

1999

# Utah v. Lance Michael Weeks : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 : Case No. 990979-CA  
 v. :  
 :  
 LANCE MICHAEL WEEKS, : Priority No. 2  
 :  
 Defendant/Appellant. :

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*BRIEF OF APPELLEE*

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APPEAL FROM DENIAL OF POST-JUDGMENT MOTION FOR REVIEW  
HEARING REQUESTING RESTITUTION HEARING, IN THE THIRD  
JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF  
UTAH, THE HONORABLE J. DENNIS FREDERICK, JUDGE, PRESIDING

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**FILED**  
Utah Court of Appeals

MAY 12 2000

Julia D'Alesandro  
Clerk of the Court

**IN THE UTAH COURT OF APPEALS**

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<b>Plaintiff/Appellee,</b>	<b>:</b>	
		<b>Case No. 990979-CA</b>
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<b>LANCE MICHAEL WEEKS,</b>	<b>:</b>	<b>Priority No. 2</b>
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### *BRIEF OF APPELLEE*

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#### JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from defendant's post-judgment motion for review hearing in which defendant untimely requested a restitution hearing. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

#### ISSUES ON APPEAL AND STANDARDS OF REVIEW

- I. Did the trial court abuse its discretion in denying defendant's untimely post-sentencing motion for a restitution hearing where defendant did not object to the court's restitution order or request a hearing at sentencing?

A trial court's ruling on a post-judgment motion is reviewed for abuse of discretion. *See State v. Loose*, 2000 UT 11, ¶ 8, 994 P.2d 1237 (stating standard of review on motion for new trial); *State v. Bakalov*, 1999 UT 45, ¶ 28, 979 P.2d 799 (same); *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App. 110, ¶ 9, 393 Utah



Adv. Rep. 23 (stating standard of review on motion for relief from judgment). Legal conclusions, if any, are reviewed for correctness. *See Loose*, 2000 UT 11, ¶8; *Bakalov*, 1999 UT 45, ¶ 28.

An appellate court will not disturb a trial court's restitution order "unless it exceeds that prescribed by law or otherwise abused its discretion." *State v. Schweitzer*, 943 P.2d 649, 653 (Utah App. 1997).

II. Did defendant waive his claim that the trial court did not consider his financial condition in ordering restitution where defendant failed to raise that claim before the trial court either at sentencing or in his post-judgment motion?

Because this issue does not require review of any trial court order, no standard of review applies. However, to establish plain error, defendant must demonstrate that "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

Utah Code Ann. §§ 76-3-201 (1999) and 77-18-1 (1999) are attached at Addendum A.

## **STATEMENT OF THE CASE**

Defendant was charged in three different cases with one count of unlawful possession of a controlled substance, methamphetamine, a third degree felony (R.

2830:3);<sup>1</sup> two counts of receipt or transfer of a stolen motor vehicle, second degree felonies (R. 3049:3; R. 3239:2-3); and one count of failure to respond to an officer's signal to stop, a third degree felony (R. 3239:2-3). On July 6, 1999, pursuant to plea negotiations, defendant pleaded guilty to one count of attempted illegal possession or use of a controlled substance, a class A misdemeanor (R. 2830:19, 21-27); one count of attempted receipt or transfer of a stolen vehicle, a third degree felony (R. 3049:24, 26-32); and one count of failure to respond to an officer's signal to stop a third degree felony (R. 3239:22, 24-30).

On September 10, 1999, defendant was sentenced to concurrent terms in these and four other cases (R. 2830:33-34; 3049:39-40; 3239:37-38; R. 70:Tab 2:5, 10; Final order in defendant's case no. 991902297, Addendum B).<sup>2</sup> The terms were to run consecutive

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<sup>1</sup>The State will cite to the records in these cases using the same convention used by defendant. *See* Aplt. Br. at 2 n.1.

<sup>2</sup>Defendant was charged in case no. 991902297 with forgery, a third degree felony, and failure to respond to an officer's signal to stop, a third degree felony (PSI at 3). He pleaded guilty to one count of failure to respond to an officer's signal to stop, a third degree felony (PSI at 3).

Defendant was charged in case no. 91903420 with possession of a controlled substance, a third degree felony; possession of a controlled substance, a class B misdemeanor; possession of drug paraphernalia, a class B misdemeanor; and driving on a suspended license, a class C misdemeanor (PSI at 5). Defendant pleaded guilty to one count of possession of a controlled substance, a third degree felony (PSI at 5).

Defendant was charged in case no. 991903821 with burglary, a second degree felony; theft, a second degree felony; possession of a controlled substance, a third degree felony; and possession of a controlled substance, a class B misdemeanor, in connection with a theft that occurred on or about December 1, 1998 (PSI at 2). Defendant pleaded guilty to one count of attempted burglary, a third degree felony (PSI at 2).

to sentences imposed by Judge Noel on pleas to five unrelated third degree felonies (R. 2830:33-34; 3049:39-40; 3239:37-38; R. 70:Tab 2:5, 10; Final order in defendant's case no. 991902297, Addendum B). Based on information contained in his pre-sentence investigation report ("PSI"), defendant was also ordered to pay restitution in the amount of \$9,104.35 (R. 2830:33-34; 3049:39-40; 3239:37-38; R. 70:Tab 2:10; Final order in defendant's case no. 991902297, Addendum B). Defendant did not object to the trial court's restitution order or request a restitution hearing at the time of sentencing. He also did not object to any material information contained in his PSI upon which his sentences were based. (R. 70:Tab 2).

Eleven days after the trial court entered its final judgments, defendant filed a Motion for Review Hearing requesting a restitution hearing pursuant to Utah Code Ann. § 76-3-201(4)(e) (R. 2830:37, 3049:41; 3239:39). After argument, but without an evidentiary hearing, the court denied defendant's motion (R. 2830:40, 42; 3049:45; 3239:42, 43). Defendant timely appealed (R. 2830:44; 3049:47; 3239:45).

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Defendant was charged in case no. 991904978 with possession of a controlled substance, a third degree felony; possession of drug paraphernalia, a class B misdemeanor; false identification to a peace officer, a class C misdemeanor; and driving on a suspended license, a class C misdemeanor (PSI at 4). Defendant pleaded guilty to attempted possession of a controlled substance, a class A misdemeanor (PSI 4).

## STATEMENT OF THE FACTS

On his latest crime spree, which occurred between December 1, 1998 and February 26, 1999, defendant was caught with methamphetamine and marijuana four times. He also stole three cars, led officers on two high-speed chases through residential areas, and forged at least one check.

**Case No. 991903239.** On December 16, 1998, Yolanda Garcia reported that her 1994 Ford Mustang had been stolen from a store parking lot while she shopped (R. 3239:3). Around 11:30 p.m. that same night, an officer activated his police lights after observing the Mustang on the road (R. 3239:3). However, instead of stopping, the driver of the Mustang accelerated to over seventy miles per hour through a residential area (R. 3239:3). After running through four different stop signs and making numerous turns, the driver eventually stopped the car, got out, and ran away (R. 3239:3). A letter addressed to defendant, as well as his finger prints, were found inside the Mustang (R. 3239:3-4).

Defendant was charged with receiving a stolen motor vehicle, a second degree felony, and failure to respond to an officer's signal to stop, a third degree felony (R. 3239:2-3). The State dismissed the stolen motor vehicle charge in exchange for defendant's guilty plea to failure to respond to an officer's signal to stop (R. 3239:22, 24-30).

**Case No. 991903049.** On December 19, 1998, David Hatton reported that his 1992 Honda Accord had been stolen from his driveway, where it had been parked,

uninsured and unregistered (R. 3049:4). Because another car had been parked behind Mr. Hatton's Accord, whoever stole it had to first push the other car out of the way (R. 3049:4). A few weeks later, Leisa Watkins reported that she had noticed a Honda Accord being parked in front of her mailbox several times, and that the driver, whom she identified as defendant, would park the car and walk to a residence located down the street (R. 3049:4). After recovering the Accord, Mr. Hatton discovered that the car's steering column had been broken (R. 3049:4). A screwdriver had been used to start the car (R. 3049:4).

Defendant was charged with one count of receiving or transferring a stolen motor vehicle, a second degree felony (R. 3049:3). He was subsequently allowed to plead guilty to a reduced charge of attempted receipt or transfer of a stolen vehicle, a third degree felony (R. 3049:24, 26-32).

**Case No. 991902830.** On January 23, 1999, the vehicle defendant was driving was stopped on a registration violation (R. 2830:4). After impounding the vehicle, police found a container of methamphetamine (R. 2830:4).

Defendant was charged with possession of a controlled substance, a third degree felony (R. 2830:3-4). He was subsequently allowed to plead guilty to a reduced charge of attempted possession, a class A misdemeanor ((R. 2840:19, 21-27).

**Sentencing.** Defendant's sentencing hearing on these three cases and four others, *see footnote 2 supra*, was held on September 10, 1999 (R. 70:Tab 2). At that time,

defendant stated that “[t]here are just two mistakes in the presentence report I wanted to point out. I guess they’re not mistakes, they’re just corrections. On page 10 and then on the last page when it’s reflecting the amount of time he served” (R. 70:Tab 2:3).

Defendant did not challenge the accuracy of any other information contained in his PSI at the time of sentencing (R. 70:Tab 2).

Defendant’s PSI indicated the following: that defendant had an extensive criminal history dating back to age fourteen, including numerous tobacco, alcohol, and drug violations, as well as theft, burglary, forgery, and destruction of property (PSI Addendum at 9-12); that Mr. Hatton, the victim in case no. 991903049, estimated the cost of repairs to his Honda Accord and of replacing several missing items to be \$1,500 (PSI at 8); that Ms. Garcia, the victim in case number 991903239, reported a loss of personal items valued at \$500, payment of a \$500 deductible on her Mustang’s insurance policy, and payment of an additional \$500 “for repair and a complete repainting of her car to make it all match” (PSI at 9); that Ms. Garcia’s insurance company, Liberty Mutual, had paid \$6,104.35 toward her vehicle’s repair (PSI at 9); and that defendant was a healthy twenty-year-old who had been gainfully employed in the past (PSI at 13; PSI Addendum at 14, 16).

The PSI recommended that defendant be committed to prison “and that he be required to pay a \$625 fine, \$532 surcharge, full restitution and \$200 recoupment fee upon parole” (PSI at 14).

Just before defendant was sentenced, the State reiterated that defendant's criminal history dated back to age fourteen, and that, besides abusing drugs and alcohol, defendant is "a forger and he's a burglar[], he's a car thief and it's a miracle he didn't kill somebody during the felony of evading" (R. 70:Tab 2:9).

Immediately following the State's comments, the trial court, although not specifically addressing its reasons for ordering restitution, noted: "There's no mystery about the fact that I'm going to obviously commit you to prison, which is probably where you need to be, at least until you get your head on straight. You've taken now since you were 14 to develop this style of living, it's going to take you a while [to] undevelop [sic] it" (R. 70:Tab 2:9). The court then sentenced defendant to prison and jail terms and to pay \$9,104.35 in restitution (the total of the amounts reported by Mr. Hatton and Ms. Garcia) and a \$250 recoupment fee to his attorney (R. 70:Tab 2:9-10). Despite the PSI's recommendation, the trial court did not order defendant to pay a fine or a surcharge.

Defendant did not object to the court's order or request a restitution hearing (R. 70:Tab 2). Final orders of his convictions and sentences were entered the same day ((R. 2830:33-34; 3049:39-40; 3239:37-38).

**Motion for Review Hearing.** Eleven days later, on September 21, 1999, defendant filed a Motion for Review Hearing, requesting a restitution hearing pursuant to Utah Code Ann. § 76-3-201(4)(e) "on the grounds that defendant objects to the amount of restitution claimed by the State" (R. 2830:37, 3049:41; 3239:39). For the first time,

defendant challenged the factual basis for those amounts and requested an evidentiary hearing on that issue (R. 60). He did not, however, argue at any time that the trial court had failed to consider his financial condition prior to ordering restitution.

A hearing on defendant's motion was held on October 18, 1999, but no evidence was taken (R. 60). After argument, the trial court clarified that the amount of restitution ordered was the sum of the amounts identified in defendant's pre-sentence investigation report (R. 60:4-5). It then ruled:

Given the circumstances, the time of the sentencing, the persuasive burden is upon the State to establish, I believe, by preponderance of the evidence to myself, the fact finder, that the sums sought for restitution are fair and reasonable.

Given what I have reviewed, that being the presentence report, as well as the orders in the matter, as well as now having heard arguments of counsel, I was persuaded and now persuaded that preponderance of the evidence burden has been met, that the numbers I have ordered as restitution is fair and reasonable. Consequently the motion to modify the — I will characterize it as a motion to modify the order of restitution is denied.

(R. 60:7; 2830:40, 42; 3049:44-45; 3239:42, 43). A final order was entered on October 18, 1999 (R. 3239:43-44). Defendant timely appealed.<sup>3</sup>

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<sup>3</sup>Although not titled such, defendant's post-judgment motion appears to be a motion to alter or amend judgment under rule 59(e), Utah Rules of Civil Procedure. *See State v. Parker*, 872 P.2d 10411043 (Utah App. 1994). Under rule 4(b), Utah Rules of Appellate Procedure, the time by which a defendant must file an appeal is stayed during the pendency of a rule 59(e) motion. *See Utah R. App. P. 4(b)*.



## SUMMARY OF THE ARGUMENT

In Utah, a criminal defendant has the statutory right at sentencing both to request a restitution hearing and to challenge his PSI. As long as defendant has the opportunity to examine and challenge the information on which his sentence is based, his statutory and his due process rights are not violated.

Here, defendant neither requested a restitution hearing nor challenged the information in his PSI upon which the court's restitution order was based. Thus, he waived any claim that he was entitled to a restitution hearing or that the restitution amount in his PSI was unreliable or inaccurate. The trial court did not cure defendant's waiver in ruling on his post-judgment motion. Consequently, the claims raised in defendant's post-judgment motion are waived on appeal.

Defendant's claim that the trial court failed to consider his financial condition before ordering restitution is raised for the first time on appeal. Because defendant has not established plain error, this Court should decline to reach this issue.

## ARGUMENT

### **I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S UNTIMELY REQUEST FOR A RESTITUTION HEARING WHERE DEFENDANT DID NOT REQUEST A HEARING OR OTHERWISE OBJECT TO THE COURT'S RESTITUTION ORDER AT THE TIME OF SENTENCING**

Defendant argues that the trial court violated his due process rights at sentencing by denying his statutory right to a restitution hearing and by denying his right to

challenge the accuracy of the restitution information in his PSI. *See* Aplt. Br. at 16.

However, defendant neither requested a restitution hearing nor challenged the factual basis of the trial court's restitution order at the time of sentencing. Because defendant had the opportunity to raise his claims at sentencing but failed to do so, the trial court's denial of his request for post-judgment relief does not violate any statutory or due process rights.

**A. Defendant waived his right to a restitution hearing by failing to request it at the time of sentencing**

Section 76-3-201(4)(e) of the Utah Code provides that, “[i]f a defendant objects to the imposition, amount, or distribution of the restitution, the court shall *at the time of sentencing* allow the defendant a full hearing on the issue.” Utah Code Ann. § 76-3-201(4)(e) (1999) (emphasis added). Under this provision, any defendant who wishes to challenge a trial court's restitution order must make his objection known at the time he is sentenced in order to preserve his right to a full hearing on the issue. *See Monson v. Carver*, 928 P.2d 1017, 1029 (Utah 1996) (holding that defendant had no right to restitution hearing where he failed to request a hearing or otherwise object to the restitution order at sentencing); *State v. Snyder*, 747 P.2d 417, 421 (Utah 1987) (same); *cf. State v. Haga*, 954 P.2d 1284, 1289 (Utah App. 1998) (holding that trial court erred in failing to hold hearing where defendant “requested a restitution hearing *at his sentencing*” (emphasis added)).

Here, defendant did not request a restitution hearing or otherwise object to the trial court's restitution order at sentencing. Defendant had a copy of the PSI and was therefore on notice that restitution was being recommended and the basis of that recommendation. He also heard the trial court impose the restitution order. Yet, he waited eleven days after entry of the trial court's final orders to complain. Because defendant waived his statutory right to a restitution hearing by failing to request a hearing at the time of sentencing, the trial court did not abuse its discretion in denying his belated request for a hearing in his post-judgment motion. *See State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1991) (holding that trial court in criminal case may refuse to consider the merits of claim in a post-judgment motion where defendant waived that claim at trial).<sup>4</sup>

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<sup>4</sup>Although a trial court may cure a defendant's failure to timely raise claims of error at trial by reaching the merits of those claims in a post-judgment motion, *see State v. Belgard*, 830 P.2d 264, 266 (Utah 1992) (per curiam) (holding that "trial court in effect reopened the trial when it held an evidentiary hearing" after a bench trial); *State v. Matsamas*, 808 P.2d 1048, 1053 (Utah 1991) (same), the court is under no obligation to do so, *see Johnson*, 821 P.2d at 1161; *see also In re Estate of Covington*, 888 P.2d 675, 678 & n.6 (Utah App. 1994) (holding that "[r]aising an issue in a post-trial motion . . . does not preserve that issue for appeal"), *cert. denied*, 910 P.2d 425 (Utah 1995).

Here, although the trial court did not expressly rely on waiver in denying defendant's post-judgment motion, such reliance is implicit in the fact that the trial court denied the very evidentiary hearing necessary to decide defendant's claims on the merits. *See Estate of Covington*, 888 P.2d at 678-79 n.6 (reading *Belgard* as limited to cases where the trial court "had the opportunity and chose to take evidence and fully hear the arguments raised"). Thus, the trial court's denial of defendant's post-judgment motion without taking evidence did not cure defendant's waivers at sentencing.

**B. Defendant waived his right to challenge the accuracy of statements contained in his PSI by not raising any of the alleged inaccuracies at sentencing**

Fundamental fairness and the right to effective assistance of counsel require that a criminal defendant have access to his PSI prior to his sentencing hearing so that he has “some opportunity to point out mistakes in that information.” *State v. Casarez*, 656 P.2d 1005, 1007-08 (Utah 1982) (citing *State v. Lipsky*, 608 P.2d 1241, 1248 (Utah 1980)). However, “[i]f 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.” Utah Code Ann. § 77-18-1(6)(a) (emphasis added); *see also State v. Gomez*, 887 P.2d 853, 855 (Utah 1994) (holding that defendant could not on appeal challenge reliability of information upon which trial court based his sentence where defendant waived opportunity to challenge that information at time of sentencing).

Here, defendant received a copy of his PSI before sentencing (R. 70:Tab 2). He obviously had time to review it because he noted that it had incorrectly calculated the time he had spent in jail before the sentencing hearing (R. 70:Tab2:3). This was the only item in the PSI that defendant identified as inaccurate (R. 70:Tab 2:3). At no time during his sentencing hearing did defendant challenge the accuracy of the report’s restitution figures or the financial information it contained on defendant (R. 70:Tab 2).

Because the failure of a defendant to challenge the accuracy of his PSI at the time of sentencing *shall* constitute waiver of that matter under section 77-18-1(6)(a), the trial

court did not abuse its discretion in refusing to reach that claim in defendant's post-judgment motion.<sup>5</sup>

**C. Defendant's due process rights at sentencing were not violated**

The due process clauses of both the federal and Utah constitutions require that a court act "on reasonably reliable and relevant information in exercising discretion in fixing a sentence." *State v. Johnson*, 856 P.2d 1064, 1071 (Utah 1993) (citation omitted). Thus, as stated, "[f]undamental principles of procedural fairness in sentencing require that a defendant have the right to examine and challenge the accuracy and reliability of the factual information upon which his sentence is based." *State v. Patience*, 944 P.2d 381, 389-90 & n. 12 (Utah App. 1997); *see also Gomez*, 887 P.2d at 855. Where, however, defendant is "given the opportunity to examine and challenge all factual information upon which his sentence was based" but "fail[s] to avail himself of the opportunity," defendant has no claim that his due process rights were violated. *Gomez*, 887 P.2d at 854-55.

In this case, it is undisputed that defendant received a copy of his PSI before his sentencing hearing and that he had time to review it (R. 70:Tab 2:3). It is also clear that the trial court did not prohibit defendant from requesting a restitution hearing or challenging the accuracy and reliability of his PSI at the time of sentencing (R. 70:Tab 2). In fact, defendant challenged the accuracy of two points in the PSI (R.70:Tab 2:3). He

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<sup>5</sup>Because the trial court did not take evidence on the accuracy of defendant's PSI at the hearing on his post-judgment motion, the trial court's ruling on that motion did not cure defendant's waiver. *See footnote 4.*

never suggested, however, that the information regarding the restitution amounts was unreliable, that the amount was unfair, that restitution should not be imposed because of his financial condition, or that a restitution hearing was otherwise necessary (R. 70:Tab 2).

Because defendant was provided at his sentencing hearing with “the right to examine and challenge the accuracy and reliability of the factual information upon which his sentence is based,” defendant was not deprived of his due process rights at sentencing. *Gomez*, 887 P.2d at 854-55. Consequently, the trial court did not abuse its discretion in denying defendant’s post-judgment motion.

**II. BECAUSE DEFENDANT DID NOT RAISE HIS CLAIM THAT THE TRIAL COURT FAILED TO CONSIDER HIS FINANCIAL CONDITION EITHER AT SENTENCING OR IN HIS POST-JUDGMENT MOTION, THAT CLAIM IS NOT PRESERVED; FURTHERMORE, DEFENDANT HAS FAILED TO ESTABLISH PLAIN ERROR**

Defendant asserts that the trial court failed to take into consideration his financial condition, as required under section 76-3-201(8)(c), before ordering him to pay restitution. However, defendant waived this claim below and has failed to establish plain error on appeal.

**A. Defendant waived this claim because he did not specifically preserve 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 a claim on appeal.” *State v. Tillman*, 750 P.2d 546, 551 (Utah 1987); *see also State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998). Thus, “[i]f the trial court, as defendant alleges, erroneously failed to consider defendant’s paltry financial resources before ordering him to reimburse [the victims], defendant should have *immediately* brought that error to the attention of the sentencing judge.” *See James v. Galetka*, 965 P.2d 567, 574 (Utah App. 1998). Otherwise, “that issue is not properly preserved for appeal.” *State v. Larsen*, 865 P.2d 1355, 1363 n.12 (Utah 1993); *see also Bryant*, 965 P.2d at 546; *State v. Ramos*, 882 P.2d 149, 155 n.3 (Utah App. 1994); Utah R. Crim. P. 20.

As with his other claims, defendant failed to preserve this claim at his sentencing hearing below. Moreover, he waived the claim again when he failed to raise it in his post-judgment motion. Defendant’s failure to raise this issue in his post-judgment motion almost rises to the level of invited error. In his motion, defendant alerted the trial court to his claim of alleged error at sentencing—that the trial court had relied on inaccurate information in defendant’s PSI. The implication was that defendant had no claims other than that presented in the motion. “[O]n appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.” *State v. Betha*, 957 P.2d 611, 617 (Utah App. 1998) (quoting *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993)). Since defendant arguably led the trial court into the error he

now claims by failing to raise it in his post-judgment motion, this Court should refuse to consider it.

**B. Defendant has not established plain error**

Acknowledging that he may not have properly preserved this claim below, defendant asks this Court, in the alternative, to reach his claim under the plain error doctrine. *See* Aplt. Br. at 19 n.5. To establish plain error, defendant must demonstrate that “(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful.” *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). For an error involving a statute to be obvious, the trial court’s actions must be contrary to the express provisions of the statute or of case law interpreting those provisions. *See State v. Braun*, 787 P.2d 1336, 1341 (Utah App. 1990). Here, neither statute nor case law requires the trial court to make specific findings on defendant’s financial condition before ordering restitution. Furthermore, the record supports the conclusion that the trial court did in fact consider defendant’s financial condition prior to entering its order.

**1. Written findings on factors considered are not required**

In making his plain error argument, defendant relies on section 76-3-201(8)(c) of the Utah Code. Section 76-3-201(8)(c) provides:

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsection (8)(b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to



the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

Utah Code Ann. § 76-3-201(8)(c). Nothing in this provision or the statute as a whole requires the trial court to make specific findings concerning the factors in subsection (8)(c). *See, e.g., State v. Robertson*, 932 P.2d 1219, 1235 (Utah 1997) (holding that remand not necessary where record supports assumption that trial court considered financial status in ordering restitution for hospital costs).

The only requirement under section 76-3-201 is that the trial court “make the reasons for the decision a part of the record.” Utah Code Ann. § 76-3-201(4)(d)(i); *Robertson*, 932 P.2d at 1234. The trial court complied with that requirement here.

At sentencing, the trial court, in addition to having the information in defendant’s PSI, listened to defendant’s criminal history, dating back to age fourteen and including drug and alcohol abuse, and the fact that defendant is “a forger and he’s a burglar[], he’s a car thief and it’s a miracle he didn’t kill somebody during the felony of evading” (R. 70:Tab 2:9).

Immediately thereafter, although not specifically addressing its reasons for restitution, the court noted: “There’s no mystery about the fact that I’m going to obviously commit you to prison, which is probably where you need to be, at least until

you get your head on straight. You've taken now since you were 14 to develop this style of living, it's going to take you a while [to] undevelop [sic] it" (R. 70:Tab 2:9). The court then sentenced defendant to jail terms, to pay restitution, and to pay a \$250 recoupment fee to his attorney (R. 70:Tab 2:9-10). In addition, while ruling on defendant's post-judgment motion, the trial court further explained that he ordered that amount in restitution because that was the amount identified in defendant's PSI (R. 60:4-5).

The court's comments make clear that it ordered restitution, as well as the other sentence provisions, because defendant had a substantial and continuous criminal history despite repeated attempts at rehabilitation, and because his criminal conduct consistently involved the taking and destruction of other people's property.

Because the trial court's reasons for ordering restitution are clear from the record, the trial court fulfilled its requirements under section 76-3-201. Moreover, because neither the statute nor case law require the trial court to make specific findings concerning defendant's financial condition, *cf. Robertson*, 932 P.2d at 1235, the trial court's failure to make such findings in this case does not constitute plain error, *see Braun*, 787 P.2d at 1341.

## **2. The trial court considered defendant's financial condition**

The record at sentencing supports the conclusion that the trial court did in fact consider defendant's financial condition in ordering restitution. Section 76-3-201(8)(c)(i) requires the trial court to consider "the financial resources of the defendant and the

burden that payment of restitution will impose, with regard to the other obligations of the defendant,” before ordering restitution in a particular case. In this case, “[t]he trial court’s actions at the sentencing hearing indicate that it considered [defendant’s] financial resources.” *Robertson*, 932 P.2d at 1234.

Defendant’s PSI recommended that defendant be committed to prison “and that he be required to pay a \$625 fine, \$532 surcharge, full restitution and \$200 recoupment fee upon parole” (PSI at 14). It also indicated that defendant was a healthy twenty-year old who had held several jobs in the past (PSI at 13; PSI Addendum at 14, 16). Finally, it indicated that defendant may have been ordered to pay restitution in the amount of \$3,732 in connection with other convictions (PSI Addendum at 17).

In light of this evidence, the trial court ordered full restitution in the amount set forth in the PSI and ordered defendant to pay recoupment in the amount of \$250 but did not order defendant to pay any fine and a surcharge:

This indicates that the court used some factor to limit the amount of restitution costs imposed on defendant. Because the court had already ordered defendant to pay a significant sum as restitution, this limiting factor was likely defendant’s ability to pay. Although the court did not make findings relating to [defendant’s] financial condition part of the record, we can reasonably assume that the court actually made such findings.

*Robertson*, 932 P.2d at 1234-35.

In short, section 76-3-201 does not require the trial court to make specific findings concerning defendant’s financial condition before ordering restitution. Thus, this Court

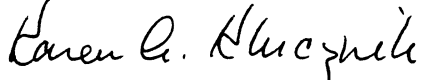
may conclude that the trial court considered defendant's condition if such a conclusion is reasonable on the record. *Id.* at 1235 It is here.

### CONCLUSION

Based on the above, the State requests that the Court affirm the trial court's denial of defendant's post-judgment motion for review hearing and affirm defendant's sentence.

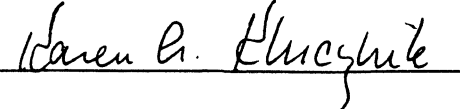
RESPECTFULLY SUBMITTED 12 May 2000.

JAN GRAHAM  
Utah Attorney General

  
KAREN A. KLUCZNIK  
Assistant Attorney General

### CERTIFICATE OF MAILING

I certify that on 12 May 2000, I caused to be hand-delivered two accurate copies of this Brief of Appellee to Linda M. Jones and Scott C. Williams, Salt Lake Legal Defender Assoc., 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, attorneys for appellant.

  
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## **ADDENDA**

## **Addendum A**

**76-3-201. Definitions — Sentences or combination of sentences allowed — Civil penalties — Restitution — Hearing.**

- (1) As used in this section:
  - (a) "Conviction" includes a:
    - (i) judgment of guilt; and
    - (ii) plea of guilty.
  - (b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.
  - (c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.
  - (d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including the accrual of interest from the time of sentencing, insured damages, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Subsection (4)(c).
  - (e)
    - (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.
    - (ii) "Victim" does not include any coparticipant in the defendant's criminal activities.
- (2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:
  - (a) to pay a fine;
  - (b) to removal or disqualification from public or private office;
  - (c) to probation unless otherwise specifically provided by law;
  - (d) to imprisonment;
  - (e) to life imprisonment;
  - (f) on or after April 27, 1992, to life in prison without parole; or
  - (g) to death.
- (3)
  - (a) This chapter does not deprive a court of authority conferred by law to:
    - (i) forfeit property;
    - (ii) dissolve a corporation;
    - (iii) suspend or cancel a license;
    - (iv) permit removal of a person from office;
    - (v) cite for contempt; or
    - (vi) impose any other civil penalty.
  - (b) A civil penalty may be included in a sentence.

- (4) (a) (i) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. For purposes of restitution, a victim has the meaning as defined in Subsection (1)(e).
- (ii) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (4)(c) and (4)(d).
- (iii) If the court finds the defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Subsection (8)(b) on the civil judgment docket and provide notice of the order to the parties.
- (iv) The order is considered a legal judgment enforceable under the Utah Rules of Civil Procedure, and the person in whose favor the restitution order is entered may seek enforcement of the restitution order in accordance with the Utah Rules of Civil Procedure. In addition, the Department of Corrections may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure.
- (v) If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover reasonable attorney's fees.
- (vi) A judgment ordering restitution constitutes a lien when recorded in a judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action. Interest shall accrue on the amount ordered from the time of sentencing.
- (vii) The Department of Corrections shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
- (b) (i) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.
- (ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (4)(c).
- (c) In determining restitution, the court shall determine complete restitution and court-ordered restitution.
- (i) Complete restitution means the restitution necessary to compensate a victim for all losses caused by the defendant.
- (ii) Court-ordered restitution means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing.
- (iii) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (8).



(d) (i) If the court determines that restitution is appropriate or inappropriate under this subsection, the court shall make the reasons for the decision a part of the court record.

(ii) In any civil action brought by a victim to enforce the judgment, the defendant shall be entitled to offset any amounts that have been paid as part of court-ordered restitution to the victim.

(iii) A judgment ordering restitution constitutes a lien when recorded in a judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action. Interest shall accrue on the amount ordered from the time of sentencing.

(iv) The Department of Corrections shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(e) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow the defendant a full hearing on the issue.

(5) (a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:

(i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;

(ii) charged with a felony or a class A, B, or C misdemeanor; and

(iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

(i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or

(ii) the defendant was not transported pursuant to a court order.

(c) (i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

(A) \$75 for up to 100 miles a defendant is transported;

(B) \$125 for 100 up to 200 miles a defendant is transported;

and

(C) \$250 for 200 miles or more a defendant is transported.

(ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

(6) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.

(b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.

(c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in

the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.

(7) If during the commission of a crime described as child kidnaping, rape of a child, object rape of a child, sodomy upon a child, or sexual abuse of a child, the defendant causes substantial bodily injury to the child, and if the charge is set forth in the information or indictment and admitted by the defendant, or found true by a judge or jury at trial, the defendant shall be sentenced to the highest minimum term in state prison. This subsection takes precedence over any conflicting provision of law.

(8) (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense, that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; the cost of necessary physical and occupational therapy and rehabilitation; and the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim; and

(iii) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsection (8)(b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

(d) The court may decline to make an order or may defer entering an order of restitution if the court determines that the complication and prolongation of the sentencing process, as a result of considering an order of restitution under this subsection, substantially outweighs the need to provide restitution to the victim.

**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.

(iii) 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 court may require that the defendant:

(a) 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, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;

(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:

(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 shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest 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) (A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.

(B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, 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.

(b) (i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(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.



## **Addendum B**

# IMAGED

## THIRD DISTRICT COURT - SLC COURT SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
vs.	:	Case No: 991902297 FS
	:	
LANCE MICHAEL WEEKS,	:	Judge: J. DENNIS FREDERICK
Defendant.	:	Date: September 10, 1999
Custody: USP	:	

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PRESENT  
Clerk: cindyb  
Prosecutor: MORGAN, B. KENT  
Defendant  
Defendant's Attorney(s): NIELSEN, MATTHEW G.

ENTERED IN REGISTRY  
OF JUDGMENTS  
DATE 9/21/99

DEFENDANT INFORMATION  
Date of birth: September 18, 1978  
Video  
Tape Number: 1 Tape Count: 10:54-11:09

### CHARGES

2. FAIL TO STOP/RESPOND AT COMMAND OF POLIC - 3rd Degree Felony  
Plea: Guilty - Disposition: 07/06/1999 Guilty Plea

### SENTENCE PRISON

Based on the defendant's conviction of FAIL TO STOP/RESPOND AT COMMAND OF POLIC a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 991902297  
Date: Sep 10, 1999

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**SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE**

Sentence to run concurrently with case #991902830, 991903049, 991903239, 991903420, 991903821, and 991904978; but consecutive to other terms presently serving including Judge Noel's sentence.

**SENTENCE RECOMMENDATION NOTE**

Credit for 32 days time served. The Court recommends defendant receive substance abuse therapy at the prison.

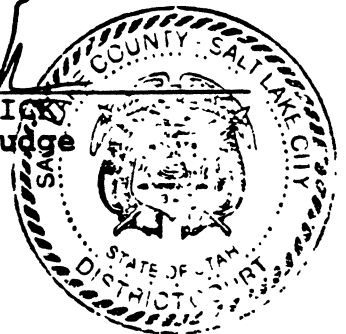
**SENTENCE TRUST**

The defendant is to pay the following:  
Attorney Fees: Amount: \$250.00 Plus Interest  
Pay in behalf of: LDA

Restitution: Amount: \$9104.35

Dated this 10<sup>th</sup> day of Sept, 1999.

  
J. DENNIS FREDERICK  
District Court Judge



I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.

DATE: 1-13-00  
  
DEPUTY COURT CLERK

