

2015

**The State of Utah, Plaintiff/Appellee, v. Girato Kamillo Phillip,
Defendant/Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff/Appellee,

v.

GIRATO KAMILLO PHILLIP,

Defendant/Appellant.

Case No. 20150278-CA

Appellant is incarcerated.

BRIEF OF APPELLANT

Appeal from an order revoking probation and imposing the original sentence for Aggravated Robbery, a first degree felony, in violation of Utah Code §76-6-302, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Mark Kouris presiding.

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IN THE UTAH COURT OF APPEALS

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Appellant is incarcerated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code §78A-4-103(2)(j). *See* Addendum A (Sentence, judgment, Commitment); R.112-13, 123-24. The Utah Supreme Court transferred the appeal to this Court. R.123-24.

ISSUES, STANDARD OF REVIEW, AND PRESERVATION

Issue I: Whether the district court erred in concluding that it could revoke defendant's probation for conduct that occurred when AP&P was not supervising his probation?

Standard of Review: This Court generally reviews a district court's decision to revoke probation for an abuse of discretion. *State v. Wellington*, 2015 UT App 12, ¶6, 343 P.3d 328. But the question in this case concerns the scope of judicial authority to revoke probation, and "[q]uestions of the scope of judicial authority are reviewed for correctness." *Oliphant v. Estate of Brunetti*, 2002 UT App 375, ¶7, 64 P.3d 587; *see also In re Discipline of Alex*, 2004 UT 81, ¶29, 99 P.3d 865 ("Whether the March 22 order

exceeded the scope of the district court's authority under Rule 27 is a question of law we review for correctness, without deference to the district court's interpretation.").

Preservation: This issue is preserved. R.129:1-29.

Issue II: Whether the district court erred in concluding that it could revoke defendant's probation when the record indicated that defendant did not willfully violate his probation?

Standard of Review: On appeal, a defendant "must show that the evidence of a probation violation, viewed in a light most favorable to the trial court's findings, is so deficient that the trial court abused its discretion in revoking defendant's probation." *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct. App. 1994) (quotations omitted).

Preservation: This issue is preserved. R. 129:5, 21-25. But if it is not, this Court may review it for plain error or ineffective assistance of counsel. "Under the plain error standard, [this Court] may reverse the district court on an issue not properly preserved for appeal when a party can show the following: '[1][a]n error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful....'" *State v. Powell*, 2007 UT 9, ¶ 18, 154 P.3d 788, 794. And, to support an ineffective assistance of counsel claim, a defendant must demonstrate, first, "that counsel's performance was deficient" and, second, "that counsel's deficient performance was prejudicial." *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92.

STATUTORY PROVISIONS AND RULES

The following are attached at Addendum B: Utah Code §77-18-1. Utah Code §64-13-21. Utah R. Crim. P. Rule 11. 18 U.S.C. § 3603.

STATEMENT OF THE CASE AND FACTS

On April 15, 2011, Girato Kamilo Phillip ("Mr. Phillip") pleaded guilty pursuant to Rule 11 of the Utah Rules of Criminal Procedure to Aggravated Robbery for an incident occurring on December 26, 2010. Utah R. Crim. P. Rule 11. R.34-36, 40-46; 135:1-4; R.136:3. Mr. Phillip took responsibility for being part of a group of people who used force to take money from a convenience store clerk. R. 40-46; 136:3. In addition, the "codefendant was armed with a baseball bat." R. 136:3.

Mr. Phillip was sentenced immediately after entering his plea. R. 136:5. The district court suspended the five-years-to-life prison sentence and placed Mr. Phillip on supervised probation for 36 months. R.34-36; 136:5. Among the conditions of probation were that probation was zero tolerance, that Mr. Phillip serve 365 days in jail, that Mr. Phillip not use or possess alcohol or illegal drugs, and that Mr. Phillip not violate any laws. R.35. 136:5-6. The order of probation stated: "Probation is to be supervised by Adult Probation & Parole" (AP&P). R.35. The sentencing judge told Mr. Phillip, "Today we have all agreed that you are going to do a year in jail and then go to AP&P probation, but you need to understand that if you don't comply with probation and do everything they tell you, a judge could bring you back and sentence you to [the] maximum amount." R. 136:4. *See also* 136:2. (Based upon the plea bargain, the parties anticipated that "after the [365 days in] jail [Mr. Phillip] goes to AP&P.").

Approximately one month after Mr. Phillip was sentenced in this matter, he addressed an Aggravated Assault case where his AP&P supervision was terminated for that matter and a zero-to-five-year prison commitment was imposed. R.129:1-2, 7, 9-10,

30. As Judge Kouris recognized, Mr. Phillip was not in prison when he was sentenced in this matter, but was sentenced to prison on a subsequent date for the Aggravated Assault case. R. 129:9. Mr. Phillip, however, was in jail when he was sentenced in this matter and had been from the start of this matter up until the time he was sentenced to prison for the Aggravated Assault case. R.11, 26, 31;129:9, 30; 133:2.

At some point when Mr. Phillip was in prison, AP&P closed its file on Mr. Phillip's probation for this Aggravated Robbery matter. R.51-52; 129:1-2, 9-10. After serving approximately two years in prison, Mr. Phillip was paroled in the Aggravated Assault case. R.129:1-2, 9-10, 50. AP&P supervised Mr. Phillip's parole, the conditions of which were materially the same as the conditions of his probation in this matter.¹ R.129:2-3, 4, 6, 12, 15, 21.

On February 20, 2014, more than 34 months after Mr. Phillip was sentenced in this matter, AP&P filed an affidavit in support of an order to show cause alleging that Mr. Phillip committed seven probation violations for this matter. R.48-49. Specifically, the affidavit alleged that Mr. Phillip failed to establish a residence of record, changed his residence without AP&P's permission, consumed alcohol on four separate occasions, and failed to submit to drug tests. R.48-49. In AP&P's probation violation report, the

¹ Utah R.Evid. 201 allows this Court to take judicial notice that the Aggravated Assault case that sent Mr. Phillip to prison is case 091900040FS. *See Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 (Utah Ct. App. 1988). *See also State v. Bates*, 22 Utah 65, 61 P. 905 (1900) ("Courts will generally take judicial notice of whatever ought to be generally known within the limits of their jurisdiction, and particularly will they take notice of the records and prior proceedings in the same case.").

probation officer noted that AP&P had “inadvertently closed out [Mr. Phillip’s] probation case (in [AP&P’s] system),” and that he “wasn’t aware Mr. Phillip was on probation for this case until this last week.” R.51-52. On September 25, 2014, AP&P filed an amended affidavit alleging three additional probation violations: possession of a controlled substance, carrying a concealed dangerous weapon, and assault. R.62-63.

The district court issued an order to show cause. R.69-70, 73-74. At a hearing on the order to show cause, Mr. Phillip denied the alleged probation violations. R.108-09. At the evidentiary hearing held March 20, 2015, Mr. Phillip had the assistance of an Arabic interpreter, as he did for the other hearings in this matter. R.24-25, 32, 36, 108, 110; 134:1; 136:2.

At the evidentiary hearing, the unnamed probation officer said that AP&P had erroneously closed Mr. Phillip’s probation file when Mr. Phillip was serving his prison sentence in the other case. R.129:9. *See also* R.51. He noticed the error after Mr. Phillip was paroled and he erased the “end date” for Mr. Phillip’s probation in AP&P’s system. R.129:9. He said that he didn’t think Mr. Phillip ever initiated his probation with AP&P because he was in custody when he was sentenced. R.129:20.

The district court judge acknowledged that a finding of a probation violation in this matter would “carry a greater consequence” for Mr. Phillip than if he was at the prison for only the case where the zero-to-five-year sentence was imposed. R. 129:7. Furthermore, the district court agreed that Mr. Phillip could not be found to violate conditions of probation of which he lacked notice. R.129:20-23. The court specifically expressed a concern about whether Mr. Phillip could violate a condition of probation if

he didn't know what it was. R.129:21. Consequently, the court found that because AP&P closed this matter in its system, Mr. Phillip lacked adequate notice of the conditions that he establish a residence of record with AP&P, inform AP&P of any change in residence, and submit to drug tests. R.129:25-26. Accordingly, the court struck the allegations that Mr. Phillip violated those conditions. R.129:25-26.

However, the district court concluded that AP&P lacked authority to terminate probation and so Mr. Phillip's probation could be revoked regardless of whether AP&P was supervising it. R.129:15-16, 18-19, 25. In light of the court's conclusion, Mr. Phillip did not challenge the factual basis for the remaining allegations and no evidence was taken. R.129:27-28. The district court found that Mr. Phillip committed seven probation violations: consuming alcohol on four occasions, committing assault, possessing a controlled substance, and carrying a dangerous weapon. R.129:29. It revoked Mr. Phillip's probation and imposed the original prison sentence of five-years-to-life. R.112-13; 129:31-32. The matter was ordered to run concurrent to Mr. Phillip's other prison commitment matter. 129:32. Mr. Phillip timely appealed the district court's imposition of the prison commitment in this matter. R. 117, 121-122.

SUMMARY OF THE ARGUMENT

The district court erred when it concluded that it could revoke Mr. Phillip's probation for conduct that occurred when AP&P was not supervising his probation. The pertinent statutory provision implies that supervision by the Department of Corrections, i.e., AP&P, is necessary for probation. Thus, a defendant's probation cannot be revoked if AP&P isn't supervising it. Furthermore, the plain language of the district court's

probation order also indicates that AP&P's supervision was a necessary condition of Mr. Phillip's probation. Accordingly, because AP&P was not supervising Mr. Phillip's probation in this matter, this Court should reverse the trial court's finding that Mr. Phillip's probation could be revoked in this matter.

The district court erred when it concluded that it could revoke Mr. Phillip's probation where the record indicates that Mr. Phillip did not willfully violate his probation. Mr. Phillip did not willfully violate his probation because there was no reason for Mr. Phillip to know or believe that he was on probation. Accordingly, this Court should reverse the trial court's finding that Mr. Phillip's probation could be revoked in this matter.

ARGUMENT

I. The district court erred in concluding that it could revoke Mr. Phillip's probation for conduct that occurred when AP&P was not supervising his probation.

Mr. Phillip could not have violated probation where AP&P had closed its file on his probation and was not supervising him.

Utah's probation statute provides, in pertinent part:

On a plea of guilty, . . . or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

- (i) on probation under the supervision of the Department of Corrections . . . ;
- (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.

Utah Code §77-18-1(2)(a).² Hence, there are three possibilities for probation. The defendant may be put on probation (1) “under the supervision of the Department of Corrections” (the Department), (2) “with an agency of local government or with a private organization,” or (3) “on bench probation under the jurisdiction of the sentencing court.” §77-18-1(2)(a).

In this case, the district court put Mr. Phillip on probation “to be supervised by [AP&P],” R.35, which is a division of the Department. *See* §63M-7-404(6),(7); §77-40-107(4). The plain language of the statute implies that where, as here, a court places a defendant on probation “under the supervision of the Department,” the Department’s supervision is a necessary condition of the defendant’s probation. §77-18-1(2)(a)(i). Indeed, if the Department terminates supervision, the defendant is no longer “on probation under the supervision of the Department.” §77-18-1(2)(a)(i). Thus, under the probation statute, the Department effectively closes probation by not supervising it. The district court judge was therefore mistaken that the Department “can’t close” probation. R.129:12.

Furthermore, the plain language of the district court’s probation order also indicates that AP&P’s supervision was a necessary condition of Mr. Phillip’s probation.

² The version of section §77-18-1(2)(a) that was “in effect at the time of the incident underlying this appeal” does “not differ substantively from the current version,” so this brief cites to the current version for the Court’s convenience. *State v. Ellis*, 2014 UT App 185, ¶9 n.3, 336 P.3d 26.

The order expressly stated that Mr. Phillip's probation was "to be supervised by [AP&P]." R.35.

Accordingly, if AP&P wasn't supervising Mr. Phillip's probation during the alleged probation violations, then the alleged violations cannot support the revocation of Mr. Phillip's probation. In other words, Mr. Phillip can't be found to be in violation of supervised probation if AP&P wasn't supervising him. Furthermore, AP&P wasn't supervising Mr. Phillip. "If [Mr. Phillip] had been supervised [by AP&P] there would have been a record established" indicating so. R. 129:3. No such record was ever provided by AP&P. R. 129:1-32.

In this matter, on April 15, 2011, Mr. Phillip pleaded guilty and the court sentenced him to complete 36 months of AP&P probation. R.34-36. Among the conditions of his probation were that probation was zero tolerance, that Mr. Phillip serve 365 days in jail, that Mr. Phillip not use or possess alcohol or illegal drugs, and that Mr. Phillip not violate any laws. R.34-36; 136:5. Approximately one month later, Mr. Phillip was in court for an aggravated assault case where he was terminated from AP&P probation and a prison sentence was imposed. R.129:1-2, 9-10, 30. AP&P probation was never initiated in this matter because Mr. Phillip was in jail when he was sentenced, and he remained in jail until he was sentenced to prison for the Aggravated Assault matter. R.129:20. While Mr. Phillip was in prison, AP&P closed its file on Mr. Phillip's probation for this matter. R.129:9. It was not until mid-February of 2014, approximately 34 months after Mr. Phillip was sentenced, that AP&P even knew about this matter and then quickly filed the initial affidavit dated February 20, 2015. R.48-52.

Because AP&P was not supervising Mr. Phillip for this matter, and this supervision was a necessary condition of his probation, this Court should reverse the trial court's finding that Mr. Phillip violated the terms of his probation. Furthermore, Mr. Phillip was prejudiced by the trial court's error because he is now serving an additional five-year-to-life prison sentence in addition to the zero-to-five-year prison sentence that initially started Mr. Phillip's prison stay. Lastly, this issue was preserved by defense counsel who stated, "because [Mr. Phillip] was not being supervised for his probation... the Court shouldn't find he's in violation of his probation, [and] his probation should continue in this case." R.129:2; *see also* R.129:10-12. Defense counsel also highlighted that "the requirement of the court was that he be supervised by Adult Probation & Parole, and they closed that supervision." R.129:12.

II. The district court erred in concluding that it could revoke Mr. Phillip's probation where the record indicates that Mr. Phillip did not willfully violate his probation.

According to Utah Code Ann. 77-18-1(12)(e)(ii), "[u]pon 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." Although Utah Code Ann. §77-18-1 does not specifically address whether the defendant's violation of a probation condition must be willful, this Court has held that "in order to revoke probation, a violation of a probation condition *must*, as a general rule, *be willful*." *State v. Hodges*, 798 P.2d 270, 276 (Utah Ct. App. 1990) (emphasis added). This willfulness requirement falls under a due process right that is granted to criminal defendants that was acknowledged in U.S. Supreme Court jurisprudence in *Bearden v.*

Georgia, 461 U.S. 660 (1983). Specifically, *Bearden* made clear that “[t]he fundamental fairness requirement of the Fourteenth Amendment forbids the revocation of probation when a probationer has failed to pay restitution or a fine through no fault of his own.” *State v. Orr*, 2005 UT 92, ¶ 33, 127 P.3d 1213, 1221; *see Bearden v. Georgia*, 461 U.S. at 672.

Underlying the willfulness requirement is the view that “[a]s long as the defendant to whom leniency has been extended keeps faith with the court and the agency which supervises his probation, he is entitled to the benefits of the probation or suspension.” *Hodges*, 798 P.2d at 276. In addition, the willfulness requirement prevents a defendant from being terminated from probation for “problems beyond his control” *Id.* at 277; *see also State v. Legg*, 2014 UT App 80, ¶ 10, 324 P.3d 656, 659 (to revoke probation, the trial court must first find by a preponderance of the evidence “that the violation was willful and not merely the result of circumstances beyond the probationer’s control.”). This willfulness requirement also entails that “a probationer be clearly and accurately apprised of the expectations for remaining on probation.” *Hodges*, 798 P.2d at 277. Thus, “probation conditions must be sufficiently precise and unambiguous to inform probationer of conduct essential to retain liberty.” *Id.* at 277.

Hodges reversed and remanded because the record did not adequately reveal that the defendant had willfully violated his probation. *Hodges*, 798 P.2d at 278. In *Hodges*, the record was not clear whether the defendant was unable to make adequate progress in sex offender treatment due to no fault of his own. *Id.* at 278 (defendant “was never informed that he had to make [treatment] progress at a certain rate regardless of fault”).

This Court reversed the probation revocation order, noting that the record failed to address whether the defendant's probation was revoked because of problems beyond or within his control. *Id.*

A finding that a defendant has willfully violated his probation also necessitates that the trial court determine that a defendant has the requisite knowledge surrounding the conduct alleged in the probation violation. *Legg*, 2014 UT App 80, ¶ 13. In other words, if a defendant lacks pertinent knowledge that is essential to the violation, there cannot be a finding of willfulness. *Id.* In *Legg*, the court concluded that the defendant lacked the requisite knowledge to show that he willfully violated probation for possessing a controlled substance when there was nothing in the record to support that the defendant had knowledge of the narcotic character of the substance that he possessed. *Id.* (“[i]f Legg had no idea what the substance at the bottom of his pill bottle was, then it cannot be said that he *willfully* violated his probation agreement by possessing a controlled substance.”).

Utah case law emphasizes that a finding of willfulness “merely requires a finding that the probationer did not make *bona fide* efforts to meet the conditions of his probation.” *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct. App. 1994); *see also State v. Robinson*, 2014 UT App 114, ¶ 16, 327 P.3d 589, 593. Utah case law also makes clear that “the word willful should not be equated with the word intentional.” *State v. Johnson*, 2012 UT App 118, ¶ 9, 276 P.3d 1254, 1257 (quotations omitted). Lastly, a “trial court's finding of willfulness may be implicit rather than explicit.” *Robinson*, 2014 UT App 114, ¶ 16.

In this matter, the trial judge erred in terminating Mr. Phillip's probation when the record shows that Mr. Phillip did not willfully violate his probation. *See Hodges*, 798 P.2d at 276. Applying *Legg* to the facts of this case, Mr. Phillip needed to have the requisite knowledge about the probation violation in order to support a finding that he willfully violated his probation. *See Legg*, 2014 UT App 80, ¶ 13. This requisite knowledge is lacking in this matter because the record indicates that Mr. Phillip could not have known or believed that he was on probation during the time of the alleged conduct. R.129:5. That is, Mr. Phillip cannot willfully violate probation if he does not even know that he is on probation. He likewise cannot make bona fide efforts to meet the terms of his probation if he does not even know that he is on probation. *See Bearden*, 461 U.S. 660, at 672. Thus, because the requisite knowledge requirement for willfulness was not met in this case, the trial court could not have found that Mr. Phillip willfully violated his probation.

The record does not support that Mr. Phillip could have reasonably known or believed that he was on supervised probation for multiple reasons. First, there was no evidence provided that AP&P ever initially met with Mr. Phillip after he was sentenced in this matter to review the probation agreement and to have him sign the agreement. *See* R. 129:20. In fact, the record indicates that an initial meeting between Mr. Phillip and AP&P never occurred for this matter. *Id.* This initial meeting is a crucial first step that makes clear to a defendant what it means to be on supervised probation as opposed to court probation. Because this initial meeting between Mr. Phillip and AP&P never occurred, Mr. Phillip could not have reasonably known that he was on probation.

Second, the record does not indicate that there were any meetings with Mr. Phillip and AP&P at any time for this matter. Mr. Phillip was in jail at the start of this case and he remained in jail until he was sentenced to prison for his Aggravated Assault case. R.11, 26, 31; R.129:9, 30. There were no meetings with Mr. Phillip and AP&P about this matter at AP&P's place of business prior to Mr. Phillip's incarceration at the prison. *See* R.129:20. There were no visits by AP&P officials to Mr. Phillip about this matter while he was incarcerated at the jail or at the prison. *See* R.51; *see also* R.129:9, 20. There were no visits by AP&P to Mr. Phillip about this matter once Mr. Phillip was placed on parole for his other matter. *Id.* In fact, it was not until Mr. Phillip was placed on parole for his other matter that he had regular contact from AP&P officials. R.129:1-4, 6, 12, 15, 21. Thus, AP&P never met with Mr. Phillip for this matter before he went to prison, while he was at the prison, or while he was on parole for his other case. R.50. This means that over the course of approximately three years, AP&P never met with Mr. Phillip about this matter. Mr. Phillip thus could not have reasonably known that he was on probation.

Third, Mr. Phillip did not receive the instructions, communication, and assistance that AP&P typically provides. The duties of a probation officer are not just to report a defendant's probation violations to the court once they occur, but they are specifically tasked with communicating with a probationer in order to assist and help the probationer succeed. *See* Utah Code Ann. § 64-13-21, at Addendum B (probation officers have the following duties: "(a) monitoring, investigating, and supervising a parolee's or probationer's compliance with the conditions of the parole or probation agreement;"); *see also* *U.S. v. Davis*, 151 F.3d 1304, 1306 (10th Cir. 1998) (a "[p]robation officer serves as

an investigative and supervisory arm of the [sentencing] court”). For example, “an AP&P agent is committed to helping offenders become productive members of the community” and “[t]he supervision of offenders transcends beyond ensuring that they comply with conditions of probation or parole... [Probation] officers often *must* assist offenders with obtaining the basic essentials to survive. This may include housing, employment, school, training, food, treatment, therapy and counseling.” *About Adult Probation and Parole*, (retrieved August 21, 2015), http://corrections.utah.gov/index.php?option=com_content&view=article&id=845:adult-probation-parole&catid=10&Itemid=262 (emphasis added). As a result of these varying duties, probation officers will act in “the role of a police officer, court adviser, mentor and social worker.” *Id.* Thus, AP&P’s role is to provide both support and reminders to their probationers when needed, including reminders of the consequences of noncompliance, so that probationers have the best chance of succeeding on probation.

This recognition of the role of probationers is also codified federally. According to 18 U.S.C. § 3603, a “probation officer shall...(3) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition...[and] (10) perform any other duty that the court may designate.” Probation officers also “monitor [offenders] through phone calls and personal contacts,” and “direct them to services to help them – such as substance abuse or mental health treatment, medical care, training, or employment assistance – as ordered by the court.” *See Addendum B. Probation and Pretrial officers and Officer Assistants, Supervise*

defendants and offenders in the community, (retrieved August 21, 2015), <http://www.uscourts.gov /services-forms/probation-and- pretrial-services/probation -and- pretrial-officers-and-officer>. In completing these tasks, probation officers give probationers the best opportunity of succeeding on probation.

In this matter, AP&P never communicated with or assisted Mr. Phillip with his probation. Even though AP&P was supervising his parole for the other case on materially the same conditions, Mr. Phillip was still not being supervised on this case. R.129:2-3,4,6,12,15,21. Thus, AP&P was not conveying anything to Mr. Phillip about the specific requirements and possible positive and negative outcomes that would await Mr. Phillip depending upon his compliance or non-compliance *for this matter*. Had AP&P been supervising Mr. Phillip on this matter after he was released from prison, they would have made clear to him that any non-compliance could result in a five-years-to-life prison term. Had AP&P been supervising Mr. Phillip they would have reminded him that any prison time imposed for this matter would add additional time to the prison time he faced for the matter for which he was on parole. In addition, if Mr. Phillip were being properly supervised on probation, AP&P would have reminded and emphasized to Mr. Phillip the ramifications of being placed on a zero-tolerance probation.

Further, had AP&P been supervising Mr. Phillip, they would have reminded him that probation is different from parole because the consequences are different for the violations. *See* R.129:4. Mr. Phillip's counsel addressed these differences at the evidentiary hearing by stating that the "systems of supervision are different in that one is a probation supervision, one is a parole supervision, and the consequences are different

for the violation. One is an individual goes before the board, and the rest of their prison sentence is imposed. With regard to probation, an individual goes before the court, and then the court evaluates whether or not there has been a violation of those terms” to warrant probation being revoked and the prison term imposed. R.129:4. Had AP&P been supervising Mr. Phillip, they would have made clear that Mr. Phillip needed to go back before the trial judge and explain that he could not complete probation because he was in prison. Thus, because AP&P was not communicating or assisting Mr. Phillip in this matter, Mr. Phillip would have no reason to know or believe that he was on probation.

Fourth, Mr. Phillip could not have reasonably known or believed that he was on probation for this matter when he was sentenced to prison for his other matter. That is, while serving time at the prison, he cannot successfully complete all of the requirements that are entailed in being on supervised probation. He has no freedom to drive to AP&P’s place of business for check-ins. He also cannot secure employment as a means of paying off his court ordered fees. In addition, the trial court told him that he was placed on a zero-tolerance probation, which told Mr. Phillip that his probation would be revoked upon the first instance of a probation violation. R.35. 136:4-6. Thus, once Mr. Phillip was terminated from AP&P supervision and sentenced to prison for his Aggravated Assault matter, it would be reasonable for Mr. Phillip to believe that he was no longer on supervised probation.³

³ The court docket and pleadings for case number 091900040FS show that Mr. Phillip’s AP&P probation in that matter was terminated because of the charges and plea in this matter. *See supra* note 1.

Fifth, Mr. Phillip could not have reasonably known or believed that he was on probation for this matter when he was paroled on his other matter. Once he was paroled for his other matter, he had contact and communication with AP&P officials for that matter. R. 129:2-3, 4, 6, 12, 15, 21. However, during this time that AP&P was supervising Mr. Phillip's parole, no AP&P official ever informed him that he was also on probation. Because AP&P was meeting with Mr. Phillip while he was on parole for the Aggravated Assault matter, and failed to inform him about this matter, Mr. Phillip would have reasonably believed that he was not on probation. Otherwise, AP&P would have informed him of such.

Sixth, Mr. Phillip could not have reasonably known that he was on supervised probation because AP&P wasn't even aware about this case during the time that a number of the probation violations supposedly took place. That is, AP&P acknowledged that they didn't even know that Mr. Phillip was on probation until a week before February 20, 2014 because they had inadvertently closed this case in their computer system. R.51-52. Yet, the dates of the probation violation conduct alleged in the initial affidavit in allegations three through five ranged from December 4, 2013 to January 15, 2014. R.48-49. Therefore, AP&P filed an affidavit listing that Mr. Phillip violated his probation for a series of dates when AP&P did not even know that Mr. Phillip was on probation. Once AP&P knew about this case, sometime around mid-February of 2014, they soon after filed the initial affidavit dated February 20, 2014. R.48-52. Thus, the first work that AP&P did on this case, other than inadvertently closing out the case, was to file an affidavit listing probation violations based on concerns that arose in Mr. Phillip's

parole matter. R.48-52. Because the only work that AP&P did on this case was to close it out in their computer system and then file an affidavit listing allegations against Mr. Phillip once they realized that their computer entry was made in error, Mr. Phillip could not have reasonably believed or known that he was on probation. *Id.*

Thus, for multiple reasons, Mr. Phillip could not have reasonably known that he was on supervised probation for this matter. And, because Mr. Phillip did not know that he was on probation, the requisite knowledge requirement needed for showing that he willfully violated his probation was not met in this matter. *See Legg*, 2014 UT App 80, ¶ 13. In addition, because Mr. Phillip did not even know that he was on probation during the time of the alleged probation violation conduct, the trial judge improperly terminated his probation for issues that were beyond Mr. Phillip's control. *See Hodges*, 798 P.2d at 277. That is, Mr. Phillip cannot meet the terms of his supervised probation if he does not know that he is even on probation. The trial judge therefore erred in revoking Mr. Phillip's probation in this matter because the record indicates that Mr. Phillip did not willfully violate his probation.

The trial court's error in revoking probation where the record failed to show that Mr. Phillip willfully violated his probation requires reversal. The error deprived Mr. Phillip of a fundamental due process right. *See Holmes v. S. Carolina*, 547 U.S. 319, 324 (2006); *see also Bearden v. Georgia*, 461 U.S. a 672. Because the error "result[ed] in the deprivation of a constitutional right, [this Court] [should] apply a higher standard of scrutiny, reversing the conviction unless [it] find[s] the error harmless beyond a reasonable doubt.'" *State v. Crowley*, 2014 UT App 33, ¶17, 320 P.3d 677. But even if a

lesser standard is appropriate, reversal is required as the trial court's error was not harmless. *See State v. Calliham*, 2002 UT 86, ¶ 45, 55 P.3d 573, 589. ("Notwithstanding error by the trial court, we will not reverse a conviction if we find that the error was harmless.").

Mr. Phillip is prejudiced because he will now be serving additional time at the prison because of the trial judge's finding. R. 129:7. The district court judge acknowledged that a finding of a probation violation in this matter would "carry a greater consequence" for Mr. Phillip than if he was serving time at the prison for only the case where the zero-to-five year sentence was imposed. R. 129:7. Here, because the trial judge found that Mr. Phillip violated his probation in this case, the court imposed the five-years-to-life prison term, which Mr. Phillip is currently serving at the Utah State Prison. *Id.* If, however, the trial court had found that Mr. Phillip could not be revoked on probation because he did not willfully violate his probation, then the Utah Board of Pardons would not currently have jurisdiction over this matter and Mr. Phillip would only be serving time for his other matter. Thus, the trial court's finding prejudiced Mr. Phillip because he is now required to serve much more time at the Utah State Prison because of the five-years-to-life prison term issued by the trial court in this matter. *Id.*

This issue was preserved. R. 129:5, 21-25. This Court "will not address an issue if it is not preserved or if the appellant has not established other grounds for seeking review." *State in interest of C.C.*, 2013 UT 26, ¶16, 301 P.3d 1000 (quotations omitted). To preserve an issue for appeal, "the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Id.* (quotations omitted).

“An issue may be raised directly or indirectly, so long as it is raised to a level of consciousness such that the trial judge can consider it.” *Hill v. Superior Prop. Mgmt. Servs., Inc.*, 2013 UT 60, ¶57 (quotations omitted); *see also Pratt v. Nelson*, 2007 UT 41, ¶24, 164 P.3d 366 (concluding that an issue was preserved because the trial court “was aware” of the issue and specifically resolved it in a “deliberate manner,” even though the trial “court did not have the benefit of the [appellants’] argument”).

In this matter, Mr. Phillip’s counsel preserved this issue by indirectly arguing that Mr. Phillip did not willfully violate his probation. R.129:5. Specifically, defense counsel argued that “there’s an inherent need in due process of an individual being supervised, [of him] receiving notices of his violations, and [of him] *knowing* that the consequences that will flow will be the violation of his probation.” R.129:5 (emphasis added). And, even though Mr. Phillip’s counsel couched his argument by stating that Mr. Phillip did not receive adequate notice of the probation violations, the effect of counsel’s argument was to draw attention to the issue that Mr. Phillip did not willfully violate his probation. R.129:5. That is, defense counsel raised the concern that because Mr. Phillip did not even know that he was on probation during the time period of the probation violations, it followed that Mr. Phillip did not willfully violate his probation. Thus, defense counsel preserved this issue because although he did not use the word “willful,” he “raised to a level of consciousness” the issue of whether Mr. Phillip’s could have willfully violated his probation if he did not even know that he was on probation. *See Hill*, 2013 UT 60, ¶57.

In addition, this issue is preserved because the trial judge was aware of it. R.129: 21-25. During the evidentiary hearing, the trial judge asked, “But if, in fact, [Mr. Phillip] was never given a condition of probation, could [he] violate it if [he] did not know what it was?” R. 129:21. This question shows that the trial court understood that a probation violation must be willful. Thus, applying *Pratt*, this question posed by the trial judge reveals that he “was aware” of the issue, even if counsel did not directly address the issue of willfulness. *See Pratt v. Nelson*, 2007 UT 41, ¶24.

Nevertheless, if this Court finds that this issue was not preserved, this Court may review it for plain error or ineffective assistance of counsel. Plain error requires reversal where “(i) [a]n error exists; (ii) the error should have been obvious to the trial court, and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome...” *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). First, as explained previously, an error exists because the trial court terminated Mr. Phillip’s probation and imposed a prison term when the record showed that Mr. Phillip did not willfully violate his probation. *See supra* at 10-19; *see also* R.129: 1-32.

Second, the error was obvious. The “obviousness requirement poses no rigid and insurmountable barrier to review.” *See State v. Eldredge*, 773 P.2d 29, 35 n.8 (Utah), *cert denied*, *Eldredge v. Utah*, 493 U.S. 814 (1989). Mr. Phillip need only “show that the law governing the error was clear at the time the alleged error was made.” *State v. Dean*, 2004 UT 63, ¶16, 95 P.3d 276. Here, the error should have been obvious to the trial court as the willfulness requirement of *Hodges* is well established Utah case law and a due process right under U.S. Supreme Court jurisprudence. *See Bearden v. Georgia*, 461 U.S.

at 672; *see also Hodges*, 798 P.2d at 276. In addition, the trial court raised a concern about the knowledge requirement of a willfulness analysis by asking, “[b]ut if, in fact, [Mr. Phillip] was never given a condition of probation, could [he] violate it if [he] did not know what it was?” R. 129:21. Thus, the issue that Mr. Phillip’s probation violation was not willful should have been obvious to the trial court based upon a question asked by the trial court. *Id.*

Third, the error was prejudicial. An error is prejudicial when ““there is a reasonable likelihood of a more favorable outcome”” ““absent the error.”” *State v. Cox*, 2012 UT App 234, ¶2. In addition, an error is prejudicial if there is “a probability sufficient to undermine [the Court’s] confidence in the outcome.” *State v. Ott*, 2010 UT 1, ¶40, 247 P.3d 344. Such error occurs when its effect on the trial is ““pervasive”” rather than ““isolated”” and ““trivial.”” *Id.* In this case, there was a reasonable probability of a different result but for the errors.

Mr. Phillip has been prejudiced by the trial court’s finding that it could revoke his probation when Mr. Phillip had not willfully violated his probation. The court violated Mr. Phillip’s probation and imposed the five-year-to-life prison term, which Mr. Phillip is currently serving at the Utah State Prison. R. 129:7. If, however, the trial court had found that Mr. Phillip could not be revoked on probation because he did not willfully violate his probation, then the Utah Board of Pardons would not currently have jurisdiction over this matter and Mr. Phillip would only be serving time for his other matter. Thus, the trial court’s finding prejudiced Mr. Phillip because he is now required to serve much more

time at the Utah State Prison because of the five-year-to-life prison term issued by the trial court in this matter. *See* R.129:7.

If this Court finds that this issue was not preserved, this Court may also review it for ineffective assistance of counsel. To prevail on an ineffective assistance claim, a defendant must first, ““identify specific acts or omissions demonstrating that counsel’s representation failed to meet an objective standard of reasonableness.”” *State v. Montoya*, 2004 UT 5, ¶24, 84 P.3d 1183. In evaluating counsel’s performance, “an ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel’s actions.” *State v. Tennyson*, 850 P.2d 461, 468 (Utah Ct. App. 1993). Second, a defendant must show that ““but for counsel’s deficient performance there is a reasonable probability that the outcome of the trial would have been different.”” *Montoya*, 2004 UT 5, at ¶23.

In this matter, if counsel failed to raise the issue that Mr. Phillip did not willfully violate his probation, his performance was deficient when the facts indicated that Mr. Phillip did not willfully violate his probation. The willfulness requirement is a strong protection afforded to Mr. Phillip under established U.S. Supreme Court jurisprudence and Utah case law. *See Bearden*, 461 U.S. 660, at 668; *see also Hodges*, 798 P.2d at 276. In addition, in applying *Legg*, the willfulness requirement could not have been met because Mr. Phillip did not even know that he was probation during the time period that he was accused of violating his probation. *See Legg*, 2014 UT App 80, ¶ 13. Thus, if counsel failed to point out that Mr. Phillip did not willfully violate his probation, then his

performance would fall well below the objective standard of reasonableness. *State v. Montoya*, 2004 UT 5, ¶24, 84 P.3d 1183.

Furthermore, there would be no strategic choice by defense counsel to fail to insist that the willfulness requirement was not met in this matter. *See Tennyson*, 850 P.2d at 468 (a strategic choice must be reasonable). A choice is not strategic if counsel simply fails to perform an important task. *See State v. Moore*, 2012 UT 62, ¶¶7-9, 289 P.3d 487 (counsel performed deficiently when he failed to use important defense evidence that he had access to); *State v. Moritzsky*, 771 P.2d 688, 691-92 (Utah Ct. App. 1989) (counsel performed deficiently when he “overlooked the statutory presumption by failing to check the ‘pocket-part’ of the Utah Code”). In this case, there would be “no tactical explanation for” counsel to permit the trial judge revoke Mr. Phillip’s probation when the record showed that Mr. Phillip did not willfully violate it. *See Tennyson*, 850 P.2d at 468. Thus, there was no potential upside to failing to bring up the willfulness requirement, only downside. Creating a scenario that is all downside for one’s client is not a legitimate trial strategy. Therefore, if counsel failed to point out that defendant did not willfully violate his probation, he performed deficiently.


Second, if Mr. Phillip’s counsel failed to preserve this issue, then Mr. Phillip was prejudiced by counsel’s deficient performance as there was a reasonable probability of a different outcome but for the deficient performance. *State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct. App. 1992) (the prejudice analysis for plain error and ineffective assistance is the same). That is, Mr. Phillip’s probation would not have been terminated because there was no willful violation. And, as previously mentioned, Mr. Phillip was prejudiced by the

trial judge's error in this matter because he is now serving an additional five-year-to-life prison sentence in addition to the zero-to-five-year prison sentence that initially started Mr. Phillip's prison stay. Therefore, this Court should reverse because if counsel failed to argue that the trial judge could not revoke Mr. Phillip's probation because willfulness was lacking in this matter, this would clearly constitute ineffective assistance.

CONCLUSION

For the reasons given above, Mr. Phillip respectfully asks this Court to reverse the district court's revocation of his probation and remand for further proceedings.

SUBMITTED this /st day of December, 2015.



TERESA L. WELCH
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 1st day of December, 2015.



TERESA L. WELCH

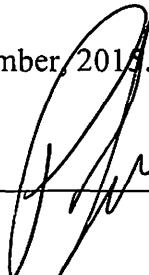
CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 6,992 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.



TERESA L. WELCH

DELIVERED this 01 day of December, 2015.



ADDENDUM A

Tab A

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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 101909538 FS
GIRATO KAMILO PHILLIP,	:	Judge: MARK KOURIS
Defendant.	:	Date: March 20, 2015

PRESENT

Clerk: sierras
Prosecutor: LEAVITT, PETER D
Defendant
Defendant's Attorney(s): WALL, EDWIN S
Interpreter: Moayeed Ahmed (Arabic)

DEFENDANT INFORMATION

Language: Arabic
Date of birth: October 4, 1990
Sheriff Office#: 322021
Audio
Tape Number: W48 Tape Count: 2.01

CHARGES

1. AGGRAVATED ROBBERY - 1st Degree Felony
Plea: Not Guilty - Disposition: 04/15/2011 Guilty

HEARING

2.01

Opening arguments.

2.12

Counsel argues the conditions of the defendant's probation.

2.27

Mr. Leavitt proffers evidence.

2.29

The Court finds the defendant violated terms 3-6 and 8-10.

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life 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.

The defendant's probation is revoked.

The defendant's probation is terminated unsuccessfully.

CUSTODY

The defendant is present in the custody of the Department of Corrections Utah State Prison - Draper.

Date: 3-20-15

By  
MARK KNIFF, District Court Judge
STAMP USED AT DIRECTION OF JUDGE
District Court Judge

ADDENDUM B

Tab B

Utah Code §77-18-1

77-18-1. Suspension of sentence -- Pleas held in abeyance -- Probation -- Supervision -- Presentence investigation -- Standards -- Confidentiality -- Terms and conditions -- 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 with a mental illness, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the 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 results of a risk and needs assessment;
- (iii) the demand for services;
- (iv) the availability of agency resources;
- (v) public safety; and
- (vi) 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) Before 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:

(i) a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family;

(ii) 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 Title 77, Chapter 38a, Crime Victims Restitution Act;

(iii) findings from any screening and any assessment of the offender conducted under Section 77-18-1.1;

(iv) recommendations for treatment of the offender; and

(v) the number of days since the commission of the offense that the offender has spent in the custody of the jail and the number of days, if any, the offender was released to a supervised release or alternative incarceration program under Section 17-22-5.5.

(c) The contents of the presentence investigation report 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 10 working days to resolve the alleged inaccuracies of the report with the department. If after 10 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 the defendant is legally liable;

(iv) participate in available treatment programs, including any treatment program in which the defendant is currently participating, if the program is acceptable to the court;

(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 76-6-107.1;

- (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 Title 77, Chapter 38a, Crime Victims Restitution Act; 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 (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, 12 months in cases of class B or C misdemeanors or infractions, or as allowed pursuant to Section 64-13-21 regarding earned credits.
 - (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. If the court retains jurisdiction for this limited purpose, the court may order the defendant to pay to the

court the costs associated with continued probation under this Subsection (10).

(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 the defendant's 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 is being requested by the department or 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.

(iii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation constitutes service of time toward a term of incarceration imposed as a result of the revocation of probation.

(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 the defendant's arrest or a copy of the affidavit and an order to show cause why the defendant's 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 if the defendant 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 the defendant's 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 a period of incarceration is imposed for a violation, the defendant shall be sentenced within the guidelines established by the Utah Sentencing Commission pursuant to Subsection 63M-7-404(4), unless the judge determines that:

(A) the defendant needs substance abuse or mental health treatment, as determined by a risk and needs assessment, that warrants treatment services that are immediately available in the community; or

(B) the sentence previously imposed shall be executed.

(iv) If the defendant had, prior to the imposition of a term of incarceration or the execution of the previously imposed sentence under this Subsection (12), served time in jail as a condition of probation or due to a violation of probation under Subsection 77-18-1(12)(e)(iii), the time the probationer served in jail constitutes service of time toward the sentence previously imposed.

(13) The court may order the defendant to commit himself or herself to the custody of the Division of Substance Abuse and 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 the superintendent's 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-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

(14) Presentence investigation reports are classified protected in accordance with Title 63G, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63G-2-403 and 63G-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 63G-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.

(15)

- (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 (16).

(16)

- (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.

Utah Code §64-13-21

64-13-21. Supervision of sentenced offenders placed in community -- Rulemaking -- POST certified parole or probation officers and peace officers -- Duties -- Supervision fee.

- (1) (a) The department, except as otherwise provided by law, shall supervise sentenced offenders placed in the community on probation by the courts, on parole by the Board of Pardons and Parole, or upon acceptance for supervision under the terms of the Interstate Compact for the Supervision of Parolees and Probationers.
(b) Standards for the supervision of offenders shall be established by the department in accordance with sentencing guidelines, including the graduated sanctions matrix, established by the Utah Sentencing Commission, giving priority, based on available resources, to felony offenders and offenders sentenced pursuant to Subsection 58-37-8(2)(b)(ii).
- (2) The department shall apply graduated sanctions established by the Utah Sentencing Commission to facilitate a prompt and appropriate response to an individual's violation of the terms of probation or parole, including:
 - (a) sanctions to be used in response to a violation of the terms of probation or parole; and
 - (b) requesting approval from the court or Board of Pardons and Parole to impose a sanction for an individual's violation of the terms of probation or parole, for a period of incarceration of not more than three consecutive days and not more than a total of five days within a period of 30 days.
- (3) The department shall implement a program of graduated incentives as established by the Utah Sentencing Commission to facilitate the department's prompt and appropriate response to an offender's:
 - (a) compliance with the terms of probation or parole; or
 - (b) positive conduct that exceeds those terms.
- (4) (a) The department shall, in collaboration with the Commission on Criminal and Juvenile Justice and the Division of Substance Abuse and Mental Health, create standards and procedures for the collection of information, including cost savings related to recidivism reduction and the reduction in the number of inmates, related to the use of the graduated sanctions and incentives, and offenders' outcomes.
(b) The collected information shall be provided to the Commission on Criminal and Juvenile Justice not less frequently than annually on or before August 31.
- (5) Employees of the department who are POST certified as law enforcement officers or

correctional officers and who are designated as parole and probation officers by the executive director have the following duties:

- (a) monitoring, investigating, and supervising a parolee's or probationer's compliance with the conditions of the parole or probation agreement;
 - (b) investigating or apprehending any offender who has escaped from the custody of the department or absconded from supervision;
 - (c) providing investigative services for the courts, the department, or the Board of Pardons and Parole;
 - (d) supervising any offender during transportation; or
 - (e) collecting DNA specimens when the specimens are required under Section 53-10-404.
- (6) (a) A monthly supervision fee of \$30 shall be collected from each offender on probation or parole. The fee may be suspended or waived by the department upon a showing by the offender that imposition would create a substantial hardship or if the offender owes restitution to a victim.
- (b) (i) The department shall make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, specifying the criteria for suspension or waiver of the supervision fee and the circumstances under which an offender may request a hearing.
- (ii) In determining whether the imposition of the supervision fee would constitute a substantial hardship, the department shall consider the financial resources of the offender and the burden that the fee would impose, with regard to the offender's other obligations.
- (7) (a) The department shall establish a program allowing an offender on probation under Section 77-18-1 or on parole under Subsection 76-3-202(1)(a) to earn credits for the offender's compliance with the terms of the offender's probation or parole, which shall be applied to reducing the period of probation or parole as provided in this Subsection (7).
- (b) The program shall provide that an offender earns a reduction credit of 30 days from the offender's period of probation or parole for each month the offender completes without any violation of the terms of the offender's probation or parole agreement, including the case action plan.
- (c) The department shall maintain a record of credits earned by an offender under this Subsection (7) and shall request from the court or the Board of Pardons and Parole the termination of probation or parole not fewer than 30 days prior to the termination date that reflects the credits earned under this Subsection (7).
- (d) This Subsection (7) does not prohibit the department from requesting a termination date earlier than the termination date established by earned credits

under Subsection (7)(c).

- (e) The court or the Board of Pardons and Parole shall terminate an offender's probation or parole upon completion of the period of probation or parole accrued by time served and credits earned under this Subsection (7) unless the court or the Board of Pardons and Parole finds that termination would interrupt the completion of a necessary treatment program, in which case the termination of probation or parole shall occur when the treatment program is completed.
- (f) The department shall report annually to the Commission on Criminal and Juvenile Justice on or before August 31:
 - (i) the number of offenders who have earned probation or parole credits under this Subsection (7) in one or more months of the preceding fiscal year and the percentage of the offenders on probation or parole during that time that this number represents;
 - (ii) the average number of credits earned by those offenders who earned credits;
 - (iii) the number of offenders who earned credits by county of residence while on probation or parole;
 - (iv) the cost savings associated with sentencing reform programs and practices;
and
 - (v) a description of how the savings will be invested in treatment and early-intervention programs and practices at the county and state levels.

Utah Rule of Criminal Procedure – Rule 11

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) If the defendant pleads guilty, no contest, or guilty and mentally ill to 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 plea, 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.

(h)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved or rejected by the court.

(h)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(i)(1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(i)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(i)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(j) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(k) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(l) Compliance with this rule shall be determined by examining the record as a whole. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea.

18 U.S. Code § 3603 - Duties of probation officers

A probation officer shall—

- (1) instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;
- (2) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;
- (3) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;
- (4) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district;
- (5) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;
- (6) upon request of the Attorney General or his designee, assist in the supervision of and furnish information about, a person within the custody of the Attorney General while on work release, furlough, or other authorized release from his regular place of confinement, or while in prerelease custody pursuant to the provisions of section 3624(c);
- (7) keep informed concerning the conduct, condition, and compliance with any condition of probation, including the payment of a fine or restitution of each probationer under his supervision and report thereon to the court placing such person on probation and report to the court any failure of a probationer under his supervision to pay a fine in default within thirty days after notification that it is in default so that the court may determine whether probation should be revoked;
- (8) (A)
when directed by the court, and to the degree required by the regimen of care or treatment ordered by the court as a condition of release, keep informed as to the conduct and provide supervision of a person conditionally released under the provisions of section 4243 or 4246 of this title, and report such person's conduct and condition to the court ordering release and to the Attorney General or his designee; and

(B)

immediately report any violation of the conditions of release to the court and the Attorney General or his designee;

(9)

if approved by the district court, be authorized to carry firearms under such rules and regulations as the Director of the Administrative Office of the United States Courts may prescribe; and

(10)

perform any other duty that the court may designate.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2002; amended Pub. L. 99-646, § 15(a), Nov. 10, 1986, 100 Stat. 3595; Pub. L. 102-572, title VII, § 701(a), Oct. 29, 1992, 106 Stat. 4514; Pub. L. 104-317, title I, § 101(a), Oct. 19, 1996, 110 Stat. 3848.)