2010

State of Utah v. Andrew C. Brooks : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. ANDREW C. BROOKS, Defendant/Appellant.	Case No. 20100335-CA

REPLY BRIEF OF THE APPELLANT

Appeal from a judgment of conviction for Unlawful Sex Activity with a Minor, a Third Degree Felony, in violation of Utah Code Ann. § 76-5-401, in the Second Judicial District Court, State of Utah, the Honorable Ernie W. Jones, Judge, presiding.

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INTRODUCTION

Defendant replies to several points made by the State in its brief. First, he contends that contrary to the State's assertions, his probation was in fact revoked because the trial court not only used the term "revoked," but that it sentenced him to punitive sanctions. Second, the defendant asserts the court failed to make either oral or written findings and that the law supports the conclusion that courts may not imply statutorily-mandated findings from the record. Finally, defendant asserts the court failed to give him a meaningful opportunity to present evidence in mitigation.

ARGUMENT

I. THE DEFENDANT'S PROBATION WAS ACTUALLY REVOKED, NOT MODIFIED.

The State contends in its brief that since "the court essentially modified and then commenced anew Defendant's probation," it relieved the court of the obligation to find that defendant's violations were willful. Appellee's Br. at 10. The State concedes that if a

defendant's probation is revoked, it is "well established" that "the court must further determine that the violation was willful." *Id.* at 9.

However, this argument neglects to consider that Mr. Brook's probation was in fact revoked in this case: "... what I'll do is ***revoke*** and restart his probation ..." R. 80:12 (emphasis added). While true that the effect of Mr. Brook's revocation was the *eventual* reinstatement of his probationary term, the court nonetheless entered a formal revocation of probation and imposed additional sanctions on the defendant.

The statute does not distinguish, as the State does, between an implied modification of probation and an actual revocation. It says simply that "[p]robation may not be ***revoked*** except upon a hearing in court and a finding that the conditions of probation have been violated." Utah Code Ann. § 77-18-1(12)(a)(ii) (emphasis added).

The statute clearly contemplates a difference in terminology between revocation and modification. The following passage illustrates this point:

> (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.

Id. at (12)(e) (emphasis added). In subsection 12(e)(ii), if a defendant violates probation, the court may "order the probation revoked, modified ...." *Id.* at 12(e)(ii). Under pure statutory construction, the terms "revoked" and "modified" modify the term "probation." If the court wishes to modify probation, then it would not be able to impose a jail or prison commitment, since those sanctions do not modify the probation. But if a court

were to revoke the probation, then according to subsection 12(e)(iii), the court may then sentence the defendant accordingly, in which case a jail or prison commitment would be appropriate.

In this case, the court did not merely extend or modify Mr. Brooks' probation, as the State contends. The court resentenced the defendant, as section (12)(e)(iii) contemplates after a revocation, and imposed 90 to 365 *additional* days in jail after which time, Mr. Brooks would be allowed to continue his probation. R. 80:12. The court chose to use the term revoke, which carries significance.[1] This was not a simple modification and new commencement of probation—it was a revocation of probation, an imposition of jail time, and a reinstatement of probation following the sanction.[2]

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[1] Black's Law Dictionary defines "revocation" as "The recall of some power, authority, or thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void." Black's Law Dictionary 1484 (4th ed. rev. 1968). The loss of defendant's freedom would certainly qualify as a "recall of some ... thing granted." *Id.*

[2] Additionally, the State relies on *State v. Orr*, 2005 UT 92, 127 P.3d 164 for the proposition that if probation is not revoked, then the court retains no obligations to find that a violation is willful. Appellee's Br. at 10-11. In *Orr*, the Court addressed the narrow question of whether "a defendant in a probation *extension* proceeding is entitled to the same rights as a defendant in a probation *revocation* proceeding." *Id.* at ¶ 13. The trial court in *Orr* did actually enter written findings, something that did not happen in this case. *Id.* at ¶ 27. The Court said that since the statute did not explicitly require a finding of willfulness, the Court looked to whether due process required such a finding. *Id.* at ¶ 28. As to the due process question, the Court declined to address whether due process required a finding of willfulness because it concluded the trial court in that case made sufficient findings of willfulness under a revocation of probation standard. *Id.* at ¶ 35-37. Thus, in *Orr*, the Court did not address the due process question, which defendant asserts here. Additionally, the State concurs with defendant's assertion that if an actual revocation, and not a modification, occurred, then the Court would need to make a finding of willfulness. Appellee's Br. at 9.

The State's argument contemplates a scenario in which a defendant willfully violates the conditions of probation, and the court simply decides to continue the probationary period, but with additional or different conditions. The State's argument does not apply when the court imposes a punitive sanction, like a jail commitment and subsequently resentences the defendant, as happened here.

II. THE COURT MUST MAKE FORMAL FINDINGS OF FACT, EITHER ORAL OR WRITTEN, WHICH IT FAILED TO DO IN THIS CASE

At no point in this case did the trial court make any express findings, either written or oral. Defendant would concede that if the trial court had made oral findings in this case, then a due process violation would not exist. *See State v. Peterson*, 869 P.2d 989 (Utah Ct. App. 1994) (trial court's oral findings were sufficient). The State contends that the trial court's findings do not need to be express, so long as "they are implied by the proceedings." Appellee's Br. at 13. However, the State has no direct authority for this proposition.

First, in the *Peterson* case, the trial court actually entered oral findings on the record, something lacking in this case. *Peterson*, 869 P.2d at 991. The State cites *Morishita v. Morris*, 621 P.2d 691 (Utah 1980) for the proposition that implied findings

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Also, the State uses the order to show cause affidavit as support for an implied finding that defendant willfully failed to comply. Appellee's Br. at 14-18. However, Mr. Brooks only admitted to one allegation in the affidavit, not to the entire affidavit. R. 46-47; 77:4. Specifically, he admitted that he failed to complete the NUCCC program. *Id.* This specific admission does not constitute an admission to all of the conduct alleged in the affidavit. The court never, in a meaningful way, attempted to clarify which of these violations defendant admitted and which he disputed. R. 78.

are sufficient. Appellee's Br. at 13. *Morishita* does not support this argument. *Morishita* dealt with a habeas petition, in which the defendant alleged a due process violation from the trial court's failure to make findings. *Morishita*, 621 P.2d at 692. The Court dismissed the alleged violation because it found that a habeas petition was not the proper procedure. *Id.* at 692-93. "The appropriate procedure was for plaintiff to appeal the probation revocation order. A habeas corpus proceeding is not intended as a substitute for an appeal ..." *Id.* at 693. Then, in a footnote, the court noted that the "requirement for written findings [was] inapplicable in the instant case" in part because revocation dealt with only one issue, about which the court adequately conveyed its reasoning. *Id.* at 693 n. 2. Written findings would "add nothing," the court said "in the instant case." *Id. Morishita* only stands for the limited proposition that habeas corpus is the improper avenue to challenge probation revocation findings and, as to the issue of findings, only notes that in Morishita's case specifically, the court adequately conveyed its reasoning for revocation on the sole issue. *Id.*

Additionally, *Orr* supports the argument that the trial court has an obligation to enter formal findings. "One of the minimum requirements of due process is that a defendant receive a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation." *State v. Orr*, 2005 UT 92 at ¶ 30 (quoting *Black v. Romano*, 471 U.S. 606, 612, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985); *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); *United States v. Gilbert*, 1995 U.S. App. LEXIS 33744, 7-8 (10th Cir. Dec. 4, 1995) (unpublished opinion)) (internal quotations omitted).

The written statement allows courts a "basis for review" and "encourage[s] accurate factfinding." *Id.* at ¶ 31. A "***transcribed oral finding*** or ***district court order*** is sufficient to meet that requirement so long as it enables the reviewing court to determine the basis of the district court's decision." *Id.* (citing *Gilbert*, 1995 U.S. App. LEXIS 33744; *Morishita v. Morris*, 702 F.2d 207, 210 (10th Cir. 1983) (holding that "written findings" are required only if the transcript and record do not allow a court to determine the basis for the revocation); *Morishita*, 621 P.2d 691, 693 n. 2 (Utah 1980) (emphasis added). No oral finding occurred in this case, nor did the court make an order sufficient to qualify as a finding.

Courts clearly will find that an oral finding will be sufficient, so long as there is a basis on the record to enable the appellate courts to understand the basis for the court's decision. But these decisions do not stand for the proposition that courts may imply the findings themselves from the record. Courts may imply the reasoning, (i.e. a finding of willfulness or other rationale), behind the findings, but the findings themselves still need to occur explicitly. *See* Utah Code Ann. § 77-18-1(12)(e)(i) ("After the hearing the court *shall* make findings of fact.") (emphasis added).

Since the trial court failed to make any explicit findings, either written or oral, it improperly revoked the defendant's probation in violation of both the statute and due process.

III. THE DEFENDANT DID NOT HAVE A TRUE OPPORTUNITY TO PRESENT EVIDENCE TO MITIGATE A FINDING OF WILLFULNESS

The State contends that "at each instance in which the trial court cited a breach of a probation condition Defendant was given an opportunity to respond." Appellee's Br. at 21. The record does not support this assertion.

The transcript of this proceeding consists of nine pages of discussion. R. 78. For the first two pages, defendant's attorney speaks, and then the defendant gives a one-paragraph statement in which he acknowledged breaking the rules but asked the court to consider probation. R. 78:3-5. The remaining pages consist of the court speaking almost the entire time, with one-sentence responses from the defendant. R. 78:5-13. Of 181 lines of transcript, the trial court's commentary takes up 129 lines or 71% of the space. The defendant's comments take up 41 lines or 23% of the space. The defendant's attorney used 11 lines or 6% of the space. R. 78:5-13. The defendant used 12 of his 41 lines for the following statements: "No, Your Honor." R. 78:6:16, 7:5, 8:20, 13:6; "Yes, sir." R. 78:7:12 10:5; "Yes, Your Honor." R. 78:7, 8:3, 8:10, 11:18; "That's true." R. 78:8:23; "That's totally untrue." R. 78:10:22. If these twelve statements were removed from the record, as they failed to constitute a meaningful attempt to present evidence in mitigation, the defendant's statements accounted for 16% of the discussion. The trial court's commentary would constitute 76% of the statements made.

A thorough reading of the transcript shows that the defendant, when he did speak, was only allowed to perfunctorily respond, and when he did, the court interrupted him. R.

78:7:8, 9:20, 10:19. Additionally, the majority of the transcript reflects lengthy statements by the court, to which the defendant had little or no opportunity to respond.

> THE COURT: Mr. Brooks, when I first looked at this recommendation, I thought to myself, well, this—this seems to be kind of the old slap on the wrist. My impression is you're totally out of control. You really are. And I know you're concerned about your mother. I know you're concerned about your family. But do you know what? If you don't get your life in order, you don't have to worry about any of those things because you're going to just end up at the prison. You know, I can tell you, people who are on probation for sex offenses, for some reason they have such a difficult time. I don't know what there is about it, but they are the hardest group of people for the probation department to work with. I don't know if you're aware of the fact, but one-third of all of the people now at the Utah State Prison, one-third are there for sex offenses. And I, you know, I just—I mean, I look at this report and my initial reaction was why on earth are they going to give you another chance. I mean, you're—you're [sic] track record on probation is not very good, is it?

R. 78:5-6.[3]

The State cited a relevant colloquy in its brief in which the court confronted the defendant about images on a cell phone, the defendant denies it in a sentence and the court tells defendant that this showed defendant's attitude that "I don't really care about what the judge does." Appellee's Br. at 22-23 (citing R. 78:7-8).

The court also had this to say:

> THE COURT: And then I get this note here, I guess in January of this year they tried to handle this as an alternative event, right? Where they don't even come close to court, the probation department tries to work with you, try to do

[3] The defendant, in his initial brief, said that this statement "equated [defendant] with all other sex offenders ..." Appellant's Br. at 16. The State called this statement a "mischaracterization of the proceedings" and asserted that the court's statement was "more likely intended to impress Defendant that he, unlike probationers in general, needed to be especially assiduous in his rehabilitation to avoid failure ..." Appellee's Br. at 23. Defendant continues to assert that the court's comment implied that defendant was like all other sex offenders, who were "the hardest group of people for the probation department to work with." R. 78:6.

something, apparently you take the agreement, the waiver, and cross out some of the terms. I guess you've decided you're going to set the conditions for all of this, which is—and now I'm supposed to give you another chance on probation when you're telling the probation department what you will and will not do? Again, I mean, your attitude to all of this just floors me. And yet I'm supposed to think that you just go on probation again? I don't think there's anything genuine about your effort here to try to change your life or try to comply with what the probation department says. And then on top of that now we get to February, you're over at NUCCC and apparently there's a period of time where you're unaccountable?

DEFENDANT BROOKS: Just—

THE COURT: You're telling them you're in one place and you're not, like looking for a job?

DEFENDANT BROOKS: I think that the only—the only time that they have on there is when I went next door to the health food store to get something to eat for lunch.

THE COURT: Okay. But you understand, sir, when they put you in NUCCC or any program and they have these rules, you have to follow the rules. You don't set the rules; they do.

DEFENDANT BROOKS: Yes, Sir.

THE COURT: If you can't handle that, just tell me right now and we'll just send you to prison and you won't have to worry about rules other than the ones that are in the prison.

DEFENDANT BROOKS: (Inaudible)

THE COURT: But like I say, we give you opportunities, chances and you just seem to screw it up every time.

R. 78:8-10.

In short, these passages give the flavor of the court's hearing. It consisted largely of the court making long statements with the defendant giving very brief responses. The court did not, as the State contends, give "[d]efendant all the opportunity to be heard to which he was entitled." Appellee's Br. at 23. Rather, the court gave defendant an extremely limited opportunity to be heard and virtually no opportunity to mitigate the claims the court made about his alleged probation violations. "At a minimum, timely and adequate notice and an opportunity to be heard *in a meaningful way* are at the very heart of procedural fairness." *Nelson v. Jacobsen*, 669 P.2d 1207, 1211 (Utah 1983) (emphasis

added); *see also McBride v. Utah State Bar*, 2010 UT 60, ¶ 16, 242 P.3d 769 (citing *In re Worthen*, 926 P.2d 853, 876 (Utah 1996).

Defendant asserts that the court did not give him a meaningful opportunity to mitigate the claims against him and as such, violated procedural due process.

CONCLUSION

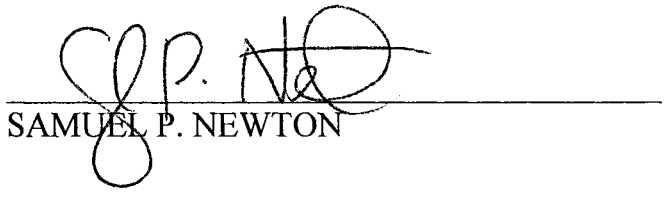
Based on the foregoing, Mr. Brooks asks this court to remand the matter for a new probation revocation proceeding.

RESPECTFULLY SUBMITTED this 13 day of May, 2011.

SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

CERTIFICATE OF SERVICE

I, SAMUEL P. NEWTON, hereby certify that I have caused to be deposited in the United States mail eight copies of the foregoing and an electronic copy to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and two copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 13 day of May, 2011.



SAMUEL P. NEWTON

MAILED a true and correct copy of the foregoing and an electronic copy to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 13 day of May, 2011.

ADDENDUM A

Transcript of Hearing

March 24, 2010

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 091900574
Plaintiff,	:	Appellate Case No. 20100335
v	:	
ANDREW C. BROOKS,	:	
Defendant.	:	With Keyword Index

SENTENCING MARCH 24, 2010

BEFORE

THE HONORABLE ERNIE W. JONES

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

APPEARANCES

For the Plaintiff: L. DEAN SANDERS
Deputy County Attorney

For the Defendant: ROY D. COLE
Attorney at Law

* * *

OGDEN, UTAH - MARCH 24, 2010

JUDGE ERNIE W. JONES

(Transcriber's note: speaker identification may not be accurate with audio recordings.)

P R O C E E D I N G S

THE COURT: Mr. Cole?

MR. COLE: Good afternoon, Your Honor, we do the sentencing on number 1 and 2, Andrew Brooks.

THE COURT: All right. State of Utah vs. Andrew Brooks, case 0103 and 0574. Did you get a copy of the pre-sentence report?

MR. COLE: I didn't, but I reviewed the State's copy, and I reviewed it with him.

THE COURT: All right. Mr. Brooks is present. Any legal reason then why we shouldn't impose sentence?

MR. COLE: No, Your Honor.

THE COURT: All right. Anything you wanted to say on this matter?

MR. COLE: There's a couple of things. He was hoping - we had filed a motion previously to review his sentence to see if he could get out on an out-patient treatment program, and unfortunately got the violation filed shortly thereafter and he's been in custody since that time. Part of the reason we were doing it is his mom is very ill and could really benefit from having him at home. I brought

a copy of a letter that I've already submitted to the State and you as part of it from Dr. Cory Ferguson, his doctor. I didn't know if you wanted another copy of that or not.

THE COURT: Okay. Sure.

MR. COLE: Also some letters of reference from his employer, John Daskalos, and...

What is the last name?

And his friend Emily Johnson and Bernie Diamond on his behalf.

I understand the recommendation is to revoke and restart. We don't have an objection to that. The recommendation further goes on to do no less than 90 days in jail and no more than 365, and then be released to NCUUU. The whole reason we were hoping for a review is because his mother is very ill and could benefit from him, having him at home. To facilitate that and make sure he doesn't have any other problems and get in any more trouble, he's more than willing to submit to the group a conditions on the sex offender program, do to ISAT and to do a GPS ankle monitor at his own expense. He's got some children out there that he's responsible for, and his mother is sick and not working and really needs him at home if it's possible. Other than that, I think it's probably a standard recommendation. Those are just kind of the things we'd be asking as possible modification of that recommendation.

THE COURT: All right. Mr. Brooks, anything you wanted to say?

DEFENDANT BROOKS: Yes, Your Honor. I know that I've definitely made some mistakes and made some really poor choices, but I am whole-heartedly trying to - to make a change and to really - I - I was working very hard. I was, you know, I - I want to be able to take care of my family and help, you know, better myself. But I truly believe that the best thing to actually help me - to help me to do these things would be to allow me to be there and help my family, help my kids and my mom. I - I understand a rule's a rule, and I've broken the rules. But I - all I want to do is get better and - and work and be able to pay my fines off. I was catching my mom's bills up, you know, I was - I was really whole-heartedly going at this and I - I felt that that place just isn't the best option for me, Your Honor. So I respectfully - I beg you to consider these options that a - that my attorney has presented.

THE COURT: All right. Does the State want to be heard?

MR. SAUNDERS: We'll submit, Your Honor.

THE COURT: Mr. Brooks, when I first looked at this recommendation, I thought to myself, well, this - this seems to be kind of the old slap on the wrist. My impression is you're totally out of control. You really are. And I know

you're concerned about your mother. I know you're concerned about your family. But do you know what? If you don't get your life in order, you don't have to worry about any of those things because you're going to just end up at the prison. You know, I can tell you, people who are on probation for sex offenses, for some reason they have such a difficult time. I don't know what there is about it, but they are the hardest group of people for the probation department to work with. I don't know if you're aware of the fact, but one-third of all of the people now at the Utah State Prison, one-third are there for sex offenses. And I, you know, I just - I mean, I look at this report and my initial reaction was why on earth are they going to give you another chance. I mean, you're - you're track record on probation is not very good, is it?

DEFENDANT BROOKS: No, Your Honor.

THE COURT: I mean, I'm looking here. We put you on probation on this sex with a minor in July of 2008. And then a year later in May of '09 we put you on probation for this evading or failing to stop for a police officer, right?

MR. COLE: I think they're reversed actually.

THE COURT: The other way around? Okay. Anyway, we put you on probation for one offense -

MR. COLE: I take that back, he says they are the same time -

THE COURT: No, I said they were different times. The sex offense was in July of '08 and then the other one was in May of '09; is that right? So we put you on probation for one offense, right?

DEFENDANT BROOKS: No, Your Honor.

THE COURT: No?

DEFENDANT BROOKS: I was sentenced on both of them at the exact same time. I have never had -

THE COURT: Maybe I misspoke. What - what happened is though one happened in '08 and the other one happened in '09?

DEFENDANT BROOKS: Yes, sir.

THE COURT: So that's what I'm trying to get at is you have two offenses in a period of maybe eight to 10 months.

DEFENDANT BROOKS: Yes, Your Honor.

THE COURT: Okay. But after we put you on probation, we have this thing where you're in possession of a cell phone which has 130 sexual images and 15 videos. I mean, you've got to be out of your mind to be on probation for a sex offense and have something like that in your possession. I guess my question is, what in the hell were you thinking about? How could you do this?

DEFENDANT BROOKS: Your Honor, I admit I was in possession of it, but the cell phone was not mine.

THE COURT: I know that. But it doesn't matter who owned it. You had it in your possession.

DEFENDANT BROOKS: Yes, Your Honor.

THE COURT: What are you doing in possession of anything of a sexual nature when you're on probation for a sex offense?

DEFENDANT BROOKS: [inaudible].

THE COURT: I mean, that's an absolute guarantee that something bad is going to happen to you, isn't it?

DEFENDANT BROOKS: Yes, Your Honor.

THE COURT: But what it tells me is that I don't really care what the judge does. I don't care what the probation department does. I'm going to keep living the lifestyle that I want. 130 images and 15 videos? I can't believe that. I mean, I just - you know, it says I just don't care. So why would you run that risk of doing that when you're on probation for this type of offense? You obviously weren't thinking about your mom. You weren't thinking about your kids, were you?

DEFENDANT BROOKS: No, Your Honor.

THE COURT: You're just thinking about yourself, right?

DEFENDANT BROOKS: That's true.

THE COURT: And then I get this note here, I guess in January of this year they tried to handle this as an

alternative event, right? Where they don't even come to court, the probation department tries to work with you, try to do something, apparently you take the agreement, the waiver, and cross out some of the terms. I guess you've decided you're going to set the conditions for all of this, which is - and now I'm supposed to give you another chance on probation when you're telling the probation department what you will and will not do, and they're trying to help you out again? And you decide, Oh, I don't want to this, I don't want to do this. And so you start lining through the agreement and you're going to tell them what you will and will not do? Again, I mean, your attitude to all of this just floors me. And yet I'm supposed to think that you just go on probation again? I don't think there's anything genuine about your effort here to try to change your life or try to comply with what the probation department says. And then on top of that now we get to February, you're over at NUCCC and apparently there's a period of time where you're unaccountable?

DEFENDANT BROOKS: Just -

THE COURT: You're telling them you're in one place and you're not, like looking for a job?

DEFENDANT BROOKS: I think that the only - the only time that they have on there is when I went next door to the health food store to get something to eat for lunch.

THE COURT: Okay. But you understand, sir, when they put you in NUCCC or any program and they have these rules, you have to follow the rules. You don't set the rules; they do.

DEFENDANT BROOKS: Yes, sir.

THE COURT: If you can't handle that, just tell me right now and we'll just send you to prison and you won't have to worry about rules other than the ones that are in the prison.

DEFENDANT BROOKS: (Inaudible).

THE COURT: But like I say, we give you opportunities, chances and you just seem to screw it up every time.

DEFENDANT BROOKS: Yes, Your Honor. I - I was never on this - the only time I was on just regular probation, Your Honor, was prior you released me from jail and I was just waiting to go to NCUUU and in that period of time I have - I didn't have a dirty, I didn't have any mistakes -

THE COURT: There's an allegation here you were drinking on the job. What's that all about?

DEFENDANT BROOKS: That's totally untrue.

THE COURT: Well, that's what's in the report.

DEFENDANT BROOKS: I - I submitted, I told them I - I - told NCUUU that I'd be more than willing to - because

they make you take a - actually had a polygraph set up a couple days after, you know, on the 21st and I was brought in here I believe on the - brought into jail on the 17th and I was more than willing to submit to that polygraph and answer those types of questions, Your Honor. So that's completely untrue.

THE COURT: Well, there's an allegation here that apparently you decided to slap some woman on the butt while you're in this - I just - your conduct just blows me away. I mean, what's this - what are you doing? You want to be on probation and yet everything you do suggests you really don't want to be on probation.

DEFENDANT BROOKS: Your Honor, I understand how you can see that, but I truly do. I truly want to be on probation.

THE COURT: I know you say that, but you do it by your actions and your behavior, not by what you say here.

DEFENDANT BROOKS: Yes, Your Honor.

THE COURT: And I'm just looking at your history and it's not very good.

DEFENDANT BROOKS: Yes, Your Honor. But there are a number things that I think that they did not put in there like the - I was half-way through that program in a very short amount of time, that I was working 80 and 90 hours a week and still going to all my - going to my classes, going

to all my therapies, going to my group therapy.

MR. COLE: And actually his work is one of the things that became a problem. He was allowed to open and close on his own, and apparently he wasn't supposed to be alone at work and his employer didn't really understand how that worked. So she gave him a key to the place and let him open and close on his own and trusted him to even make deposits. So he was doing quite well at work, but he wasn't supposed to be there alone.

THE COURT: I mean, I'm looking at this termination summary, they use words like he's dishonest, he's manipulative, he's unwilling, he's high-risk. I mean, there's just nothing in this report and yet I get to the bottom line and they recommend that we start all over again and give you another chance. I'm thinking why? With this kind of conduct and behavior and attitude, I don't see anything in your future here. I think we're really just wasting our time. Okay.

All right. We'll just give AP&P another shot at it and what I'll do is revoke and restart his probation. He'll serve a minimum 90 days, not to exceed 365 in the Weber County Jail. He'll be returned to NUCCC when bed space is available, but I'm not going to give him work release and I won't give him any good time. I'm also going to recommend that they impose the sex offender group A conditions, okay,

and then he'll be required to do a polygraph test while you're on probation. And you're restricted, Mr. Brooks, from having access to any sexually explicit material or to have contact with anyone under the age of 18. Okay? Any questions then about what you have to do?

DEFENDANT BROOKS: No, Your Honor.

THE COURT: Good luck.

MR. COLE: That's all I have, Your Honor, may I be excused?

THE COURT: All right. Thanks, Mr. Cole.

MR. COLE: Thank you, Your Honor.

(Whereupon the hearing was concluded)

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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearings were held before Ernie Jones was transcribed by me from a audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this July 20, 2010, in Sandy, Utah.

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber