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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee	((	BRIEF OF APPELLANT
v.s.	(	Priority No. 2
BOB J. ANDREASEN, Defendant and Appellant	((	Appellate Court No. 20000879CA

BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES
CITES

JURISDICTIONAL STATEMENT

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

STATEMENT OF THE ISSUES

1. Did the court err in revoking Appellant's probation and sentencing him to the Utah State Prison where the Appellant did not receive notice of the grounds considered by the court to revoke his probation?

2. Did the court err in revoking Appellant's probation based the evidence presented as well as the probation order?

STANDARD OF REVIEW

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

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Page

STATEMENT OF THE CASE

On or about Feb. 23, 2000 Appellant plead guilty to forgery, a third degree felony and was sentenced to 0-5 years in the Utah State Prison on or about April 3, 2000. Execution of that sentence was stayed and Appellant was placed on 36 months probation. An order to show cause was filed against Appellant alleging one violation. On Sept. 25, 2000 the court sentenced Appellant to the Utah State prison.

STATEMENT OF FACTS

On or about Feb. 23, 2000 Appellant plead guilty to forgery, a third degree felony and was sentenced to 0-5 years in the Utah State Prison on or about April 3, 2000. Execution of that sentence was stayed and Appellant was placed on 36 months probation. As a condition of his probation Appellant was to serve a certain period of time in the Washington County Jail. On or about May 16, 2000 an order to show cause was filed against appellant alleging only one violation of his probation, to-wit:

> By having committed the offense of disruptive unmanageable behavior by an inmate on or about May 12, 2000 in The Purgatory Correctional Facility.

The allegation was denied by appellant on June 28, 2000. After hearing the evidence on July 12, 2000 and Sept. 25, 2000 the Court revoked appellant's probation and sentenced him to 0-5 years in the Utah State Prison.

Appellant appeals from the entire judgment of the court.

SUMMARY OF THE ARGUMENT

The trial court erred in revoking appellant's probation and subsequently sentencing the appellant to the Utah State prison because the court failed to afford appellant due process because the court found that appellant was in violation of his probation on grounds for which the appellant had received no notice.

The trial court erred in revoking appellant's probation and subsequently sentencing the appellant to the Utah State prison because the State failed to sustain its burden of proof.

ARGUMENT

POINT I. DID THE COURT ERR IN REVOKING APPELLANT'S PROBATION AND SENTENCING HIM TO THE UTAH STATE PRISON WHERE THE APPELLANT DID NOT RECEIVE NOTICE OF THE GROUNDS CONSIDERED BY THE COURT TO REVOKE HIS PROBATION?

A probationer is entitled to written notice of the ground(s) on which revocation is sought. State v Bonza, 106 Utah 553, 150 P.2d 970 (1944); Gagnon v Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Section 77-18-1 (12)(a), (b), (d) and (e) of the Utah Code requires that the State give Appellant specific notice of alleged violations. Here, there was only one ground for termination of Appellant's probation, and that ground was by committing disruptive, unmanageable behavior by an inmate on or about May 12, 2000. The court permitted a trial amendment in the pleadings to reflect that the incident alleged occurred not May 12, 2000 but the 9th or 10th of May, 2000, approximately 38 days after having been placed on probation. Counsel for appellant had objected a couple of times to questions relating to disruptive behavior alleged to have occurred outside the May 12, 2000 date. Rec 200 page 6 Ln 1-15; page 11 Ln 5-8; page 12 Ln 3-8. The purpose in objecting was to make sure that the court only considered the allegation alleged. Finally, the court, upon the state's motion, narrowed the date of the alleged violation to be May 09 or 10, 2000. Rec 200 page 16 Ln 4-8. The appellant was put on notice of only one violation and had the opportunity to either admit or deny only that one alleged violation. There was no probation condition that appellant avoid disruptive unmanageable conduct while incarcerated, and there was no allegation that appellant comitted a new crime or failed to complete his GED. Record pages 126-130 and 142. The

court in State v Cowdell, 626 P.2d 487 (1981) considered that appellant's notice problems. The alleged violation of probation in the Cowdell case was that the appellant committed the offense of aggravated robbery. However, the court there indicated that the charge of aggravated robbery had no influence in the court's decision to revoke probation. The trial court then explained that it was revoking the appellant's probation due to a DUI conviction. The Utah Supreme Court held that the trial court's reliance on a ground not mentioned in the order to show cause was a clear violation of "even the limited procedural rights afforded a probationer"..., Id at 489, and that the error was prejudicial and required reversal. The court after the conclusion of the evidence and argument stated the following:

THE COURT:

"....the Court finds specifically that Mr. Andreasen has violated the terms and conditions of his probation by having failed to complete his GED and by having behaved in such a fashion as to make it impossible for him to complete his GED because of his continued disruptive behavior in the facility.

I also find that Mr Andreasen has violated the terms and conditions of the probation in that he is bound by his agreement with Adult Probation and Parole to comply with all of the terms and conditions of the agreement, and the first term and condition of that agreement is that he not commit any law violations, and Mr Andreasen obviously is involved directly as a party to a law violation, that is injury to the jail, a third degree felony." Record 198 page 15 Ln 17-25; page 16 Ln 1-5. Appellant did not receive written notice of the ground upon which revocation was sought as dictated by the court in State v Bonza, 150 P.2d 970 (1944). The court erred in sentencing appellant because appellant was not given proper notice as stated in the Bonza decision. Appellant was given notice of an allegation of some type of

disruptive behavior that allegedly occurred on May 12, 2000. However, the date of the alleged violation was narrowed during the evidentiary hearing and alleged to have occurred on May 9 or May 10, 2000. The violation alleged to have occurred was the flooding of Appellant's jail cell. Record 200 page 9 Ln 17-23; Record 200 page 12 Ln 16-19.

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

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

It is cleared that the court erred and revoked appellant's probation and sentenced him to prison based solely on allegations of violations for which appellant did not receive notice. The appellant was put on notice that he allegedly committed some type of disruptive, unmanageable behavior that occurred on May 9 or May 10, 2000. At the evidentiary hearing it became clear that the alleged disruptive behavior was the flooding of appellant's cell. The court, however, found that appellant's probation should be revoked and that he should be sentenced to prison because he had violated two conditions of his probation which were not alleged: failure to obtain his GED and the commission of a crime. Record 198 page 15 Ln 17-25 and page 16 Ln 1-5. The court even acknowledged that appellant had not be charged with the third degree felony. Record 198 Ln 6-7.

POINT II. DID THE COURT ERR IN REVOKING APPELLANT'S PROBATION BASED ON THE EVIDENCE PRESENTED AS WELL AS THE PROBATION ORDER?

The decision of the trial court to revoke probation is a discretionary matter. Section 77-18-1 Utah Code Annotated. Here, the trial court abused its discretion. The standard to be used in proving a violation is a preponderance of the evidence. Conger v Tel Tech, Inc., 798 P.2d 279 (Utah App. 1990). The State here did not meet that burden even had the alleged violation actually been a condition of probation. There was no notice given to appellant in the Order to Show Cause that he allegedly failed to complete his GED (after only 38 days of probation) or that he committed a violation of the law, only that he committed a violation of the jail rules which was not a condition of his probation.

Finally, appellant's trial counsel objected a number of times at the state's attempt to introduce evidence of any disruptive unmanageable conduct on any date other than May 12, 2000. T. (dated 7/12/00) p. 6 Ln 1-8; p. 11 Ln 5-8; p. 12 Ln 3-5. The court did not sustain the objection. Apparently, the disrupted unmanageable conduct alleged by the State was the flooding incident occurred on May 9 or 10, 2000. Officer Cannon, according to his testimony, had no personal knowledge of who caused the flooding. He did not question appellant about the cause of the incident nor did he know if any other officer questioned appellant concerning the incident. He made an assumption that appellant caused the flooding because the cell flooded was occupied by appellant. Record 200 page 12 Ln 16-19; page 13 Ln 1-2; page 15 Ln 3-6. Officer Cannon did not even know for sure if Appellant had a cell mate. Record 200 page 13 Ln 3-6. Appellant was the only witness having personal knowledge of the particular flooding incident, and he testified that not only did he have a cell mate but also that the cellmate was the one who caused the flooding. Record 198 page 9 Ln 8-25; page 10 Ln 1-3. Appellant

testified how the cellmate flooded the cell and how he subsequently sent appellant a kite regarding his (the cellmate's) involvement in the incident. Record 198 page 10 Ln 4-18.

For a trial court to properly revoke appellant's probation the court must find both that a probation violation occurred and that the violation was willful. State v Archuleta, 812 P.2d 80, 83 n.5 (Utah App. 1991); State v Hodges, 798 P.2d 270, 275 (Utah App. 1990). Here, Appellant testified that his cellmate flooded the cell and that he told the cellmate he would get into trouble. This fact does not constitute a willful violation of appellant's probation terms.

The state had the burden of proving the violation by a preponderance of the evidence. State v Hodges, 798 P.2d 270 (Utah App. 1990). Marshalling all of the evidence would demonstrate that the state presented no eyewitness testimony, no one who even spoke with appellant regarding the flooding and no evidence at all that appellant flooded his cell except that there was an assumption that the flooding was caused by appellant because it was his cell that was flooded. On the other hand, appellant testified that he did not flood the cell, and that his cellmate, Joe Hoskins, flooded the cell. Appellant testified that Joe Hoskins sent him a kite admitting to flooding the cell. Accordingly, the state has failed to meet its burden in light of the evidence available to the court at the evidentiary hearing

CONCLUSION

For the reasons herein alleged, the Appellant was denied a fair trial in Case No. 991500928, and the judgment and sentence should be set aside and Appellant should be released from prison.

ADDENDUM

Please see Addendum

DATED on this the 28th day of April, 2001.

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief has been served on the Office of the Attorney General and Appellant by delivery of a true copy via regular mail on the 30th day of April, 2001.

KENNETH L. COMBS

ADDENDUM NO. 1

Section 77-18-1(12)(a), (b), (d) and (e) of the Utah Code of Criminal Procedure:

(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) Upon the filing of an affidavit alleging with particularity facts asserted to constitute a 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...

(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.