT ERR IN SENTENCING APPELLANT TO THE**

## UTAH STATE PRISON?

Yes. The court erred in sentencing appellant to the Utah State prison because the court failed to make findings of fact (and the record was otherwise inadequate), and the court revoked appellant's probation erroneously. The court in Baine v Beckstead, 347 P.2d 554, 559 (1959) held that a defendant is not to be accorded all of the procedural states given him in his underlying criminal case prior to receiving probation. However, once on probation the defendant should not be deprived of such status "upon whim or caprice" and that he should be given the procedural protection of notice, an opportunity to answer and the privilege of being heard and to cross-examine. Probation programs came about due to the idea that some convicted of a crime had some "social maladjustment", and so it is important not to set the probationer up to fail and to treat him fairly. Using the language of the Baine court id at 559:

A drunk man is just as much entitled to a safe sidewalk as a sober one, and a good deal more in need of it.

In State v Cowdell, 626 P.2d 487 (1981) the defendant was served with an order to show cause while still incarcerated alleging that he had violated a condition of his probation by committing aggravated robbery. The defendant denied the allegation. The trial court noted in the record that the substance of the arrest of aggravated robbery had no influence on the court's decision to revoke probation. The court then revoked his probation for driving under the influence of alcohol which was not mentioned in the order to show cause. The Cowdell court reversed holding that the defendant did not received proper notice of the allegations of his probation violation. Id at 489. The court went on to consider defendant's contention of lack of notice due to not knowing the time of the occurrence of the alleged criminal act, and the Cowdell court found merit in said contention. In the instant case, appellant, on April 6, 1999,

was given notice that he had violated his probation by failing to complete the Life Skills program during the time of his six month incarceration to which he made an admission. T. 76 pg 3 Ln 22 - 25; pg 4 Ln 1 - 6. Appellant did not receive written notice of the ground upon which revocation was sought as dictated by the court in State v Bonza, 150 P.2d 970 (1944). He came to court expecting to be released from jail to travel to Colorado as noted in the Court minutes. Rec. 47 & 48. Instead of being released the appellant heard for the first time that a violation report (or motion for order to show cause) had been filed alleging he had violated probation for failure to complete the Life Skills program. T. 76 pg 3 Ln 6 - 25. Interestingly, there is no where in the record a violation report or order to show cause, and appellant was not served with said order to show cause. Notice was particularly crucial here since appellant had no expectation prior to court on April 6, 1999, of having his probation revoked and being committed to the Utah State prison. He expected to be released to travel to Colorado. The court erred in sentencing appellant because appellant was not given proper notice as stated in the Bonza decision. Further, the court failed to obtain from appellant a waiver of the filing and service upon himself of an order to show cause. There 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 here. There can be no waiver where appellant was not advised by the court of these rights and other procedural rights afforded a probationer as held by the Baine court. Id at 557. The court erred by failing to adequately advise the appellant of his rights and by failing to obtain a waiver of those rights prior to proceeding.

Although appellant admitted the allegation, it was explained to the court that the reason for the failure to complete the Life Skills program was because appellant was "locked down" in jail on numerous occasions. T. 76 pg 4 Ln 14 - 19; pg 6 Ln 1 - 5. The court did not inquire

as to whether appellant's admission was made upon his expectation that the court would follow the state's recommendation to revoke and restart the probation for an additional 6 months incarceration, T 76 pg 5 Ln 8 - 17 nor did the court inquire into the "wilfulness" of appellant's alleged violation as required by Bearden v Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). Eventhough appellant admitted the violation of failure to complete the life skills - program the court had insufficient evidence to revoke appellant's probation. Admission alone, without the corpus, has long been recognized as insufficient grounds for conviction of a crime. Even in a probation revocation hearing more than an admission is required. The state had the burden of proving the violation by a preponderance of the evidence. State v Hodges, 798 P.2d 270 (Utah App. 1990). The state failed to meet its burden in light of the other information the court had available to it at the "revocation hearing": the fact that appellant had been lockdowned numerous times during the jail period and the fact that appellant's 6 month jail period had not been concluded. On July 29, 1998, the court, in placing appellant on probation, made it a condition of his probation to be incarcerated in jail (without credit for time served) for a period of 6 months - T. 66 pg 16 Ln 23 - 25 and to complete, prior to release from jail, the Life Skills course. T. 66 pg 19 Ln 3 - 9. The probationer is entitled to be "clearly and accurately apprised of the expectations for remaining on probation". State v Hodges, 798 P.2d 270, 277 (Utah App. 1990). Here, appellant was not clearly and accurately apprised of what was expected. On April 6, 1999, he came to court expecting to be released to Colorado; instead he got a quick trip to the Utah State prison. Being locked down prevented appellant from completing the Life Skills course. There was insufficient evidence that the appellant willfully failed to complete the course. On the contrary it was shown to the court that appellant was prevented from completing the course due to his lockdowns. Even if the court had found

willfulness in failing to complete the course the fact is the appellant did not fail to complete the Life Skills course during his 6 month jail incarceration. Appellant was placed in the jail as a condition of his probation on July 29, 1998; his probation was revoked on April 6, 1999. Appellant still had at least 3 weeks to complete his Life Skills course at the time he was sent to prison. Additionally, appellant had been led to believe by the court on Dec. 2, 1998 and Jan. 4, 1999 that he would be released to go to Colorado as shown by the court minutes. Rec. 47 & 48. There had been no mention of the Life Skills course requirement during those two hearings. Although the court received appellant's admission of the violation the duty of the court extended much further; at least, to hold the state to its burden of proof. Inquiry into the reason and/or basis for appellant's admission may have assisted the court in its determination. The court erred by revoking and sentencing appellant without the state having met its burden of proof.

Finally, the court is required to make a written statement as to the evidence relied on and the reasons for revoking probation. Gagnon v Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). See also Section 77-18-1(12)(e) of the Utah Code of Criminal Procedure. The court utterly failed to make the written findings and reasons for revocation here. The court in State v Hodges Id at 274 held that written findings are not required in every probation revocation; however, the court held that the record and transcript must still satisfy the Gagnon requirement. In the instant case the transcript and record are woefully deficient and do not come close to satisfying the Gagnon requirement. The court received the appellant's admission, heard explanations for the failure to complete the course, heard the parties sentencing recommendation and then engaged in the following dialogue with state's counsel:

MR. LANGSTON:

...But that we didn't put in that the condition for probation is that he obey the jail rules. So the only probation violation we do have is the fact that he did not complete the Life Skills Course as ordered.

Also, to bring the court up to date, the defendant was ordered before to try to compact with Wisconsin.

THE COURT: That failed.

MR. LANGSTON: That failed. They refused to accept him. Also, his parents who he began to reside with are moving to Denver, Colorado, I believe, later this month.

THE COURT: That was my understanding.

T. 76 pg 4 Ln 20 - 25; pg 5 Ln 7.

Then, a few minutes later, the court stated:

All right. Mr. Cannoles, you do understand that while you are in jail you have to follow the jail rules? I cannot imagine how you are going to do in Colorado there.

The previous state of sentence in this matter is ordered lifted. Mr. Cannoles, I am going to let you do out your time in prison and go to Colorado after you are out on parole. That is the order.

T. 76 pg 6 Ln 6 - 13.

There is no way to ascertain what the court's findings were and specifically whether the court was relying on appellant's alleged failure to comply with jail rules (which was not a specific condition of probation), alleged failure to compact to Colorado or alleged failure to complete the Life Skills course even though the time for completion of the course had not expired. Interestingly, there was no evidence as to the length of time that would be required to complete the Life Skills course in jail. The chief purpose of findings of fact, whether separately written or found in a transcript, is to enable a reviewing court to accurately determine the basis for the trial court's decision. Hodges at 274. The court erred by failing to make written findings.

**CONCLUSION**

For the reasons herein alleged, the Appellant was denied a fair trial in Case No. 981500241, and the judgment and sentence should be set aside and Appellant should be granted a new trial.

**ADDENDUM**

Please see Addendum

DATED on this the 10th day of June, 2000.

  
\_\_\_\_\_  
SHERRI PALMER & ASSOCIATES  
By: Kenneth L. Combs  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief has been served on the Office of the Attorney General and Appellant by delivery of a true copy via regular mail on the 10th day of June, 2000.

  
\_\_\_\_\_  
KENNETH L. COMBS

## ADDENDUM NO. 1

Section 77-18-1(12)(e) of the Utah Code of Criminal Procedure:

- (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.