

2016

**State of Utah, Plaintiff/Appellee, V, Roger Wayne Simmons,  
Defendant/ Appellant.**

Utah Court of Appeals

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Case No. 20151012-CA

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IN THE  
UTAH COURT OF APPEALS

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STATE OF UTAH,  
*Plaintiff/Appellee,*

*v.*

ROGER WAYNE SIMMONS,  
*Defendant/Appellant.*

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Brief of Appellee

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Appeal from convictions for driving under the influence of alcohol, a third-degree felony, and alcohol restricted-driver and operating a vehicle without an ignition interlock system, both class B misdemeanors, in the Third Judicial District, Salt Lake County, the Honorable Richard D. McKelvie presiding

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Oral Argument Not Requested

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UTAH APPELLATE COURTS

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STATE OF UTAH,  
*Plaintiff/Appellee,*

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ROGER WAYNE SIMMONS,  
*Defendant/Appellant.*

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Brief of Appellee

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STATEMENT OF JURISDICTION

Defendant Roger Simmons appeals from convictions for driving under the influence of alcohol, a third-degree felony, and alcohol-restricted driver and operating a vehicle without an ignition interlock system, both class B misdemeanors. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2015).

INTRODUCTION

By his own admission, Simmons has a problem with alcohol abuse. He has a long history of alcohol-related offenses, including driving while intoxicated (DUI). While DUI charges were pending from a 2011 offense, he was charged with DUI in the present case. Six months later, he was charged with another DUI.

Simmons pleaded guilty in March 2015 to the 2011 DUI. A presentence investigation report (PSR) was prepared and recommended that Simmons be sent to prison. The trial court agreed. Simmons later pleaded guilty in the present case and Adult Probation and Parole (AP&P) submitted the prior PSR with an addendum. In pro se filings to the court and in a pro se argument at the sentencing hearing, Simmons vociferously complained that AP&P was biased and that the PSR was rife with errors.

Before sentence was announced, the trial court opined that Simmons' complaints were about only how the PSR was investigated and prepared, not that it contained factual inaccuracies. While the trial court's assessment was correct for the most part, Simmons did articulate a handful of errors that the court failed to resolve on the record.

### STATEMENT OF THE ISSUE

Should this case be remanded for the purpose of (1) entering findings in compliance with the trial court's duty to resolve inaccuracies in the PSR on the record, and (2) resentencing Defendant in light of those findings?

*Standard of Review.* Whether the trial court complied with a legal duty is a question of law reviewed for correctness. *See State v. Waterfield*, 2014 UT App 67, ¶29, 248 P.3d 57.



## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute is reproduced in Addendum A:

Utah Code Ann. § 77-18-1 (West Supp. 2015)

### STATEMENT OF THE CASE

#### A. Summary of facts.<sup>1</sup>

##### *Prior DUI*

In September 2011, police saw a car entering the airport traveling thirty miles per hour in a fifty mile per hour zone. R317. The car drifted over the center line and failed to stop at a stop sign. *Id.* When officers attempted to initiate a stop, the car accelerated down the road and ran another stop sign. *Id.* The car turned into a parking lot and came to a stop after crashing into a cement barrier. *Id.* When an officer made contact with the driver—Simmons—he immediately detected a strong odor of alcohol and noticed that Simmons was fumbling with his keys. *Id.* Simmons denied consuming alcohol, but a forty-four ounce cup of beer was found in the console. R318.

Simmons refused to perform a field sobriety test. *Id.* Officers arrested and transported him to the police station. *Id.* Officers also obtained a

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<sup>1</sup>Because this is an appeal of a sentencing issue from a guilty plea where no preliminary hearing was held, the facts are primarily taken from the probable cause statement attached to the original and amended informations, the PSR, and the transcript of the sentencing hearing. *See* R3, 67-68, 289, 310, 317.



warrant for a blood draw, but Simmons became combative, cursed at officers, and attempted to spit on them as they tried to restrain him. *Id.* The toxicology report showed that Simmons' blood alcohol content exceeded the legal limit. *Id.*

#### *Current DUI*

In the present case, in August 2014, officers from the Unified Police Department saw a car swerving from left to right, crossing the center travel lane, and not maintaining its lane of travel. R3, 67, 310. After stopping the car and making contact with the driver—later identified as Simmons—one of the officers immediately detected the odor of alcohol. R3, 67-68, 310. An assisting officer also smelled alcohol and noted that that Simmons' speech was slurred. R3, 68, 310. Officers determined that Simmons was an alcohol and ignition interlock-restricted driver, and noted that he did not have an interlock device installed on his car. R3, 67-68, 310. Nor did Simmons have proof of insurance. *Id.* Officers asked Simmons to perform a field sobriety test, but he refused. *Id.* Officers arrested Simmons and a subsequent blood draw showed that his blood alcohol level was above the legal limit. *Id.*

#### *Subsequent DUI*

In November 2014, Simmons was again arrested for—and later charged with—another DUI. R101, 114, 289, 311.

## **B. Summary of proceedings.**

### *Charges and Pleas*

Simmons pleaded guilty in March 2015 to the September 2011 DUI, a third-degree felony. R315. AP&P prepared a PSR and recommended that he be sent to the Utah State Prison. R315. The court in that case followed AP&P's recommendation. R278, 312. Then, in the present case, Simmons was charged with DUI for the August 2014 incident, along with several misdemeanor charges, including alcohol-restricted driver, operating a vehicle without an ignition interlock system, no proof of insurance, and failure to stay in one lane. R1-3.

After the trial court sentenced Simmons for the September 2011 DUI, he pleaded guilty in the present case to DUI, a third-degree felony, and two class B misdemeanors for alcohol-restricted driver and operating a vehicle without an ignition interlock system. R81, 84. The prosecutor agreed to dismiss the remaining charges and to recommend that the sentences run concurrently with one another, but consecutive to the prison commitment Simmons was already serving for the September 2011 DUI conviction. *Id.*

### *The PSR*

Within days of pleading guilty, Simmons requested a copy of his prior PSR. R88-89. He then filed a motion to continue the sentencing

hearing. R94-99. Simmons argued, in part, that the previous PSR was inaccurate. R99. Without referencing specific entries, he claimed that his "BCI file" had errors, that there were duplicate items, that a third-degree felony was reduced to a class B misdemeanor twelve years ago, that a class A misdemeanor was held in abeyance and should not appear, and that a class B misdemeanor appears as a commitment, but was held in abeyance with all jail time suspended. R99, 417-18.

AP&P subsequently submitted the previous PSR, together with an addendum report specific to the present case. R308-315. AP&P again recommended that Simmons be sent to prison. R309. Before the sentencing hearing, the prosecutor filed a motion challenging the accuracy of the PSR. R109-15. The prosecutor essentially argued that the criminal history portion of the PSR was incomplete and the prosecutor therefore provided a complete version. R110-14. Simmons, through counsel, objected because the prosecutor did not challenge the criminal history when the PSR was submitted in Simmons' prior case.<sup>2</sup> R119.

In addition, Simmons filed multiple pro se motions and memoranda making general allegations that essential information he provided to AP&P

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<sup>2</sup>The record nowhere indicates that the prosecutor's motion was ever resolved. And the State's corrected criminal history does not appear in any updated PSR.

was excluded from the PSR, that he had additional information for the court, that many statements in the PSR were untrue, that the PSR contained significant errors and disinformation, that there were numerous duplicate charges, that the dismissed charges should not have been included, that the PSR was written with a negative slant, that the employment history was not sufficiently detailed, and that mitigating circumstances were missing. R127-28, 139-41, 144, 151-52, 162-65, 172-73, 176, 349, 367, 369, 371-74, 386, 388-90, 399-400, 429-30, 434.

In more specific terms, Simmons argued that the PSR falsely stated that he failed to disclose his prior offenses and refused to take responsibility for his current offense, that he had only one prior commitment, in 2004, that any other indication of commitment in the PSR was erroneous, and that there was an unnamed problem with his 2000 simple assault class B misdemeanor conviction. R145, 175, 320. Simmons also took issue with the PSR's claim that he had been involved in accidents that resulted in property damage and that he had a history of domestic violence. R176, 316. Simmons argued that the PSR's statement that he "surrounds himself with individuals involved in criminal activity" is false R309. *See also* R380-84. Finally, Simmons argued that the PSR's claim that he only stays in touch with his mother was inaccurate because he sees his father when he visits

North Carolina. R309, 316, 411.

### *Sentencing Hearing*

The trial court heard at length from Simmons at the sentencing hearing. R273-76, 278-82, 286-89, 293-95. Simmons explained that he wanted the court to have a correct, honest PSR from AP&P. R273. He asserted—without specifics—that the PSR was full of errors, lacked essential information, was incomplete, and was “grossly incorrect” and “wrong.” R274, 279-80, 282.

But Simmons also specifically alleged that the PSR’s statement that he “takes a victim standpoint” was false and that he told AP&P that he does not consider himself a victim. R293-94, 319. He also contested any claim that he was previously involved in an accident that resulted in damage to another car. R294.

The trial court stated that it had reviewed Simmons’ “voluminous documents to the court outlining his view of the sentencing process,” “together with both your objections to the presentence report, your objections to the process of conducting the presentence investigation that led to the report as well as the presentence report that you submitted on your own behalf, the so called corrected presentence report.” R271, 277. But the court believed that Simmons was only complaining about the process by

which the presentence report was investigated and prepared, not the factual underpinnings of the report. *Id.* Indeed, the court specifically stated, “The thing that struck me about the pre- --the pleadings that you filed, is that nowhere in the pleadings that I reviewed did I see any indication that you believe the underlying facts were incorrect.” R277-78.

The court went on to explain that—because Simmons was already in prison—the only question was whether Simmons’ new sentence should be ordered to run concurrently or consecutively with the prior sentence. R278. According to the trial court, “no other sentence other than that makes any sense under the circumstances. It doesn’t make sense for me to send you to jail or to probation or anything else because you are currently serving a period of up to five years in prison in the Utah State Prison.” *Id.*

Without resolving on the record any alleged inaccuracies in the PSR—because the trial court believed Simmons never actually raised any factual inaccuracies—the court sentenced Simmons. R295-96. The court imposed a prison term of zero to five years for the DUI conviction, up to six month for the alcohol-restricted driver conviction, and up to ninety days for the interlock-restricted driver conviction. R296. The three sentences were ordered to run concurrently with one another. *Id.* But after taking into account Simmons’ struggle with alcohol abuse, his propensity for driving

while intoxicated, and the court's obligation to protect the community, the court ordered the three sentences to run consecutively to the prison sentence Simmons was then serving. R296-97.

Simmons timely appealed. R258-59.

### SUMMARY OF ARGUMENT

Both before and at the time of sentencing, Simmons made broad, generalized allegations that the PSR was incorrect. But he also made several challenges to the accuracy of specific statements in the PSR. While the trial court acknowledged that Simmons had objected to the PSR, it incorrectly concluded that Simmons' complaints were *only* about AP&P's investigation and preparation of the PSR, not its factual underpinnings. Consequently, the court did not make the specific accuracy and relevancy findings required by Utah Code Ann. § 77-18-1(6)(a).

This Court should therefore remand the case with instructions that the trial court make the appropriate findings. Simmons' sentence, however, should not be set aside. None of the alleged PSR errors would have altered AP&P's recommendation that Simmons be sentenced to prison, nor would they have affected the trial court's decision to run the sentences consecutively with the sentence Simmons was currently serving.



## ARGUMENT

### THIS CASE SHOULD BE REMANDED FOR THE SOLE PURPOSE OF RESOLVING ALLEGED INACCURACIES IN THE PRESENTENCE INVESTIGATION REPORT; DEFENDANT'S SENTENCE SHOULD BE AFFIRMED

At the sentencing hearing and in numerous pro se filings to the trial court, Simmons made broad, generalized claims that his PSR was inaccurate and erroneous because, for example, it excluded essential information, included numerous duplicate and dismissed charges in the criminal history, was written with a negative slant, insufficiently detailed his employment history, and excluded mitigating circumstances. R127-28, 139-41, 144, 151-52, 162-65, 172-73, 176, 273-76, 278-82, 286-89, 293-95, 349, 367, 369, 371-74, 386, 388-90, 399-400, 429-30, 434. He further claimed that AP&P was biased and failed to include much of the information Simmons provided that he believed would give the court a better understanding of his circumstances. R127-28, 139-44, 151-52, 162-65, 172-73, 349, 367, 369-74, 388-90. He asserted—again, without specifics—that the PSR was rife with errors and completely incorrect. *Id.*

But buried in the “voluminous documents” he filed, Simmons also made several accuracy challenges to specific parts of the PSR. He asserted, for example, that the PSR inaccurately stated that he (1) was guilty in 2000

of simple assault, a class B misdemeanor, and sent to jail, when in fact it was a plea in abeyance with no jail time; (2) failed to disclose his prior offenses and refused to take responsibility for his current offense; (3) had other commitments besides the one in 2004; (4) had been in accidents that resulted in property damage; (5) had a history of domestic violence; (6) surrounded himself with individuals involved in criminal activity; (7) had not provided verification for his high school diploma; and (8) only stayed in touch with his mother. R145, 175-76, 202, 293-94, 309, 316, 319-20, 380-84, 411. *See also* Aplt. Br. at 3-5.<sup>3</sup>

On appeal, Simmons argues that the trial court failed to address his challenges to the accuracy of the PSR and did not make specific findings on the record as required under section 77-18-1(6)(a). *See* Aplt. Br. at 8, 10-12.

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<sup>3</sup>Simmons also raises other alleged inaccuracies that do not have record support. For example, he says that the PSR falsely states that he consumed alcohol while under supervision and failed random drug tests. Aplt. Br. at 4. But no citation to the PSR is provided and the State has been unable to find these statements in the PSR. He also alleges that "he should have only had three priors: two prior third degree felony DUIs, one from 2004 and one from 2011 in which he successfully finished probation. He said he should only have one class A misdemeanor in 2004." *Id.* But the PSR says he has "two felony convictions," R309, though none from 2011, and one class A misdemeanor in 2004. R320. Finally, Simmons alleges that the PSR inaccurately states that his lack of education is a risk factor for criminality and that he has employment risks. *Id.* at 4-5. But again, no citation to the PSR is provided and the State has been unable to find these statements in the PSR.

He contends—without citation to any authority—that the court’s failure “necessitates reversal.” *Id.* at 10. *See also id.* at 8 (suggesting—without argument—that “the effect of the court’s errors may well require resentencing.”).<sup>4</sup>

Section 77-18-1 requires a trial court to “make a determination of relevance and accuracy on the record” of any alleged inaccuracies in the PSR. Utah Code Ann. § 77-18-1(6)(a). Once a defendant alleges that his PSR contains unresolved “‘factual inaccuracies,’ the court ‘must do three things: first, consider the objection raised; second, make findings on the record regarding the accuracy of the information at issue; and third, determine on the record the relevance of that information as it relates to sentencing.’”

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<sup>4</sup>Simmons also argues that “[i]n the event the State were to assert” that the issue of his PSR objections was not preserved, then this Court must consider whether (1) trial counsel was ineffective for not asking the trial court to make the required finding, and (2) the trial court abused its discretion when it allegedly failed to inquire into a potential conflict of interest between counsel and Simmons. Aplt. Br. at 8-9. But the State is not asserting that the PSR objections issue is unpreserved. “‘An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on [it].’” *Brown v. State*, 2015 UT App 254, ¶20, 361 P.3d 124 (quoting *Winward v. State*, 2012 UT 85, ¶9, 293 P.3d 259) (alteration in original) (citation and internal quotation marks omitted). Here, the trial court was fully aware of Simmons’ objections, had an opportunity to rule on the issue, but mistakenly concluded that Simmons was not alleging any factual inaccuracies. R277-78. As Simmons himself suggests, because the PSR objections issue was properly preserved, this Court need not address his counsel-ineffectiveness and conflict of interest issues. *See* Aplt. Br. at 8-9, 12-13.

*State v. Abelon*, 2016 UT App 22, ¶19, 369 P.3d 113 (emphasis in original) (quoting *State v. Monroe*, 2015 UT App 48, ¶6, 345 P.3d 755). If the court fails to do so, “the proper remedy is to remand [the] case to the trial court with instructions that it expressly resolve [defendant’s] objections in full compliance with section 77-18-1(6)(a).” *State v. Jaeger*, 1999 UT 1, ¶45, 973 P.2d 404.

Here, the trial court acknowledged that Simmons objected to the PSR, but concluded that his complaints went only to AP&P’s investigation and preparation of the PSR, not its factual underpinnings. R277-78, 283. Simmons, however, had made a handful of challenges to the accuracy of the PSR. See R145, 175-76, 202, 293-94, 309, 316, 319-20, 380-84, 411. Because the trial court mistakenly determined that none of Simmons’ objections were about factual inaccuracies, it did not make the accuracy and relevancy findings required by section 77-18-1(6)(a). The State therefore agrees that the case should be remanded to allow the trial court to “make the specific findings on the record as mandated by the statute.” *State v. Veteto*, 2000 UT 62, ¶15, 6 P.3d 1133.

But a “district court’s failure to fully resolve a defendant’s objections to a [PSR] does not necessarily require reversal of the defendant’s sentence.” *State v. Post*, 2015 UT App 162, ¶11, 354 P.3d 810 (citing *Jaeger*, 1999 UT 1,

¶45). This is particularly so when a defendant “fails to explain how resolution of the alleged errors in his favor might have affected the outcome of his sentence.” *Id.* Here, Simmons makes only three conclusory assertions that he should be resentenced. *See* Appt. Br. at 8, 10, 17 (“the effect of the court’s errors may well require resentencing”; the “court did not comport with [its] duty, which necessitates reversal”; if trial court “on remand finds that the PSR is indeed inaccurate, the court should order that it be allowed to resentence Mr. Simmons accordingly”). He nowhere provides any reasoned analysis establishing that a favorable resolution of his objections would necessitate resentencing. *See State v. Waterfield*, 2011 UT App 27, ¶¶10-11, 248 P.3d 57 (remanding for trial court to resolve alleged inaccuracies in PSR but affirming sentence because defendant inadequately briefed his argument that he should be resentenced).

In any event, the record shows that resolving Simmons’ objections in his favor would not alter the trial court’s sentencing decision. Simmons was already incarcerated on a prior third-degree felony DUI when he was sentenced in the present case. R278. And while his case was pending, he reoffended and was charged with another third-degree felony DUI. R311. In addition, although Simmons has challenged limited portions of his criminal history, he nowhere contests that he has an alcohol abuse problem and a

penchant for driving while intoxicated. R296.

Against this backdrop, the trial court stated that “the only substantive question for me to answer under these circumstances is whether or not you receive a sentence of prison that be ordered to be served concurrently or consecutively to the sentence that you are currently serving.” R278. The court expressly rejected a sentence of jail or probation. R278. In considering the appropriate punishment, the dispositive issue for the court was Simmons’ “desire to drive while . . . under the influence of alcohol. And that is my compelling concern because I have an obligation to protect the community.” R297. Under these circumstances, even if all Simmons’ objections were resolved in his favor—including those addressing his criminal history, whether his crimes resulted in property damage, and whether he takes responsibility for his actions—none of them would have altered the trial court’s central concern that society be protected from Simmons predilection for drinking while intoxicated.

In sum, the State agrees that Simmons’ case should be remanded to allow the trial court to resolve on the record Simmons’ objections to the PSR. But because even a favorable resolution of his objections would not alter the trial court’s sentence, this Court should affirm the trial court’s decision to send Simmons to prison and run his sentences consecutively

with the prison term he is already serving.

### CONCLUSION

For the foregoing reasons, the court should affirm.

Respectfully submitted on November 14, 2016.

SEAN D. REYES  
UTAH ATTORNEY GENERAL

A handwritten signature in black ink that reads "Mark C. Field". The signature is written in a cursive style with a large, stylized "K" in the middle.

MARK C. FIELD  
ASSISTANT SOLICITOR GENERAL  
Counsel for Appellee



## CERTIFICATE OF SERVICE

I certify that on November 14, 2016, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Melissa Ayer

# ADDENDA

# **ADDENDUM A**

**Utah Code Ann. § 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 under the supervision of an agency of local government or with a private organization; or
  - (iii) on court 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.
  - (iv) Court probation may include an administrative level of services, including notification to the court of scheduled periodic reviews of the probationer's compliance with conditions.(c) Supervised probation services provided by the department, an agency of local government, or a private organization shall specifically address the offender's risk of reoffending as identified by a validated risk and needs screening or assessment.
- (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 or a graduated sanction imposed under Section 63M-7-404.

(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 be modified as is consistent with the graduated sanctions and incentives developed by the Utah Sentencing Commission under Section 63M-7-404, but the length of probation may not be 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 reinstated for all or a portion of the original term of probation.

(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 validated risk and needs screening and 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.

### Credits

Laws 1980, c. 15, § 2; Laws 1981, c. 59, § 2; Laws 1982, c. 9, § 1; Laws 1983, c. 47, § 1; Laws 1983, c. 68, § 1; Laws 1983, c. 85, § 2; Laws 1984, c. 20, § 1; Laws 1985, c. 212, § 17; Laws 1985, c. 229, § 1; Laws 1987, c. 114, § 1; Laws 1989, c. 226, § 1; Laws 1990, c. 134, § 2; Laws 1991, c. 66, § 5; Laws 1991, c. 206, § 6; Laws 1992, c. 14, § 3; Laws 1993, c. 82, § 7; Laws 1993, c. 220, § 3; Laws 1994, c. 13, § 24; Laws 1994, c. 198, § 1; Laws 1994, c. 230, § 1; Laws 1995, c. 20, § 146, eff. May 1, 1995; Laws 1995, c. 117, § 2, eff. May 1, 1995; Laws 1995, c. 184, § 1, eff. May 1, 1995; Laws 1995, c. 301, § 3, eff. May 1, 1995; Laws 1995, c. 337, § 11, eff. May 1, 1995; Laws 1995, c. 352, § 6, eff. May 1, 1995; Laws 1996, c. 79, § 103, eff. April 29, 1996; Laws 1997, c. 390, § 2, eff. May 5, 1997; Laws 1998, c. 94, § 10, eff. May 4, 1998; Laws 1999, c. 279, § 8, eff. May 3, 1999; Laws 1999, c. 287, § 7, eff. May 3, 1999; Laws 2001, c. 137, § 1, eff. April 30, 2001; Laws 2002, c. 35, § 7, eff. May 6, 2002; Laws 2002, 5th Sp.Sess., c. 8, § 137, eff. Sept. 8, 2002; Laws 2003, c. 290, § 3, eff. May 5, 2003; Laws 2005, 1st Sp.Sess., c. 14, § 3, eff. July 1, 2005; Laws 2007, c. 218, § 3, eff. July 1, 2007; Laws 2008, c. 3, § 252, eff. Feb. 7, 2008; Laws 2008, c. 382, § 2193, eff. May 5, 2008; Laws 2009, c. 81, § 3, eff. May 12, 2009; Laws 2011, c. 366, § 176, eff. May 10, 2011; Laws 2014, c. 120, § 3, eff. May 13, 2014; Laws 2014, c. 170, § 1, eff. May 13, 2014; Laws 2015, c. 412, § 205, eff. Oct. 1, 2015; Laws 2015, c. 413, § 1, eff. May 12, 2015; Laws 2016, 3rd Sp. Sess., c. 4, § 1, eff. July 17, 2016.

U.C.A. 1953 § 77-18-1, UT ST § 77-18-1  
 Current through 2016 Third Special Session