

2010

# The State of Utah v. Daniel Cornell Cosby : Brief of Appellant

Utah Court of Appeals

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E. Rich Hawkes; Salt Lake Legal Defender's Association; Attorneys for Appellant.

Mark L. Shurtleff; Utah Attorney General; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 v. :  
 :  
 DANIEL CORNELL COSBY, : Case No. 20100974-CA  
 :  
 Defendant/Appellant. : Appellant is incarcerated.

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**BRIEF OF APPELLANT**

Appeal from a judgment of conviction for two counts of Violation of a Protective Order, third degree felonies, in violation of Utah Code section 76-5-108, one count of Tampering with a Witness, a Class A Misdemeanor, in violation of Utah Code section 76-8-508, and one count of Domestic Violence in the Presence of a Child, a Class B Misdemeanor, in violation of Utah Code section 76-5-109.1(2)(c), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable William W. Barrett, presiding.

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Attorneys for Appellee

FILED  
UTAH APPELLATE COURTS

MAR 02 2011

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THE STATE OF UTAH, :  
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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT ..... 1

ISSUE AND STANDARD OF REVIEW ..... 1

STATUTORY PROVISIONS AND RULES ..... 2

STATUTORY PROVISIONS AND RULES ..... 2

STATEMENT OF THE CASE ..... 3

STATEMENT OF FACTS ..... 4

SUMMARY OF THE ARGUMENT ..... 7

ARGUMENT ..... 8

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN  
IT SENTENCED MR. COSBY TO BOTH JAIL AND  
SUSPENDED PRISON SENTENCES WITH ZERO-TOLERANCE  
PROBATION BECAUSE IT DID NOT GRANT MR. COSBY'S  
MITIGATING CIRCUMSTANCES ADEQUATE WEIGHT ..... 8

CONCLUSION ..... 12

Addendum A: Sentence, Judgment & Commitment

Addendum B: Relevant Rules, Statutes and Constitutional Provisions

## TABLE OF AUTHORITIES

### Cases

<u>State v. Bluff</u> , 2002 UT 66, 52 P.3d 1210 .....	8
<u>State v. Candedo</u> , 2008 UT App 4, 176 P.3d 459, <u>aff'd</u> 2010 UT 32 .....	2
<u>State v. Carson</u> , 597 P.2d 862 (Utah 1979) .....	8
<u>State v. Dean</u> , 2004 UT 63, 95 P.3d 276 .....	11
<u>State v. Elm</u> , 808 P.2d 1097 (Utah 1991) .....	2
<u>State v. Helms</u> , 2002 UT 12, 40 P.3d 626 .....	2, 8, 10, 11
<u>State v. Holgate</u> , 2000 UT 74, 10 P.3d 346 .....	2, 11
<u>State v. Larsen</u> , 2005 UT App 201, 113 P.3d 998 .....	11
<u>State v. McCovey</u> , 803 P.2d 1234 (Utah 1990) .....	11
<u>State v. Russell</u> , 791 P.2d 188 (Utah 1990) .....	8
<u>State v. Schweitzer</u> , 943 P.2d 649 (Utah 1997) .....	8, 9
<u>State v. Sibert</u> , 310 P.2d 388 (Utah 1957) .....	8
<u>State v. Wright</u> , 893 P.2d 1113 (Utah Ct. App. 1995) .....	2

### Statutes

Utah Code Ann. § 76-5-102 (2008) .....	3
Utah Code Ann. § 76-5-108 (2008) .....	1, 2, 3, 4
Utah Code Ann. § 76-5-109.1 (2008) .....	1, 2, 3, 4, 5
Utah Code Ann. § 76-6-108 (2008) .....	3
Utah Code Ann. § 76-6-202 (2008) .....	3
Utah Code Ann. § 76-8-508 (2008) .....	1, 3, 5
Utah Code Ann. § 77-36-1.1 (2008) .....	3

Utah Code Ann. § 78A-4-103 (2008)..... 1

**Rules**

Utah R. Crim. P. 22..... 2, 3, 11

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
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 v. :  
 :  
 DANIEL CORNELL COSBY, : Case No. 20100974-CA  
 :  
 Defendant/Appellant. : Appellant is incarcerated.

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**JURISDICTIONAL STATEMENT**

This is an appeal from a judgment of conviction in two consolidated cases for two counts of Violation of a Protective Order, third degree felonies, in violation of Utah Code section 76-5-108, one count of Tampering with a Witness, a Class A Misdemeanor, in violation of Utah Code section 76-8-508, and one count of Domestic Violence in the Presence of a Child, a Class B Misdemeanor, in violation of Utah Code section 76-5-109.1(2)(c), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable William W. Barrett, presiding. This court has jurisdiction pursuant to Utah Code section 78A-4-103(2)(e). See Addendum A (Sentence, Judgment, Commitment from each case).

**ISSUE AND STANDARD OF REVIEW**

Issue: Whether the trial court abused its discretion by sentencing Mr. Cosby to two concurrent jail terms and also to thirty-six months of zero-tolerance probation with two suspended, consecutive prison sentences when circumstances had changed in Mr.

Cosby's life such that he felt he could show that, despite previous struggles with probation, he was now a good candidate for court supervision without jail time.

Standard of Review: This Court reviews a district court's sentence for abuse of discretion. State v. Candedo, 2008 UT App 4, ¶ 2, 176 P.3d 459, aff'd 2010 UT 32; State v. Wright, 893 P.2d 1113, 1120 (Utah Ct. App. 1995). "An abuse of discretion may be manifest if the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence." State v. Elm, 808 P.2d 1097, 1099 (Utah 1991) (internal quotation marks omitted). A court may also abuse its discretion by failing to "give adequate weight to . . . mitigating circumstances." See State v. Helms, 2002 UT 12, ¶ 15, 40 P.3d 626

Preservation: This issue was preserved when defense counsel argued at sentencing exclusively for probation without additional jail time. Record for Case No. 101905723 at 47:2-4.<sup>1</sup> But even if it had not been preserved, this issue can also be reviewed for plain error. See State v. Holgate, 2000 UT 74, ¶ 13, 10 P.3d 346. A court may correct a sentence imposed in an illegal manner at any time. Utah R. Crim. P. 22(e).

### **STATUTORY PROVISIONS AND RULES**

The following provisions are relevant to the issue on appeal. Their text is provided in full in Addendum B.

Utah Code Ann. § 76-5-108 (2008).

Utah Code Ann. § 76-5-109.1(2)(c) (2008).

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<sup>1</sup> The case on appeal involves two cases that were consolidated. The records from each case are numbered separately. For ease of reference, this brief will refer to the record from case no. 101905723 as "R23" and to the record from case no. 101905671 as "R71."



Utah Code Ann. § 76-8-508 (2008).

Utah Code Ann. § 77-36-1.1 (2008).

Utah R. Crim. P. 22(e).

### STATEMENT OF THE CASE

An information was filed in case no. 101905671 on August 11, 2010, that charged Daniel Cosby with Burglary (Domestic Violence), a second degree felony, in violation of Utah Code section 76-6-202, Violation of a Protective Order, a third degree felony, in violation of Utah Code section 76-5-108, Assault with a Domestic Violence Enhancement, a class A misdemeanor, in violation of Utah Code section 76-5-102, Damage to or Interruption of a Communication Device, a class A misdemeanor, in violation of Utah Code section 76-6-108, and three counts of Commission of Domestic Violence in the Presence of a Child, class A misdemeanors, in violation of Utah Code section 76-5-109.1(2)(c). R71. 1–4. The information enhanced the domestic violence charges by alleging that the crimes were committed within five years of a previous conviction for domestic violence pursuant to Utah Code section 77-36-1.1. R71. 1–4.

A second information was filed in case no. 101905723 on August 12, 2010, that charged Mr. Cosby with a second count of Violation of a Protective Order (Domestic Violence), a third degree felony, in violation of Utah Code section 76-5-108.

After plea negotiations, the two cases were consolidated and the information from case no. 101905671 was amended through interlineation to add a charge of Tampering with a Witness and to reduce one of the charges of domestic violence in the presence of a child from a class A to a class B misdemeanor. R71. 2–3; R23. 36:3. Mr. Cosby pleaded

guilty to two counts of Violation of a Protective Order, third degree felonies, in violation of Utah Code section 76-5-108, one count of Tampering with a Witness, a Class A Misdemeanor, in violation of Utah Code section 76-8-508, and one count of Domestic Violence in the Presence of a Child, a class B misdemeanor, in violation of Utah Code section 76-5-109.1. R23. 28–35; R71. 27–34. The remaining charges, as well as charges from two other cases, were dismissed. R23. 36:3.

Mr. Cosby was sentenced in both cases on November 1, 2010. R23. 47. In case no. 101905671, Mr. Cosby received an indeterminate term of not more than five years in prison for his conviction for Violation of a Protective Order. R23. 47:9. The court additionally sentenced Mr. Cosby to 365 days in jail for his Witness Tampering Conviction and 180 days in jail for his conviction for Domestic Violence in the Presence of a Child. The court ordered these terms to run concurrently. R23. 47:9. In case no. 101905723, Mr. Cosby was sentenced to a second indeterminate prison term of not more than five years for his conviction for Violation of a Protective Order. R23. 47:9. The court ordered that the sentences in both cases run consecutive to each other, but suspended the prison sentences and placed Mr. Cosby on zero-tolerance probation for a period of thirty-six months. R23. 47:9. The jail time was not suspended.

On November 30, 2010, Mr. Cosby filed timely notices of appeal in both cases. R23. 39; R71. 44. This appeal follows.

### **STATEMENT OF FACTS**

Mr. Cosby's convictions stem from two incidents. According to Mr. Cosby's statement in support of his guilty plea, on June 30, 2010, Mr. Cosby yelled at Stacey

Buchanan with a child present and caused her to be afraid, even though he knew he had a no-contact order in place. R23. 29; R71. 28. He also encouraged her not to talk to the police. R23. 29; R71. 28. On August 2, 2010, Mr. Cosby once again contacted Ms. Buchanan despite knowing that there was a no-contact order in place. R23. 29; R71. 28.

On September 13, 2010, Mr. Cosby pleaded guilty to two counts of Violation of a Protective Order, third degree felonies, in violation of Utah Code section 76-5-108, one count of Tampering with a Witness, a Class A Misdemeanor, in violation of Utah Code section 76-8-508, and one count of Domestic Violence in the Presence of a Child, a class B misdemeanor, in violation of Utah Code section 76-5-109. Adult Probation and Parole (“AP&P”) prepared a presentence report. R23. 36; R71. 37.

In this report, AP&P gave Mr. Cosby a score of 12 on its “General Matrix Criminal History Assessment,” which resulted in a recommendation of imprisonment. R23. 36; R71. 37. AP&P recommended consecutive prison sentences. R23. 36:2; R71. 37:2. This recommendation was based on Mr. Cosby’s criminal history, family issues, history of alcohol and drug use, and lack of education. R23. 36:2; R71. 37:2. Mr. Cosby had also previously absconded from AP&P’s supervision. R23. 36:2; R71. 37:2.

At the sentencing hearing, defense counsel pointed out that the “General Matrix Criminal History Assessment” had improperly asserted that Mr. Cosby had committed a violent felony, when in fact he had only committed a violent misdemeanor. R23. 47:2. This lowered Mr. Cosby’s score on the report and moved him from a category that recommended imprisonment to one that recommended intermediate sanctions. R23. 47:2. Defense counsel urged the court to give Mr. Cosby the opportunity of probation even

though Mr. Cosby had “failed at probation in the past.” R23. 47:2–3. This was because Mr. Cosby has stopped using drugs and, most importantly, because Mr. Cosby now has a son, wants to be involved in his life, and realizes that any more criminal behavior would jeopardize their relationship. R23. 47:3–4. He also asserted that, if released, Mr. Cosby had employment leads. R23. 47:4.

In contrast to defense counsel’s request, the State recommended concurrent prison sentences. R23. 47:4. In support of this recommendation, the State argued that Mr. Cosby had not accepted responsibility for his actions and that Mr. Cosby had a bad track record with probation and obeying other court orders. R23. 47:4–6.

Ms. Buchanan, whom the protective order was intended to benefit, also addressed the court. R23. 47:6–7. Ms. Buchanan asked for leniency because prison time would affect their child’s relationship with Mr. Cosby and because “he’s never really done anything that bad” in terms of domestic violence. R23. 47:7. Mr. Cosby also addressed the court and expressed that if the court gave him just one chance to be a part of his son’s life, he would not mess up again. R23. 47:8.

After Mr. Cosby had spoken, the district court responded:

Mr. Cosby, I appreciate very much that you have some motivation in your life, but there appears to be a lack of understanding that you have to follow the rules. You can’t use the love for your son or any other reasons to justify or to excuse noncompliance with what you are required to do under the law and what you are court ordered to do.

The biggest message here is if you don’t follow the rules, you will be removed from your son’s life a lot longer than you would otherwise. So you need to understand that even though it may be difficult and challenging for you, the

sooner you follow the rules, the sooner you'll get back involved in your son's life.

R23. 47:8–9. The court then sentenced Mr. Cosby to an indeterminate term of not more than five years in prison for Violation of a Protective Order, 365 days in jail for Witness Tampering, and 180 days in jail for Domestic Violence in the Presence of a Child, all to run concurrently. R23. 47:9. The court also sentenced Mr. Cosby to a second indeterminate prison term of not more than five years for the conviction for Violation of a Protective Order from his other case. R23. 47:9. The court ordered that the sentences in both cases run consecutive to each other, but suspended the prison sentences and placed Mr. Cosby on zero-tolerance probation for a period of thirty-six months. R23. 47:9. The jail sentences were not suspended. R23. 47:11.

### SUMMARY OF THE ARGUMENT

Mr. Cosby argues that the district court abused its discretion when it denied his request to be put on probation and instead sentenced him to jail time in addition to thirty-six months of zero-tolerance probation with suspended, consecutive prison sentences. At sentencing, defense counsel informed the court of several mitigating factors that indicated that Mr. Cosby would be amenable to probation. Most notably, Mr. Cosby now has a son who is his motivation for succeeding on probation and avoiding incarceration. Also, given the error in the presentence report defense counsel corrected at sentencing, the “General Matrix Criminal History Assessment” contained in Mr. Cosby’s presentence report recommended only intermediate sanctions and would have recommended only probation were it not for Mr. Cosby’s previous struggles with supervision. In light of

these factors, Mr. Cosby believes that the district court abused its discretion by sentencing him to jail and probation rather than giving him the benefit of the doubt and placing him on probation.

### ARGUMENT

#### II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. COSBY TO BOTH JAIL AND SUSPENDED PRISON SENTENCES WITH ZERO-TOLERANCE PROBATION BECAUSE IT DID NOT GRANT MR. COSBY'S MITIGATING CIRCUMSTANCES ADEQUATE WEIGHT.

Mr. Cosby believes the district court abused its discretion when it sentenced him to both jail and suspended, consecutive prison sentences with thirty-six months of zero-tolerance probation despite the presence of several mitigating factors. "Probation is not a matter of right . . . ." State v. Sibert, 310 P.2d 388, 393 (Utah 1957). And "the problem of probation must of necessity rest within the discretion of the judge who hears the case." Id. But even though a district court is accorded "wide latitude in sentencing," a judge's sentencing discretion is not unlimited. State v. Bluff, 2002 UT 66, ¶ 66, 52 P.3d 1210; State v. Carson, 597 P.2d 862, 864 (Utah 1979). While discretion in sentencing is not subject to a "mathematical formula," the "overriding consideration is that the sentence be just." State v. Russell, 791 P.2d 188, 192 (Utah 1990). In sentencing matters, an abuse of discretion may be found to exist if (1) the judges' actions were "inherently unfair," State v. Schweitzer, 943 P.2d 649, 651 (Utah 1997) (internal quotation marks omitted) (2) the judge imposed a "clearly excessive sentence," Id. (internal quotation marks omitted), or (3) the judge failed to consider "all the legally relevant factors," Id., and "give adequate weight to . . . mitigating circumstances." State v. Helms, 2002 UT 12, ¶

15, 40 P.3d 626 (internal quotation marks omitted). This Court will find a district court has abused its discretion when it concludes that “no reasonable [person] would take the view adopted by the . . . court.” Schweitzer, 943 P.2d at 651 (internal quotation marks omitted).

Here, Mr. Cosby urges that the district court abused its discretion by sending him both to jail and to thirty-six months of zero-tolerance probation with consecutive suspended prison sentences rather than simply putting him on probation. Specifically, Mr. Cosby feels his sentence is clearly excessive and inherently unfair because, despite previous failures on probation, circumstances in Mr. Cosby’s life have changed such that Mr. Cosby believes he is now an excellent candidate for probation and did not need to be further incarcerated. In particular, Mr. Cosby now has a son with Stacey Buchanan, whom the protective order was intended to benefit. Mr. Cosby loves his son and wants more than anything to be a part of his life and upbringing. In fact, it was Mr. Cosby’s attempts to visit his son that resulted in violation of the protective order against him. But even though the court’s orders temporarily kept Mr. Cosby from seeing his son, Mr. Cosby now realizes that disobeying court orders permanently jeopardizes his relationship with his son. See R23. 47:8. Thus, Mr. Cosby is a good fit for probation because he would not risk going to prison and missing his son’s entire childhood.

And Ms. Buchanan wants Mr. Cosby to spend time with their son. Even though there had been a protective order in place, Ms. Buchanan urged the court that prison would be bad for their son, and that Mr. Cosby shouldn’t be sentenced to prison time “because to me he’s never done anything that bad. I think he’s a very good man . . . . He

takes care of his son very well.” While this is not to minimize Mr. Cosby’s protective order violations, for which Mr. Cosby has apologized and accepted responsibility, see R23. 47:8, it shows that if he is not incarcerated, Ms. Buchanan will welcome Mr. Cosby’s presence in their son’s life. Having unimpeded access to his son only increases his chance of success on probation. And at sentencing, defense counsel presented other factors that bode well for a successful probation, including that Mr. Cosby no longer uses drugs and has strong employment leads when he leaves jail. R23. 47:3–4.

And while AP&P and the State recommended that Mr. Cosby serve prison time, part of the basis for that recommendation was undercut when defense counsel pointed out at sentencing that the “General Matrix Criminal History Assessment” in the presentence report incorrectly reported that Mr. Cosby had been convicted of a violent felony, when in fact he had only been convicted of a misdemeanor. R23. 37:10, 47:2. This lowered the matrix’s recommendation from prison to intermediate sanctions. R23. 37:10, 47:2. And much of the reason the matrix recommended intermediate sanctions instead of merely probation owed to Mr. Cosby’s previous struggles with probation, which accounted for five of his eleven points on the scale. R23. 37:10. But Mr. Cosby feels his life has changed since his last probation in such ways that make it so that his previous failures are no longer indicative of his present ability to succeed. Specifically, Mr. Cosby feels that the court did not give adequate weight to the mitigating factors presented by defense counsel at sentencing—especially the fact that his son now gives him a source of motivation that he did not previously have, and that he desperately wants to succeed so that he can be a part of his son’s life. See Helms, 2002 UT 12, ¶ 15.



This argument was preserved because it was raised by defense counsel at sentencing. R23. 47:1–4. But even if it was not preserved, this Court may reach the argument because the error of discounting relevant mitigating factors and sending Mr. Cosby to jail was plain error. See State v. Holgate, 2000 UT 74, ¶ 13, 10 P.3d 346. Plain error exists if there is an error that should have been obvious to the district court that is harmful to the defendant. Id. “An error is obvious if the law on the area was ‘sufficiently clear or plainly settled[.]’” State v. Larsen, 2005 UT App 201, ¶ 5, 113 P.3d 998 (quoting State v. Dean, 2004 UT 63, ¶¶ 16-17, 95 P.3d 276). A trial court abuses its discretion when it “fails to consider all legally relevant [sentencing] factors,” State v. McCovey, 803 P.2d 1234, 1235 (Utah 1990) (internal quotation marks omitted), or when the trial judge fails to give “adequate weight to . . . mitigating circumstances.” State v. Helms, 2002 UT 12, ¶ 15, 40 P.3d 626 (internal quotation marks omitted). Since the law is clear and plainly settled that a court must give adequate weight to mitigating circumstances, to the degree that the district court did not give adequate weight to Mr. Cosby’s strong tie to his son and his other mitigating evidence, it prejudiced Mr. Cosby and is plain error. This Court may correct a sentence imposed in an illegal manner at any time. Utah R. Crim. P. 22(e).

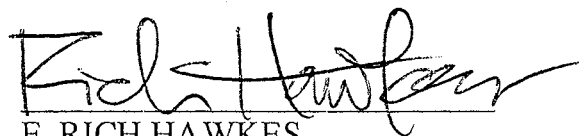
Mr. Cosby believes that because the district court did not adequately weigh his mitigating evidence, and especially the evidence of his relationship with his son, the district court entered an excessive sentence that was inherently unfair. This abuse of discretion was plain error. Thus, Mr. Cosby believes the district court abused its

discretion when it sentenced him to both and jail and thirty-six months of zero-tolerance probation with suspended, consecutive prison sentences.

**CONCLUSION**

Based on the arguments made above, Mr. Cosby respectfully asks this Court to reverse and remand for resentencing because he believes that the trial court abused its discretion by denying his request to be placed on probation and instead additionally sentenced him to jail.

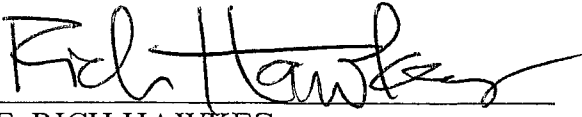
RESPECTFULLY SUBMITTED this 2 day of March, 2011.



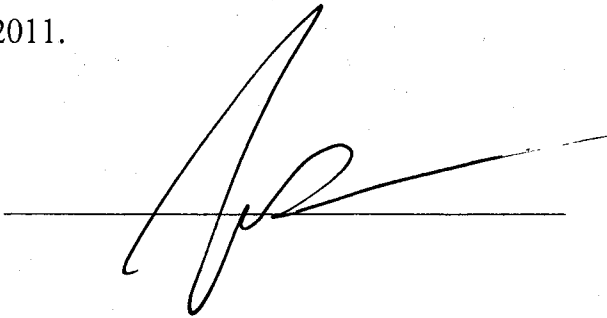
E. RICH HAWKES  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, E. RICH HAWKES, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 2 day of March, 2011.

  
E. RICH HAWKES

DELIVERED this 2 day of March, 2011.



Tab A

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
: :  
vs. : Case No: 101905723 FS  
DANIEL CORNELL COSBY, : Judge: ROBERT FAUST  
Defendant. : Date: November 1, 2010

---

PRESENT

Clerk: saraj  
Prosecutor: COOLEY, BRADFORD D  
Defendant  
Defendant's Attorney(s): ENGAR, ROBERT K

DEFENDANT INFORMATION

Date of birth: September 8, 1982  
Audio  
Tape Number: N41 Tape Count: 10:15

This case involves domestic violence.

CHARGES

1. VIOLATION OF PROTECTIVE ORDER - 3rd Degree Felony  
Plea: Guilty - Disposition: 09/13/2010 Guilty

SENTENCE PRISON

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

The prison term is suspended.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Prison sentence is to run consecutive to case #101905671.

Credit is granted for time served.

Credit is granted for 91 day(s) previously served.

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

SENTENCE FINE

Charge # 1            Fine: \$250.00  
                          Suspended: \$0.00  
                          Surcharge: \$135.79  
                          Due: \$250.00  
  
                          Total Fine: \$250.00  
                          Total Suspended: \$0  
                          Total Surcharge: \$135.79  
Total Principal Due: \$250.00  
                          Plus Interest

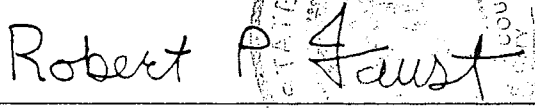
ORDER OF PROBATION

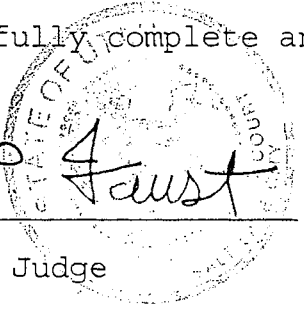
The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Adult Probation & Parole.  
Defendant is to pay a fine of 250.00 which includes the surcharge.  
Interest may increase the final amount due.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation & Parole.  
ZERO TOLERANCE PROBATION.  
If supervised by Adult Probation and Parole; all fines, fees and/or  
restitution are to be paid directly to Adult Probation and Parole.  
Obtain a substance abuse evaluation and successfully complete any  
recommended treatment.  
Obtain a domestic violence evaluation and successfully complete any  
recommended treatment.  
Defendant may complete CATS if desired.

Date: 11/1/10

  
ROBERT FAUST  
District Court Judge



3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
 :  
vs. : Case No: 101905671 FS  
DANIEL CORNELL COSBY, : Judge: ROBERT FAUST  
Defendant. : Date: November 1, 2010

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PRESENT

Clerk: saraj  
Prosecutor: COOLEY, BRADFORD D  
Defendant  
Defendant's Attorney(s): ENGAR, ROBERT K

DEFENDANT INFORMATION

Date of birth: September 8, 1982  
Audio  
Tape Number: N41 Tape Count: 10:15

This case involves domestic violence.

CHARGES

2. VIOLATION OF PROTECTIVE ORDER - 3rd Degree Felony  
Plea: Guilty - Disposition: 09/13/2010 Guilty
3. TAMPER W/ WITNESS/JUROR (amended) - Class A Misdemeanor  
Plea: Guilty - Disposition: 09/13/2010 Guilty
5. DV IN THE PRESENCE OF A CHILD (amended) - Class B Misdemeanor  
Plea: Guilty - Disposition: 09/13/2010 Guilty

SENTENCE PRISON

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

The prison term is suspended.

SENTENCE JAIL

Based on the defendant's conviction of TAMPER W/ WITNESS/JUROR a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s)

Based on the defendant's conviction of DV IN THE PRESENCE OF A CHILD a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s)

Credit is granted for time served.

Credit is granted for 91 day(s) previously served.

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

Jail sentence is to run concurrent to one another. This case is to run consecutive to case #101905723.

SENTENCE FINE

Charge # 2 Fine: \$250.00  
Suspended: \$0.00  
Surcharge: \$132.70  
Due: \$250.00

Charge # 3  
Charge # 5

Total Fine: \$250.00  
Total Suspended: \$0  
Total Surcharge: \$132.70  
Total Principal Due: \$250.00  
Plus Interest

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Adult Probation & Parole.  
Defendant to serve 365 day(s) jail.

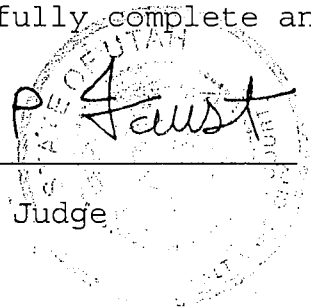
Defendant is to pay a fine of 250.00 which includes the surcharge.  
Interest may increase the final amount due.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation & Parole.  
ZERO TOLERANCE PROBATION.  
If supervised by Adult Probation and Parole; all fines, fees and/or  
restitution are to be paid directly to Adult Probation and Parole.  
Obtain a substance abuse evaluation and successfully complete any  
recommended treatment.  
Obtain a domestic violence evaluation and successfully complete any  
recommended treatment.  
Defendant may complete CATS if desired.

Date: 11/1/10

*Robert Faust*  
ROBERT FAUST  
District Court Judge





Tab B

**UTAH CODE ANN. § 76-5-108 (2008)**  
**Protective orders restraining abuse of another--Violation**

(1) Any person who is the respondent or defendant subject to a protective order, child protective order, ex parte protective order, or ex parte child protective order issued under Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act, or Title 78A, Chapter 6, Juvenile Court Act of 1996, Title 77, Chapter 36, Cohabitant Abuse Procedures Act, or a foreign protection order enforceable under Title 78B, Chapter 7, Part 3, Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor, except as a greater penalty may be provided in Title 77, Chapter 36, Cohabitant Abuse Procedures Act.

(2) Violation of an order as described in Subsection (1) is a domestic violence offense under Section 77-36-1 and subject to increased penalties in accordance with Section 77-36-1.1.

**UTAH CODE ANN. § 76-5-109.1. (2008)**  
**Commission of domestic violence in the presence of a child**

(1) As used in this section:

- (a) "Cohabitant" has the same meaning as defined in Section 78B-7-102.
- (b) "Domestic violence" has the same meaning as in Section 77-36-1.
- (c) "In the presence of a child" means:
  - (i) in the physical presence of a child; or
  - (ii) having knowledge that a child is present and may see or hear an act of domestic violence.

(2) A person is guilty of child abuse if the person:

- (a) commits or attempts to commit criminal homicide, as defined in Section 76-5-201, against a cohabitant in the presence of a child; or
- (b) intentionally causes serious bodily injury to a cohabitant or uses a dangerous weapon, as defined in Section 76-1-601, or other means or force likely to produce death or serious bodily injury against a cohabitant, in the presence of a child; or
- (c) under circumstances not amounting to a violation of Subsection (2)(a) or (b), commits an act of domestic violence in the presence of a child.

(3)(a) A person who violates Subsection (2)(a) or (b) is guilty of a third degree felony.

(b) A person who violates Subsection (2)(c) is guilty of a class B misdemeanor.

(4) A charge under this section is separate and distinct from, and is in addition to, a charge of domestic violence where the victim is the cohabitant. Either or both charges may be filed by the prosecutor.

**UTAH CODE ANN. § 76-8-508 (2008)**  
**Tampering with witness--Receiving or soliciting a bribe**

(1) A person is guilty of the third degree felony of tampering with a witness if, believing that an official proceeding or investigation is pending or about to be instituted, or with the intent to prevent an official proceeding or investigation, he attempts to induce or otherwise cause another person to:

- (a) testify or inform falsely;
- (b) withhold any testimony, information, document, or item;
- (c) elude legal process summoning him to provide evidence; or
- (d) absent himself from any proceeding or investigation to which he has been summoned.

(2) A person is guilty of the third degree felony of soliciting or receiving a bribe as a witness if he solicits, accepts, or agrees to accept any benefit in consideration of his doing any of the acts specified under Subsection (1).

(3) The offense of tampering with a witness or soliciting or receiving a bribe under this section does not merge with any other substantive offense committed in the course of committing any offense under this section.

**UTAH CODE ANN. § 77-36-1.1 (2008)**

**Enhancement of offense and penalty for subsequent domestic violence offenses**

(1) For purposes of this section, “qualifying domestic violence offense” means:

(a) a domestic violence offense in Utah; or

(b) an offense in any other state, or in any district, possession, or territory of the United States, that would be a domestic violence offense under Utah law.

(2) A person who is convicted of a domestic violence offense is:

(a) guilty of a class B misdemeanor if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class C misdemeanor; and

(ii)(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense;

(b) guilty of a class A misdemeanor if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class B misdemeanor; and

(ii)(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense; or

(c) guilty of a felony of the third degree if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class A misdemeanor; and

(ii)(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense.

(3) For purposes of this section, a plea of guilty or no contest to any qualifying domestic violence offense in Utah which plea is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

**UTAH R. CRIM. P. 22**  
**RULE 22. SENTENCE, JUDGMENT AND COMMITMENT**

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, as a result of the conviction, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a

mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.