

2015

**The State of Utah, Plaintiff and Appellee, v. John L. Legg,  
Defendant and Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
 :  
 Plaintiff and Appellee, :  
 v. :  
 :  
 JOHN L. LEGG, : Case No. 20140716-CA  
 :  
 Defendant and Appellant. : Appellant is incarcerated.

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**BRIEF OF APPELLANT**

Appeal from a Sentence, Judgment, and Commitment revoking probation for convictions of Aggravated Assault with a Deadly Weapon, in violation of Utah Code § 76-5-103, and for Possession of a Deadly Weapon by a Restricted Person, in violation of Utah Code § 76-10-503(2)(b), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Ann Boyden, presiding.

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**FILED**  
**UTAH APPELLATE COURTS**

**APR 01 2015**

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## TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u> .....	iii
<u>INTRODUCTION</u> .....	1
<u>JURISDICTION</u> .....	2
<u>STATEMENT OF THE ISSUES, STANDARD OF REVIEW, PRESERVATION</u> .....	2
<u>STATEMENT OF THE CASE/FACTS</u> .....	2
<u>SUMMARY OF THE ARGUMENT</u> .....	5
<u>ARGUMENT</u> .....	6
I.    THE TRIAL COURT VIOLATED THE MANDATE RULE WHEN IT REVOKED MR. LEGG’S PROBATION WITHOUT COMPLYING WITH THE COURT OF APPEALS’ MANDATE ON REMAND .....	6
<u>CONCLUSION</u> .....	12
Addendum A: <i>State v. Legg</i> , 2014 UT App 80, 324 P.3d 656	
Addendum B: Relevant statute	

## TABLE OF AUTHORITIES

### Cases

<i>Black v. Romano</i> , 471 U.S. 606.....	10
<i>IHC Health Servs., Inc. v. D &amp; K Mgmt., Inc.</i> , 2008 UT 73, 196 P.3d 588 .....	2, 6, 8, 11
<i>State v. Dean</i> , 2004 UT 63, 95 P.3d 276 .....	11
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993).....	2
<i>State v. Garcia</i> , 2001 UT App 19, 18 P.3d 1123 .....	11
<i>State v. Hodges</i> , 798 P.2d 270 (Utah Ct.App.1990).....	8, 10
<i>State v. Holgate</i> , 2000 UT 74, 10 P.3d 346.....	11, 12
<i>State v. Legg</i> , 2014 UT App 80, 324 P.3d 656.....	1, 2, 3, 4, 5, 6, 7, 8, 10, 11
<i>Thurston v. Box Elder County</i> , 892 P.2d 1034 (Utah 1995) .....	6
<i>Utah Dep't of Transp. v. Ivers</i> , 2009 UT 56, 218 P.3d 583.....	6, 8, 9

### Statutes

Utah Code § 76-10-503 .....	2
Utah Code § 76-5-103 .....	2
Utah Code § 78A-4-103 .....	2

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THE STATE OF UTAH,	:	
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**INTRODUCTION**

This Court issued *State v. Legg* on April 10, 2014. *See* 2014 UT App 80, 324 P.3d 656 [Addendum A]. In that case, this Court considered the trial court's decision to revoke Mr. Legg's probation based on three violations. *Id.* This Court affirmed one violation, finding that "Legg willfully violated his probation agreement by failing to be cooperative, compliant, and truthful with his probation officer" (*Id.* ¶25), nonetheless, it remanded "for further consideration and explanation by the trial court" of the other two violations. *Id.* On remand, it required that "the trial court must reassess whether, under all the circumstances, Legg's probation should be revoked." *Id.*

On remand, the state pursued only a claim that probation should remain revoked based on the one violation this Court affirmed. R.377:9. The trial court summarily revoked Mr. Legg's probation, noting there was "no question that if there had been *any finding* of violation of probation that it would have been revoked, pure and simply on his history." R.377:21,23-24 (emphasis added). Mr. Legg now appeals from that decision.

## **JURISDICTION**

Mr. Legg appeals from a July 28, 2014, sentence, judgment, and commitment for convictions of one count of possession of a dangerous weapon by a restricted person, a third degree felony under Utah Code § 76-10-503(2)(b); and one count of aggravated assault with a deadly weapon, a third degree felony under Utah Code § 76-5-103. *See generally* R.377; *see also* [Addendum B].

This Court has jurisdiction under Utah Code § 78A-4-103 (2)(e).

## **STATEMENT OF THE ISSUES, STANDARD OF REVIEW, PRESERVATION**

***Issue:*** Whether the trial court violated the mandate rule and thus abused its discretion on remand where its decision to again revoke Mr. Legg's probation did not comply with this Court's remand order.

***Standard of review:*** A trial court's decision to revoke probation is reviewed for an abuse of discretion. *See Legg*, 2014 UT App 80, ¶7. "The mandate rule . . . binds both the district court and the parties to honor the mandate of the appellate court." *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶28, 196 P.3d 588.

***Plain Error:*** To show plain error, Legg must establish that: "(i) An 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 for the appellant, or phrased differently, our confidence in the verdict is undermined." *Legg*, 2014 UT App 80, ¶8 (quoting *State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993)).

## **STATEMENT OF THE CASE/FACTS**

Nature of the Case. Course of the Proceedings. Disposition in the Court Below

In 2011, Mr. Legg pleaded guilty to one count of possession of a dangerous weapon by a restricted person (district court case no. 101901007), and one count of aggravated assault with a deadly weapon (district court case no. 101901067). R.246-47,248-55.<sup>1</sup> He was sentenced to two concurrent sentences of no less than five years in the Utah State Prison, suspended for 180 days in jail, with twenty-four months of probation. R.246-47. He was released from jail on probation on January 5, 2012. R.270-73. Only eight days later, Adult Probation and Parole filed an affidavit in support of an order to show cause, alleging several probation violations. R.274-75. The affidavit was amended to add additional violations. R.292-302. Mr. Legg denied all of the violations. R.305. An evidentiary hearing was subsequently held, where the trial court revoked his probation based on three alleged probation violations. R.307-308; *see also Legg*, 2014 UT App 80, ¶6 (noting the trial court revoked probation because Mr. Legg “(1) [] knowingly possessed a controlled substance; (2) [] failed to be cooperative, compliant, and truthful with his probation officer; and (3) [] failed to establish a residence of record.”). Mr. Legg appealed from that decision. See 20120473-CA.

On appeal, this court affirmed only the allegation that Mr. Legg had not been cooperative, compliant, and truthful with his probation officer. *Legg*, 2014 UT App 80,

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<sup>1</sup> The guilty plea to both charges is contained in one document. In the prior appeal from these convictions, this court consolidated both district court cases into case number 20120473-CA. However, in the new appeal, only the district court record from case 101900677 was included in this appellate record. Mr. Legg has moved to supplement the record with that record, however because that record is not dispositive of the issues on appeal and the court can take judicial notice of the other record, the opening brief is filed without waiting for the court’s response to the motion.



¶25. This court expressed doubt and a lack of confidence in the trial court's decisions to revoke based on the two other charges of possession and notifying AP&P of a residence. *Id.* ¶¶19,23. Even as it recognized that a single violation might suffice to revoke probation, this Court nonetheless remanded for further consideration on those two violations, mandating that the trial court determine whether "under all the circumstances, Legg's probation should be revoked." *Id.* ¶25.

On remand in the trial court hearing on July 28, 2014, a different trial court judge presided.<sup>2</sup> The state dropped any claim as to the substance or residence violations. R.377:9. It wanted to "simply move forward on the one where the Court [of Appeals] did uphold that willful violation." *Id.* The parties then stipulated that no evidentiary hearing was necessary. *Id.*10. Defense counsel argued the court should close the cases and not send Mr. Legg to prison again. *Id.*14. She noted he "is not a problem out at the prison," and was going to work with her on resources to help him stay out of prison. *Id.* Then, Mr. Legg discussed his criminal history and why he believed the probation violation was unjustified in that he made his best efforts to comply with AP&P's requests. *Id.*16-17. The State argued the original sentence was appropriate in the prior cases based on the "bottom line" that "he willfully violated probation," which the State saw as "enough to impose the original sentence." *Id.*15.

The trial court rejected the request to close the case, finding that it could not "determine that there has been enough time served on" the original sentences, but that it

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<sup>2</sup> The Honorable Ryan Harris ruled on the first probation revocation hearing, while the Honorable Ann Boyden, ruled in the remand hearing.

was for the prison and the Board of Parole to determine. *Id.*19-20. It narrowed the question before it to the question of “was there a willful violation of probation, and would that have been sufficient” to revoke and reinstate, noting this Court was “not confident that standing on its own that [single violation] would have been enough to result in revocation of probation.” R.377:20. Yet the trial court decided the only reason this Court was not “confident,” was “because [it] didn’t know anything.” *Id.*

The trial court disclosed, “[i]n all fairness” and “just to assure everyone [it was] familiar with the case,” that it knew, “because of the dealing that [it] had with Mr. Legg before, that that would have been sufficient to [] revoke probation.” *Id.*21,23. Then and based on its “experience with Mr. Legg,” the court ruled, “there is no question that if there had been any finding of violation of probation that it would have been revoked, pure and simply on his history.” *Id.* It said if it had “found a violation, looking at his history, looking at the recommendation, looking at the opportunity for probation that he had received, [it] would have imposed the original sentence.” *Id.*23. The court left the decision of how long Mr. Legg’s prison sentence would go to the Board. *Id.*

This appeal is taken from that determination.

### **SUMMARY OF THE ARGUMENT**

Mr. Legg argues the trial court abused its discretion in again revoking his probation and reinstating his sentence, because it failed to consider and analyze the circumstances surrounding his probation, and instead affirmed the probation revocation based on extraneous and irrelevant concerns. In so doing, the trial court failed to abide by this Court’s mandate to undertake “further consideration and explanation” as to “whether,

under all the circumstances, Legg's probation should be revoked," on the basis of a single violation for "failing to be cooperative, compliant, and truthful with his probation officer." *Legg*, 2014 UT App 80, ¶25.

The trial court failed to consider the circumstances surrounding that single violation and failed to explain why, despite the court of appeals' hesitation to affirm Mr. Legg's probation revocation on that single violation, it was nonetheless a sufficient basis to reinstate his prison sentence. This Court should reverse and remand for appropriate findings by the trial court.

### **ARGUMENT**

#### **I. THE TRIAL COURT VIOLATED THE MANDATE RULE WHEN IT REVOKED MR. LEGG'S PROBATION WITHOUT COMPLYING WITH THE COURT OF APPEALS' MANDATE ON REMAND.**

The trial court violated the mandate rule in its determination of this case on remand. The mandate rule "binds both the district court and the parties to honor the mandate of the appellate court." *IHC Health Servs., Inc.*, 2008 UT 73, ¶28. Moreover, the mandate rule, "'dictates that pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case.'" *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶12, 218 P.3d 583 (quoting *Thurston v. Box Elder County*, 892 P.2d 1034, 1037–38 (Utah 1995)). Indeed, that rule requires that a "lower court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Thurston*, 892 P.2d at 1038. On remand from this Court's decision in *Legg*, 2014 UT App 80, the

trial court did not comply with the mandate rule where it failed to implement this Court's mandate as it again revoked Mr. Legg's probation.

In *Legg*, this Court reviewed the trial court's original decision to revoke probation for Mr. Legg's "failure to be cooperative, compliant, and truthful." *Legg*, 2014 UT App 80, ¶¶20-21. Although this Court determined the trial court "did not explicitly reveal the evidence relied on or its reasoning in reaching this conclusion," this Court determined the basis was nonetheless clear from the record. *Id.*¶21. This Court concluded "[t]he evidence was sufficient to reasonably conclude that Legg knew he was supposed to call, that he had the means to call, and that his failure to consistently do so was willful." *Id.* It "affirm[ed] the finding that Legg willfully violated his probation agreement by failing to be cooperative, compliant, and truthful with his probation officer." *Id.*¶25.

Importantly, even as it recognized "that a single violation of probation is legally sufficient to support a probation revocation," this Court nonetheless refused to affirm Mr. Legg's probation violation from that single violation. *Id.*¶11. Noting the original trial court had "expressed qualms . . . about the revocation decision," this Court determined it had been "the totality of the three violations found by the trial court that prompted the trial court's decision to revoke notwithstanding its misgivings." *Id.* And that because the record did not make clear that "the trial court would have exercised its discretion the same way if any one of the three violations was not properly established" *Id.* There was an insufficient basis in the record for the trial court's findings on two of the violations and this Court was "not confident that, standing on its own, the single violation . . . would have resulted in a revocation of probation." *Id.*¶25. The court remanded. *Id.*

On remand, this Court's mandate was clear. The Court had no confidence that a decision to revoke probation based on Mr. Legg's relatively minor failure to contact his probation officer on five of the seven days he was on probation, would be justified. *See Legg*, 2014 UT App 80, ¶6 (noting "Legg's probation officer 'had an awful quick trigger on Mr. Legg in this case.'"). With this lack of confidence, the court remanded with strict orders to "reassess whether, under all the circumstances, Legg's probation should be revoked." *Id.* ¶25. The Court's reference to "under all the circumstances" necessarily referred to the circumstances surrounding these cases and the decision to revoke probation based on these allegations. *Id.* The Court made it clear that on remand, the trial court had to ensure the record reflected the evidence it relied on to make its decision. *See id.* ¶16 (quoting *State v. Hodges*, 798 P.2d 270, 275 (Utah Ct.App.1990)).

The context of the remand differed somewhat from what the Court anticipated, where the State dropped all allegations of the two violations this Court did not affirm and moved forward "on only the one where the Court did uphold that willful violation." R.377:9. Even with this change, the mandate rule still applied to the trial court's consideration of whether Mr. Legg's probation should have been revoked on only that violation. *See IHC Health Servs., Inc.*, 2008 UT 73, ¶28 (a trial court is bound "to honor the mandate of the appellate court."); *see also Ivers*, 2009 UT 56, ¶12 (trial court "must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces") (quotation omitted).

The Court of Appeals' mandate meant that the trial court had to look critically at the circumstances of the probation to determine whether it should again be revoked in the

face of a single, weak, probation violation. If it found that probation should still be revoked, it had to make clear on the record the justifications for that decision. That mandate did not allow the district court to simply assume a single violation sufficed to violate Mr. Legg's probation and reinstate a prison sentence.

However, and despite the mandate rule, the court made that assumption and failed "the letter and the spirit of" this Court's mandate. *Ivers*, 2009 UT 56, ¶12. Despite the Court of Appeals' clear expression of concern that the single violation was not enough to revoke Legg's probation, the trial court nonetheless decided "[t]here is no question that if there had been any finding of violation of probation that it would have been revoked. It's pure and simply on his history." R.377:21. After defense counsel made further argument, the trial court clarified the basis for its ruling on remand:

There is no question that had I found a violation, looking at his history, looking at the recommendation, looking at the opportunity for probation that he had received, I would have imposed the original sentence. . . . my finding is that on a single violation, his history, and the recommendations and the requests of the prosecution I'm sure would have resulted in revocation of probation. And if there is no question, and there does not appear to be on knowingness of a violation then the only question remains is was the revocation of probation sufficient on that one single violation and I have no question that that would have been my ruling and that I find that those circumstances still support it.

R.377:23-25. The Court ultimately justified its finding as being "based on what information the court had at the time that there was a finding a violation of probation that it was properly a basis for revoking probation, looking at the entire history of both cases."

*Id.* 25. In other words, the trial court simply reiterated the first court's determination of a probation violation based the "information the court had at the time." *Id.*

This decision did not implement the mandate of the Court of Appeals, in that it does not reflect a critical evaluation of the circumstances surrounding Mr. Legg's probation to determine whether it should again be revoked in the face of a single, weak, probation violation. Rather the trial court's ruling reflects the assumption based on some idea of the "entire history of both cases," and that it was properly revoked in the first place, that Mr. Legg's probation should again be revoked.

Not only was this ruling not compliant with the mandate rule but it was based on something other than a "permissible ground[] supported by the evidence." *Black v. Romano*, 471 U.S. 606, 614 (1985); *see also Hodges*, 798 P.2d at 275 (the record "strongly suggests that appellant's probation was revoked because of problems not within his control."). On remand, it was not Legg's entire criminal history or the trial court's professed familiarity with him, that was at issue. Yet that was the basis of the court's decision. *See* R.377:21 (trial court noting, "[i]n all fairness I know, because of the dealings that I have had with Mr. Legg before, that that would have been sufficient to, um, revoke probation."). Rather, the only question was whether this single, weak violation, in the context of Mr. Legg's current cases and the probation conditions, "would have resulted in a revocation of probation." *Legg*, 2014 UT App 80, ¶25.

The trial court failed to comply with this Court's mandate to consider the actual circumstances of probation in Mr. Legg's cases. Where the trial court strayed from the mandate and revoked probation based on personal familiarity with Legg and its purported

but unexplained history with him, its ruling did not comply with the mandate rule and this Court should reverse and remand to the trial court for appropriate findings.

**It was plain error for the trial court to revoke Mr. Legg's probation in violation of the mandate rule.**

It was plain error to revoke Mr. Legg's probation in violation of the mandate rule. Because all three requirements of plain error are satisfied, this Court can review Legg's claim. *See State v. Garcia*, 2001 UT App 19, ¶6, 18 P.3d 1123 (requiring: (1) an error; (2) that is or should have been obvious to the trial court; and (3) is prejudicial). As discussed above, it was error for the trial court to revoke Mr. Legg's probation based the findings it articulated. *See R.377:23-24*. Those findings did not reflect the mandate of this Court in its directions for remand. *See Legg*, 2014 UT App 80. Given the fact of the Court of Appeals' explicit mandate, the trial court's ruling "was so obvious and fundamental." *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346.

The second element of the plain error doctrine is also satisfied. To establish that an error was "obvious," the appellant "must 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. The mandate rule has long been recognized and was in full effect at the time of this court's ruling. *See, e.g., IHC Health Servs., Inc.*, 2008 UT 73, ¶28.

Finally, the trial court's errors harmed Legg, as his probation was unjustly revoked again on an insufficient basis. *See Holgate*, 2000 UT 74, ¶13 (a harmful error is one, where "absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined."




(quotation omitted)). Thus, Legg asserts, this Court should again reverse and remand to the trial court with directions to consider its mandate on remand.

**CONCLUSION**


For the reasons stated above, Mr. Legg respectfully requests that this Court reverse and remand with orders that the trial court comply with its mandate on remand.

SUBMITTED this 1<sup>st</sup> day of April, 2015.

  
JOANNA E. LANDAU  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOANNA E. LANDAU, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and  $\frac{3}{4}$  copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 1<sup>st</sup> day of April, 2015

  
JOANNA E. LANDAU

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f) (1), I certify that this brief contains 3,227 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.

  
JOANNA E. LANDAU

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this 1 day of April, 2015



INDEX TO ADDENDA

Addendum A: *State v. Legg*, 2014 UT App 80, 324 P.3d 656

Addendum B: Relevant statute

Tab A

THE UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff and Appellee,

*v.*

JOHN L. LEGG JR.,  
Defendant and Appellant.

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Opinion  
No. 20120473-CA  
Filed April 10, 2014

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Third District Court, Salt Lake Department  
The Honorable Ryan M. Harris  
No. 101900677

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Joanna E. Landau, Attorney for Appellant  
Sean D. Reyes and Jeanne B. Inouye, Attorneys  
for Appellee

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JUDGE GREGORY K. ORME authored this Opinion, in which  
JUDGES J. FREDERIC VOROS JR. and STEPHEN L. ROTH concurred.

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ORME, Judge:

¶1 John L. Legg Jr. appeals the trial court's decision to revoke his probation and impose the original sentence on his convictions for aggravated assault with a deadly weapon, a third degree felony, Utah Code Ann. § 76-5-103 (LexisNexis 2012), and for possession of a dangerous weapon by a restricted person, a third degree felony, *id.* § 76-10-503. Because of concerns we have with the revocation decision, we remand for further consideration by the trial court.

BACKGROUND

¶2 In reviewing a revocation of probation, we recite the facts in the “light most favorable to the trial court’s findings.” *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990). Here, the trial court’s findings were made orally from the bench and were relatively sparse. Thus, our recitation of the facts also includes findings implicitly made by the trial court and matters that are undisputed in the record.

¶3 The day he completed the jail term that was a component of his probation, Legg met with his probation officer to go over his probation agreement. Legg was particularly concerned about the requirement in the agreement that he establish a residence of record. He told the probation officer he was homeless and had no savings. The probation officer instructed Legg to check in by telephone every day until he established a residence. Legg claimed that he did not remember any such instruction, but it is undisputed that Legg failed to call on most days. After about a week, however, Legg showed up for a scheduled in-person interview with his probation officer and was arrested for suspected probation violations.

¶4 During a search incident to the arrest, Legg’s probation officer discovered a very small amount of cocaine—less than one-tenth of a normal dose—in the bottom of a pill bottle where Legg was storing his prescription medicine. A family member gave the pill bottle to Legg so he would have a more convenient method for storing his pills than in the bulky containers provided to him by jail personnel upon his release. He claimed to have never noticed the thirty-four to thirty-six milligrams of white substance in the bottle even though, on a regular basis, he “dumped” the pills out to take them as prescribed and returned the remaining contents to the bottle. A drug test administered at the same time showed that Legg had not been using cocaine. Nevertheless, the State initiated a separate criminal proceeding against Legg for possession of a

*State v. Legg*

controlled substance. In the ensuing trial, the jury returned a verdict of not guilty.

¶5 During the subsequent evidentiary hearing to consider revoking Legg's probation, which is the subject of this appeal, the trial court heard testimony from the probation officer and from Legg and considered the physical evidence of the cocaine. The trial court found, with our emphasis, that it was "more likely than not that [Legg] would know that there was a substance in there, *whatever it was*." Legg's attorney pointed out that, in order to find a violation, the court had to be convinced that Legg had knowledge of the narcotic character of the substance, not just that he had control over it and had knowledge of its presence, "whatever it was." Without identifying any additional evidence, the trial court then immediately revised its finding: "I think at least by a preponderance I'm going to find that Mr. Legg knew that that was a controlled substance in the bottle[.]"

¶6 At the conclusion of the hearing, the trial court found that Legg had violated the terms of his probation in three ways: (1) he knowingly possessed a controlled substance; (2) he failed to be cooperative, compliant, and truthful with his probation officer; and (3) he failed to establish a residence of record. In doing so, however, the trial court expressed concerns about revoking probation so quickly and opined that Legg's probation officer "had an awful quick trigger on Mr. Legg in this case."

ISSUES AND STANDARDS OF REVIEW

¶7 Legg argues that the trial court did not properly focus on the requirement that probation violations must be willful and that the evidence was insufficient to support a finding that any violation of the probation agreement was willful. We review a trial court's decision to revoke probation for an abuse of discretion. *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990).

*State v. Legg*

¶8 Legg did not preserve this issue for appeal but argues that the trial court was plainly in error in not focusing on the requirement of willfulness. Plain error is established only if: "(i) An 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 for the appellant, or phrased differently, our confidence in the verdict is undermined." *State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993).

¶9 Legg also asserts that he had ineffective assistance of counsel. A claim of ineffective assistance of counsel, when raised on appeal for the first time, presents a question of law. *See State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

ANALYSIS

¶10 To revoke probation, the trial court must find a violation of the probation agreement by a preponderance of the evidence. *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct. App. 1994). In addition, the trial court must find, also by a preponderance of the evidence, that the violation was willful, *see State v. Maestas*, 2000 UT App 22, ¶ 24, 997 P.2d 314, and not merely the result of circumstances beyond the probationer's control, *see State v. Hodges*, 798 P.2d 270, 277 (Utah Ct. App. 1990).

¶11 We recognize that a single violation of probation is legally sufficient to support a probation revocation. *See Jameson*, 800 P.2d at 804 ("The decision to grant, modify, or revoke probation is in the discretion of the trial court."). But considering the expressed qualms of the trial court about the revocation decision, it is appropriate to address each finding individually. And because it appears to have been the totality of the three violations found by the trial court that prompted the trial court's decision to revoke notwithstanding its misgivings, it is less than obvious in this case that the trial court would have exercised its discretion the same way if any one of the three violations was not properly established.



*State v. Legg*

I. Possession of a Controlled Substance

¶12 Legg argues that there was insufficient evidence to show that he knowingly possessed a controlled substance. To prove possession of a controlled substance in violation of Utah Code section 58-37-8(2)(a)(i), the State must establish “that the accused exercised dominion and control over the drug with knowledge of its presence and narcotic character.” *State v. Winters*, 396 P.2d 872, 874 (Utah 1964). *Accord State v. Salas*, 820 P.2d 1386, 1388 (Utah Ct. App. 1991).

¶13 The record is more than sufficient to show, at least by a preponderance of the evidence, that Legg exercised dominion and control over the substance in his pill bottle that later proved to be cocaine and that he had knowledge of its physical presence. He had exclusive control over the pill bottle for about a week, and the trial court did not exceed its discretion in inferring that by “dumping” out the pills on a regular basis it was more likely than not that Legg had knowledge of its presence. It is less clear, however, that Legg had knowledge of the substance’s narcotic character. This is an essential element of the violation. If 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. Counsel below was correct in raising a timely concern with the court that it was not enough to find that Legg knew the substance, “whatever it was,” was in the pill bottle. Instead, the trial court needed to find that Legg also knew of the narcotic character of the substance in order to conclude that Legg violated the terms of his probation.

¶14 The trial court acknowledged this and amended its finding to include that Legg had the requisite knowledge, but it did so without any reference to evidence on which it may have relied or the rationale for its immediately revised reasoning. Legg’s argument about the insufficiency of the evidence in this regard is well taken. Most tellingly, at one point in the hearing, Legg’s counsel complained that there was no basis for assuming that Legg

*State v. Legg*

would be able to identify cocaine residue because “there has never been any evidence that he has a history with cocaine.” In response, the State conceded, “We didn’t bring that out in any of this.” However, before we can properly address the issue of insufficient evidence, we must first determine if the trial court revealed its reasoning and the evidence upon which it relied in a way that satisfies the due process requirements of a probation revocation hearing. *See Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973).

¶15 In *Gagnon*, the United States Supreme Court held that the minimum due process protections applicable to probation revocation proceedings include “a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].” *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), and extending *Morrissey*’s parole revocation rule to probation hearings). The Court has explained that the “written statement required by *Gagnon* . . . helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.” *Black v. Romano*, 471 U.S. 606, 613–14 (1985). But when a probation revocation hearing is recorded, a written finding is “constitutionally required only if the transcript and record before the judge do not enable a reviewing court to determine the basis of the judge’s decision to revoke probation.” *Morishita v. Morris*, 702 F.2d 207, 210 (10th Cir. 1983). If the “evidence relied on and the reasons for revoking” probation are not revealed, then a remand for a rehearing is appropriate. *State v. Hodges*, 798 P.2d 270, 275 (Utah Ct. App. 1990).

¶16 In *Hodges*, the record contained some evidence supporting probation revocation, but other evidence—letters from a social worker and a corrections supervisor—was absent from the record on appeal. *Id.* at 273. In its finding, the trial court in *Hodges* did not make it clear how much it had relied on the missing letters and how much it had relied on the other evidence. *Id.* at 274. We remanded because “[t]he record on review [did] not adequately reveal the evidence relied on by the court.” *Id.* at 275.

¶17 As in *Hodges*, the record and transcript available in this case do not readily reveal the evidence relied on or the reasons for finding that Legg willfully possessed a controlled substance with knowledge of its narcotic character. The trial court originally found only that Legg had control of the substance, “whatever it was,” and that, more likely than not, he was aware of its presence. After Legg’s counsel objected, the trial court promptly revised its findings to meet the applicable legal requirement, but it failed to give any indication of its basis for doing so.

¶18 The State directs us to a confidential competency evaluation ordered by a trial court in a previous matter as evidence of Legg’s familiarity with cocaine. During the court-ordered competency evaluation, Legg made potentially incriminating statements to a social worker. The trial court did not reveal if it relied on this evidence or not, although it apparently was among the voluminous materials before the court.

¶19 Because we cannot determine from the record what evidence, if any, the trial court relied on in finding that Legg had knowledge of the narcotic character of the substance in his pill bottle, we cannot conclude that Legg willfully violated his probation. We therefore remand to the trial court to identify the evidence it relied on and its reason for moving so quickly from a finding of “whatever it was” to a finding of knowledge that the substance was cocaine. *See Black*, 471 U.S. at 613–14 (holding that without a finding from the trial court detailing the evidence relied on and the reasons for probation revocation, there will not be “an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence”).

## II. Failure To Be Cooperative, Compliant, and Truthful

¶20 Legg argues that the evidence is insufficient to show that he willfully failed to be cooperative, compliant, and truthful with his probation officer. The probation officer testified that he instructed Legg to check in by telephone every day until he established a

*State v. Legg*

residence. Legg failed to do so. The State produced evidence that Legg could have called every day if he had wanted to do so. While it may have been inconvenient at times, Legg admitted that he did have access to telephones. It is also clear that Legg had the correct telephone number for his probation officer because he called and left two messages on the second day of his probation. The trial court found the probation officer's testimony to be more reliable and ruled that Legg's failure to call was a willful violation of his probation agreement.

¶21 Again, the trial court did not explicitly reveal the evidence relied on or its reasoning in reaching this conclusion, *see supra* ¶ 19, but on this issue the evidence and statements contained in the record make the evidentiary basis for this finding sufficiently clear. *See Morishita v. Morris*, 621 P.2d 691, 693 n.2 (Utah 1980) ("[T]he transcript, in which many statements by the judge appear, reveals the judge's thought process and the conclusions he drew from the evidence. An entry of formal findings of fact and conclusions of law would add nothing[.]"). Concerning the first prong of the plain error test, we do not conclude that the trial court made any error, plain or otherwise, in connection with this ruling. *See State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993). The evidence was sufficient to reasonably conclude that Legg knew he was supposed to call, that he had the means to call, and that his failure to consistently do so was willful. *See State v. Brady*, 2013 UT App 102, ¶ 7, 300 P.3d 778 (concluding that findings of willfulness in the probation revocation context can be implicit).

III. Failure To Establish a Residence

¶22 Legg argues that the court plainly erred because the evidence was insufficient to show that he willfully failed to establish a residence of record. Legg argues that the trial court based its finding solely on the undisputed fact that Legg remained homeless after one week of probation. If this was, in fact, the trial court's reasoning, then it may have plainly erred. If an "appellant's failure . . . resulted from problems beyond his control, his

*State v. Legg*

probation cannot be revoked.” *State v. Hodges*, 798 P.2d 270, 277 (Utah Ct. App. 1990). On appeal, however, the State argues that the requirement to call every day was an accommodation to Legg that effectively replaced the requirement that he establish a residence of record. This allowed Legg to remain transient so long as he reported his temporary “residence of record” every night.

¶23 The trial court, however, did not explain whether it found the violation to be the result of Legg’s failure to establish a residence of record or whether it found the violation to be the result of Legg’s failure to call in with updated “residence” information every night. It certainly appears that it was the former, although the trial court cut short any opportunity to flesh out the basis for this claimed violation. The judge stated:

I think I can find based on the evidence that has been presented today that Mr. Legg did fail to establish a residence of record and that . . . he did fail to be cooperative, compliant and truthful with certain dealings . . . . So I’m going to make a finding without even hearing from you folks on argument . . . that those two have been violated.

This finding leaves us without “adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.” *See Black v. Romano*, 471 U.S. 606, 613–14 (1985). Accordingly, we remand to the trial court to identify the facts on which it relied in concluding that Legg willfully failed to establish a residence of record.

#### IV. Ineffective Assistance of Counsel

¶24 Legg argues that he received ineffective assistance of counsel because his trial counsel failed to object to the trial court’s revocation of probation without sufficient evidence of the willfulness of Legg’s violations. We conclude that trial counsel’s failure to object to the finding that Legg violated his probation by

*State v. Legg*

failing to be cooperative, compliant, and truthful with his probation officer—i.e., by not calling his probation officer on most days—was not ineffective. As previously discussed, *see supra* ¶ 21, the record and transcript support the trial court’s finding on this point, meaning an objection would have been unavailing. “Failure to raise futile objections does not constitute ineffective assistance of counsel.” *State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546. As a result, we conclude that trial counsel was not ineffective in this regard. And because we have already remanded for reconsideration on the remaining issues, it is unnecessary to address the effectiveness of counsel with respect to those issues.

CONCLUSION

¶25 We affirm the finding that Legg willfully violated his probation agreement by failing to be cooperative, compliant, and truthful with his probation officer. But we are not confident that, standing on its own, the single violation that we affirm would have resulted in a revocation of probation. We remand on the issues of possession of a controlled substance and failure to establish a residence of record for further consideration and explanation by the trial court. On remand, the trial court must reassess whether, under all the circumstances, Legg’s probation should be revoked.

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Tab B

**Utah Code § 76-5-103**

**76-5-103. Aggravated assault.**

- (1) A person commits aggravated assault if the person commits assault as defined in Section 76-5-102 and uses:
  - (a) a dangerous weapon as defined in Section 76-1-601; or
  - (b) other means or force likely to produce death or serious bodily injury.
- (2)
  - (a) A violation of Subsection (1) is a third degree felony, except under Subsection (2)(b).
  - (b) A violation of Subsection (1) that results in serious bodily injury is a second degree felony.