

2016

**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.

REPLY BRIEF

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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INTRODUCTION

Mr. Phillip's opening brief argues that the trial court erred when it revoked Mr. Phillips's probation for conduct that occurred when AP&P was not supervising him because: 1) the pertinent statute shows that supervision by AP&P is a necessary condition for probation, and 2) the district court's probation order indicated that AP&P's supervision was a necessary condition of Mr. Phillip's probation. Mr. Phillip further argues that the court erred when it revoked his probation because he did not willfully violate his probation where there was no reason for him to know or believe that he was on probation. In response, the State contends that the trial court properly revoked Mr. Phillip's probation based on the plain language of the probation statute and the notice of probation that was given to Mr. Phillip via the court's order and a signed probation agreement. For the reasons set forth in the opening brief and in this reply brief, the State

is incorrect. *See* Utah R. App. P. 24 (c) (“Reply briefs shall be limited to answering any new matter set forth in the opposing brief.”).

ARGUMENT

I. The district court erred in revoking Mr. Phillip’s probation for conduct that occurred when AP&P was not supervising his probation, and when Mr. Phillip did not willfully violate his probation.

Mr. Phillip’s opening brief argues that he could not have violated probation where AP&P had closed its file on his probation and was not supervising him, as required by both the probation statute and the sentencing judge’s order, and that he did not willfully violate his probation because there was no reason for him to know or believe that he was on supervised probation. In response, the State contends that the plain language of the probation statute and the notice of probation that was given to Mr. Phillip allowed the trial court to revoke Mr. Phillip’s probation. The State is mistaken for the following reasons.

A. The plain language of the probation statute and the sentencing judge’s order shows that the district court erred in revoking Mr. Phillip’s probation for conduct that occurred when AP&P was not supervising him.

On April 15, 2011, a sentencing judge ordered Mr. Phillip to complete 36 months of supervised probation with AP&P, and placed him on zero-tolerance. R.34-36; 136:5. Approximately one month later, he was sentenced to prison for aggravated assault and his supervised probation in that case was terminated. R.129:1-2, 9-10, 30. Mr. Phillip was in jail when he was sentenced in this case, and he remained in jail until he was sentenced to prison. R.129:20. While Mr. Phillip was in prison, AP&P closed its file on his probation

for this case. R.129:9. It was not until mid-February of 2014, approximately 34 months after Mr. Phillip was sentenced, that AP&P realized their mistake and subsequently filed the initial affidavit and progress violation report. R.48-52. Thus, Mr. Phillip was not being supervised by AP&P for this case while he was in prison or when he was granted parole on the aggravated assault case. The allegations included in the initial violation report addressed problems that pertained to issues that arose while AP&P was supervising Mr. Phillip on parole on the aggravated assault case.

Utah's probation statute makes clear that there are various types of probation, including a bench probation, which is supervised by the court, and supervised probation, which is supervised by the Department of Corrections. Utah Code §77-18-1(2)(a)(i)-(iii). The plain language of the probation statute shows that supervised probation is different from court probation in that AP&P action is an initial necessary step that must be sufficiently implemented for a supervised probation scenario to exist. *See Id.* Thus, if AP&P does not fulfill its requirements under the probation statute, then they effectively terminate a probationer's supervised probation. Utah Code §77-18-1(2)(a)(i)-(iii). The State, therefore, fails to read the probation statute in its entirety in arguing that AP&P's failure to supervise Mr. Phillip was not a sufficient condition to terminate Mr. Phillip's probation. *See Appellee's Br. 17.*

Here, Mr. Phillip was not placed on bench probation, but on supervised probation with AP&P. R. 35. This means that AP&P supervision was a necessary condition of probation and that AP&P needed to be supervising Mr. Phillip in order for the requirements of Utah Code §77-18-1(2)(a) to be met. Reading the plain language of the

probation statute reveals that Mr. Phillip cannot meet the required terms of what is entailed in a supervised probation simply by his own doing. Utah Code §77-18-1(2)(a)(i)-(iii). And, because AP&P was not supervising Mr. Phillip during the time period of the allegations found in the initial progress violation report, they effectively terminated Mr. Phillips' probation by failing to fulfill the statutory requirements and the requirements of the sentencing judge's order. R. 35. Utah Code §77-18-1(2)(a).

Thus, because the plain language of the probation statute and the district court's probation order indicated that AP&P's supervision was a necessary condition of Mr. Phillip's probation, the trial court erred in revoking Mr. Phillip's probation for conditions that occurred when AP&P was not supervising him. R. 35.

The State also argues that even if AP&P supervision is a prerequisite for Mr. Phillip being on probation, the trial court properly revoked his probation because AP&P began actively supervising Mr. Phillip for this case in February of 2014 once they realized their error, and that Mr. Phillip committed "three new crimes—possession of marijuana, carrying a concealed dangerous weapon, and assault" after this point. Appellee's Br. 13-14; *see also* R. 63, R.129:29. The State, however, fails to adequately acknowledge that before these new crimes had been committed, AP&P had already submitted a progress violation report to the court alleging that Mr. Phillip had violated his probation for conduct that occurred on dates on which AP&P was not supervising him. R. 49. Thus, the first supervision that Mr. Phillip would have received was when he was informed that AP&P had submitted a progress violation report to the court for this case.

R. 49-53. AP&P supervision came a little too late for Mr. Phillip because he had already violated it before it ever meaningfully began.¹

It is reasonable to think that Mr. Phillip would have been more incentivized to succeed on his probation, and better capable of succeeding on probation, if he had been adequately informed that he was still on probation for a first degree aggravated robbery that carried with it a possible five-year-to-life prison term, and if he was also properly supervised by AP&P for the almost 34 months where AP&P was not supervising him prior to their filing of the progress violation report. R. 129:7. Thus, because AP&P was not sufficiently or adequately supervising Mr. Phillip for this matter, and this supervision was a necessary condition of his probation, this Court should reverse the trial court's conclusion that Mr. Phillip violated the terms of his probation.

B. The sentencing judge's order and the signed probation agreement were not sufficient to show that Mr. Phillip willfully violated his probation when these are viewed in the context of the conflicting and misleading information that Mr. Phillip received.

For a court to revoke probation, the violation of a probation condition must be willful. *State v. Hodges*, 798 P.2d 270, 276 (Utah Ct. App. 1990). Mr. Phillip's opening brief argues that the trial court erred in revoking his probation where the evidence failed to show that he willfully violated his probation because he did not know that he was on probation for this case until the initial progress violation report had been filed. *See*

¹ AP&P conceded that prior to sending in the initial progress violation report they had not been supervising Mr. Phillip in this matter. As noted by the probation officer at the probation hearing, "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.

Appellant's brief at 10-19.; *see also State v. Legg*, 2014 UT App 80, ¶ 13, 324 P.3d 656. (stating that if a defendant lacks requisite or pertinent knowledge that is essential to the violation, there cannot be a finding of willfulness.).

The State is incorrect when it argues that Mr. Phillip was put on notice of his probation. *See Appellee's Br. 21*. Neither the in-court discussion of probation nor the signed probation agreement demonstrate that Mr. Phillip was on notice or that he would have had the requisite knowledge that he was on supervised probation. *See Legg*, 2014 UT App 80, ¶ 13.

First, the AP&P probation officer at the probation hearing did not believe that Mr. Phillip ever sufficiently initiated probation because of his ongoing custody status and because AP&P had no probation record for Mr. Phillip for the first 34 months of this case. R. 129:20 R. 129:3. And, while the State points to a probation agreement that was initialed and signed by Mr. Phillip on August 18, 2011, the State fails to acknowledge that Mr. Phillip did not have an Arabic interpreter to aid him in reviewing the probation contract. *See Appellee's Br. 21*. R. 114-116. Mr. Phillip's need for an interpreter was evident as he requested and used the assistance of an Arabic interpreter at each of the various court dates that he had in this case. *See R. 24-25, 32, 36, 108, 110; 114-116; 134:1; 136:2*. In addition, Mr. Phillip needed the assistance of an Arabic interpreter in reviewing his plea form as he made it clear to the court that he could not read nor write the English language. *See R. 136:2, Excerpt of Plea Colloquy on April, 15, 2011*, attached as Addendum A.

Second, even if this court determines that the signed probation agreement provided sufficient notice to Mr. Phillip that he had been placed on probation, the lack of AP&P supervision after August 18, 2011 would have led Mr. Phillip to reasonably believe that he was no longer on supervised probation during the time he was on parole for the assault conviction. *See* Appellants opening brief at 13-19. The record does not indicate that AP&P ever met with Mr. Phillip after August 18, 2011, when the probation agreement was signed, and before February of 2014, when AP&P sent its probation violation report to the court. *See id.* Thus, Mr. Phillip did not receive the instructions, communication, and assistance that AP&P typically provides during the almost three years that AP&P should have provided this to him. *See id.*

Because of the overall lack of probation supervision that Mr. Phillip received from AP&P, Mr. Phillip could not have reasonably known or believed that he was on supervised probation for this case even though the court indicated during sentencing that he would be on probation and he subsequently signed a probation agreement. The lack of supervision by AP&P directly contradicted the information that was given to Mr. Phillip by the judge and by the probation agreement, and the lack of action by AP&P reasonably led Mr. Phillip to believe that he was not on supervised probation. 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. The trial judge therefore erred in revoking Mr. Phillip's probation because the record indicates that Mr. Phillip did not willfully violate his probation.

CONCLUSION

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

SUBMITTED this 26th day of April, 2016.



TERESA L. WELCH
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 1,870 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

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 26th day of April, 2016.

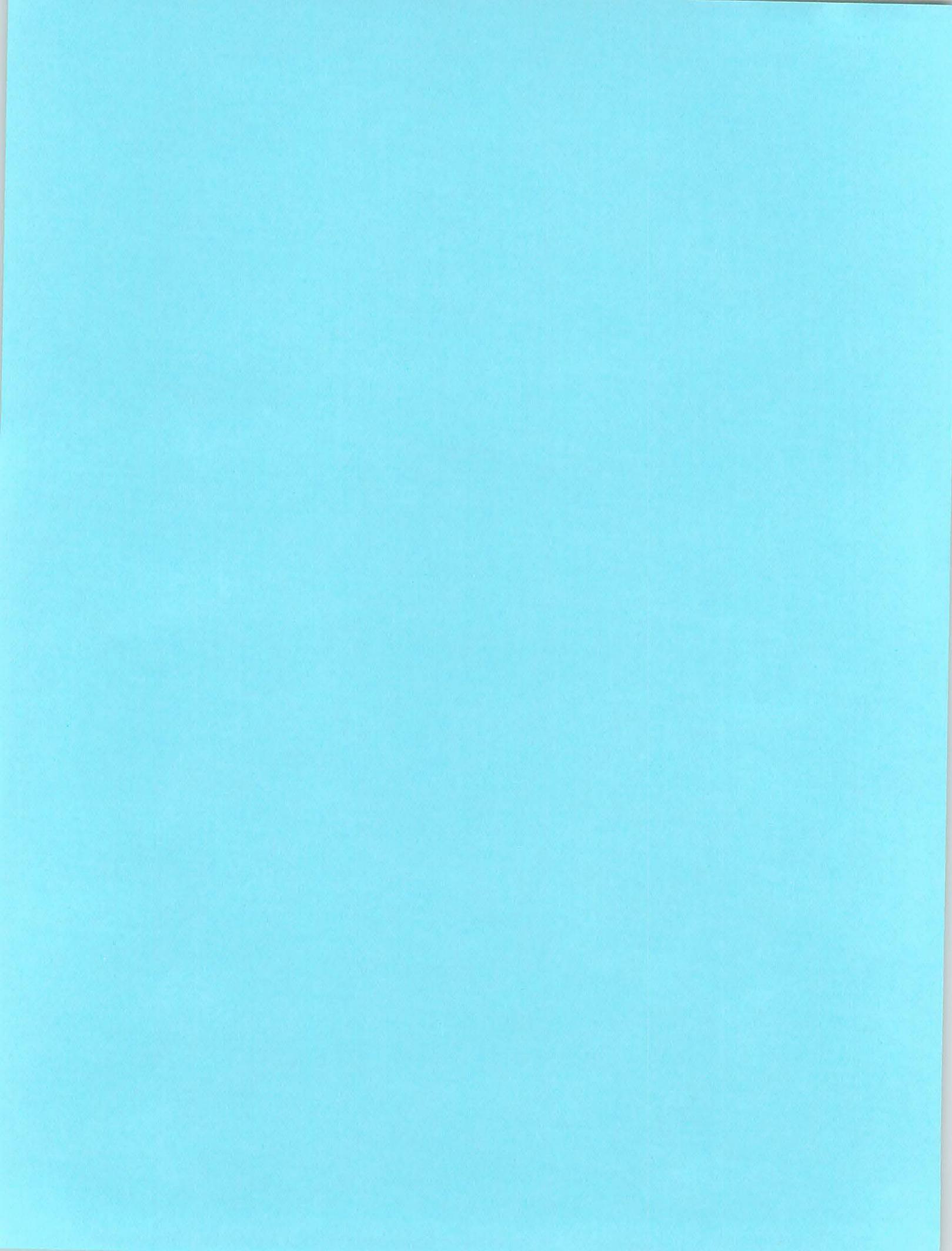


TERESA L. WELCH

DELIVERED this 26 day of April, 2016.



Tab A



IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

: Case No. 101909538 FS

Plaintiff,

: Appellate Court Case No. 20150278

vs.

GIRATO KAMILO PHILLIP,

Defendant.

: With Keyword Index

CHANGE OF PLEA APRIL 15, 2011

BEFORE

THE HONORABLE KATIE BERNARDS-GOODMAN

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

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NOV 16 2015

20150278-CA

1 case these files get separated. And you're anticipating
2 after the jail he goes to AP&P?

3 MR. EVERSLED: Yes, Your Honor.

4 THE COURT: Mr. Phillip, is that what you want to
5 do?

6 DEFENDANT PHILLIP: Yes.

7 THE COURT: Do you want to plead guilty today?

8 DEFENDANT PHILLIP: Yes.

9 THE COURT: Have you read through a plea form?

10 DEFENDANT PHILLIP: Yes.

11 THE COURT: And does he read and write the English
12 language?

13 DEFENDANT PHILLIP: No, I read Arabic.

14 THE COURT: And the form is in English?

15 MR. WILSON: It is.

16 THE COURT: And did you translate for him?

17 TRANSLATOR: Yes, Your Honor, (inaudible).

18 THE COURT: Are you under the influence of any
19 medications today?

20 DEFENDANT PHILLIP: No.

21 THE COURT: Did you understand the rights that are
22 in that form?

23 DEFENDANT PHILLIP: Yes, I understand.

24 THE COURT: Do you understand that you have a right
25 to a speedy trial where you would a fair and impartial,