2015

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

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff/Appellee, v. JOHN L. LEGG, Defendant/Appellant.	Case No. 20140716-CA Appellant is not incarcerated.

REPLY BRIEF

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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REPLY BRIEF OF APPELLANT

As outlined in the Opening Brief, the trial court's failure to comply with the mandate of this Court warrants reversal of the trial court's decision to revoke and reinstate Mr. Legg's prison sentence.

According to the Utah Rules of Appellate Procedure, this reply brief is "limited to answering any new matter set forth in the opposing brief." Utah R. App. P. 24 (c). Matters not addressed herein, were adequately addressed in the Opening Brief.

I. THE TRIAL COURT'S FAILURE TO COMPLY WITH THIS COURT'S MANDATE MERITS REVERSAL OF ITS DECISION REVOKING MR. LEGG'S PROBATION.

The trial court summarily revoked Mr. Legg's probation in violation of this Court's mandate. *See generally* OB. Specifically, although this Court was "not confident that, standing on its own, the single violation . . . would have resulted in a revocation of probation," (*State v. Legg*, 2014 UT App 80, ¶ 25, 324 P.3d 656), the trial court on remand expressed "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probation that it would have been revoked, pure and simply on his history."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). That court's decision to revoke Mr. Legg's probation on that basis violated this Court's mandate. The state responds by arguing Mr. Legg's appeal is moot and that the district court's decision was appropriate because it considered the same information that made this Court "not confident" that the single, minor probation violation justified the decision to revoke Mr. Legg's probation and reinstate his prison sentence. Neither of the state's arguments about mootness or the merits are persuasive. This Court's precedent makes patent both that Mr. Legg's appeal is not moot and that the district court violated the mandate rule.

A. Mootness Principles Do Not Apply to Mr. Legg's Appeal.

An issue on appeal is moot when the relief requested by the appellant cannot affect the appellant's rights. *State v. Sims*, 881 P.2d 840, 841-42 (Utah 1994). The state correctly notes when a criminal appellant challenges an underlying conviction, our courts presume mootness does not apply because collateral consequences inhere in criminal convictions. SB.12,16-17. The state nonetheless frames Mr. Legg's appeal as moot, claiming when "a defendant challenges something other than his conviction—for example, his sentence, his probation or parole revocation, or a prison segregation order . . . [the] collateral consequences like those attendant to a criminal conviction are *not likely*." SB.17 (emphasis added). The state goes on to argue this Court "cannot grant him any relief," as it claims "nothing suggests" Mr. Legg can show "some consequence imposed by law that he will actually, not hypothetically, suffer because his probation was revoked." SB.28-30. Yet the state "acknowledges" that this Court has twice-rejected

exactly that argument in its recent cases. *See* SB.25-28 (discussing *State v. Warner*, 2015 UT App 81, 347 P.3d 846, and *State v. Allen*, 2015 UT App 163, 789 Utah Adv. Rep. 5). The state nonetheless tries to frame *Warner* and *Allen* as "anomalous" cases that "misinterpret governing case law." SB.28. The state's arguments about the application of the mootness doctrine in this case, as well as its interpretation of this Court's cases, are unavailing for several reasons.

First, this Court was correct in both *Warner* and *Allen* to hold that because a criminal defendant faces collateral consequences from the revocation of probation, an appeal challenging a revocation decision is not moot. *See Warner*, 2015 UT App 81, ¶¶ 2-3, *Allen*, 2015 UT App 163, ¶ 4 n.2. *Warner* was correctly decided and contrary to the state's contention, this Court did not simply rely on *Towner v. Ridgeway* to support its decision. *See* SB.27 (citing *Warner*, 2015 UT App 81, ¶ 3 (quoting *Towner v. Ridgway*, 2012 UT App 35, ¶ 7, 272 P.3d 765). Rather, the *Warner* opinion correctly referenced a range of cases supporting the inevitable conclusion that an appellant challenging a probation revocation faces myriad collateral consequences as a result of that revocation. *See Warner*, 2015 UT App 81, ¶ 3 (citations omitted). Those same collateral consequences also except Mr. Legg's appeal from mootness.

Then the state's claim that collateral consequences from a probation revocation, "are not likely," is simply disingenuous. SB.17. The state moved to supplement the record in this case with "the Pre-Sentence Investigation Report (PSI)," arguing that the PSI was "particularly relevant to review of the trial court's decision to revoke probation in the two cases." *State's Stipulated Motion to Complete Appellate Record and Stay*

Briefing Schedule. As the state knows, every PSI from Adult Probation and Parole contains a section detailing every single instance of a defendant's prior probation revocations in the defendant's criminal history, which is used as a basis for AP&P's sentencing recommendation. Moreover, the General Matrix used by AP&P and attached to every PSI also lists "PRIOR REVOCATION" as a three-point aggravating factor on a defendant's criminal history assessment. The PSI itself makes patent that there are very real collateral consequences of a probation revocation decision.

There is also the fact that prosecutors regularly refuse favorable offers, or any offer of probation, to defendants with probation revocations in their criminal history. The state's argument, that collateral consequences "are unlikely," therefore exists in a vacuum without consideration for the very real risk of recidivism or the very practical consequences of a probation revocation. Thus, the Court was absolutely correct to hold that the revocation of probation may "'affix[ ] a permanent blemish to [a] petitioner's record' that could be 'take[n] into account" if the 'petitioner ever has future difficulties with the law.'" *Warner*, 2015 UT App 81, ¶ 3 (alterations in original) (quoting *Hahn v. Burke*, 430 F.2d 100, 102 (7th Cir.1970)).

Moreover, adopting the state's argument would require this Court to overrule *Warner* and *Allen*. However, the state has not carried its burden to show why either case should be overruled. It has not argued that either case was "originally erroneous or is no longer sound because of changing conditions," nor does it argue "more good than harm" would come from overruling them. *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2010 UT 65, ¶ 23, 245 P.3d 184 (quotations omitted). Thus, the state has failed to carry its

"substantial burden" of persuading this Court to depart from this precedent. *Id.* ¶ 23 (quotation omitted).

Finally, and even without any of the very real consequences associated with a probation-revocation decision, or the fact that *Warner* and *Allen* were correctly decided, this Court should reach the merits of Mr. Legg's appeal because, as in *Warner*, "in the context of deciding whether to 'entertain[ ] moot controversies . . . it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time." *Warner*, 2015 UT App 81, ¶ 3 (quoting *Sibron v. New York*, 392 U.S. 40, 57 (1968) and citing *Ellis v. Swensen,* 2000 UT 101, ¶ 26, 16 P.3d 1233 (noting "[b]ecause mootness is a matter of judicial policy, the ultimate determination of whether to address an issue that is technically moot rests in the discretion of this court.").

The question on appeal of whether Mr. Legg's probation was revoked in violation of the mandate rule remains a viable issue for this Court to determine. For these reasons, this Court should deny the state's suggestion that the appeal is moot and should reach the merits of Mr. Legg's appeal.

B. The Trial Court Violated the Mandate Rule.

As set forth in the Opening Brief, the trial court violated the mandate rule in summarily revoking Mr. Legg's probation without actually considering the circumstances, as this Court mandated. OB.6-10. The state's arguments to the contrary are unconvincing. The state cannot escape the fact that even this Court concluded both that "[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," but nonetheless remanded Mr. Legg's case to the trial court to "reassess whether, under all the circumstances, Legg's probation should be revoked" on the basis of that single violation. *Legg*, 2014 UT App 80, ¶¶ 21, 25. That this Court remanded Mr. Legg's case under those circumstances, and even as it "recognize[d] that a single violation of probation is legally sufficient to support a probation revocation," meant the trial court had to take special care to hue to this Court's mandate and actually consider "all the circumstances" surrounding the single, weak probation violation. *Id.* ¶¶ 11, 25. This is especially true where, on remand, the prosecutor dropped any claim as to the other two alleged violations, wanting instead to "simply move forward" on the case. R.377:9. Contrary to the state's contention, the trial court's determination that there was "no question" it would have revoked Mr. Legg's probation on this single negligible violation, was not an assessment of the circumstances surrounding the allegations of probation violations, but a decision made on other indefinite factors. *See* OB.10 (citing *State v. Hodges*, 798 P.2d 270, 275 (Utah Ct.App.1990) (the record "strongly suggests that appellant's probation was revoked because of problems not within his control").

Had the probation violation been the commission of a new crime, the trial court's ruling might have fit within the mandate of this Court as a single, extreme probation violation that would generally justify probation revocation. However, in this case there was only a single weak probation violation, Mr. Legg's simple failure to call AP&P every single one of the few days he was actually out on probation even though his ability to do so was questionable at best, and even though he actually "showed up for a scheduled in-

person interview with his probation officer" within the week he was on probation. *Legg*, 2014 UT App 80, ¶ 3. Under those "circumstances" the trial court violated the mandate rule in simply assuming a single violation would justify the revocation of Mr. Legg's probation. OB.8-9. That the trial court instead summarily revoked Mr. Legg's probation based on its personal assessment of Mr. Legg's "history," constituted the violation of the mandate of this Court. *See* OB.6-10.

C. It was Plain Error to Revoke Mr. Legg's Probation in Violation of the Mandate Rule.

As set forth in the Opening Brief, it was plain error to revoke Mr. Legg's probation in violation of the mandate rule. OB.11-12. The state counters that a trial court only abuses its discretion in revoking probation "when no reasonable [person] would take the view adopted by the trial court," and that Mr. Legg's record demonstrates it was reasonable to revoke probation in these circumstances SB.34 (citation omitted) (alteration in original). There are two problems with that claim.

First, this Court took the view that a reasonable person may not have revoked Mr. Legg's probation on the basis of a single violation when it remanded the case back to the trial court for that consideration. *See Legg*, 2014 UT App 80, ¶ 25. This Court could have simply affirmed the original trial court's decision in Mr. Legg's case, but chose not to. *See id.* ¶ 11 ("recognize[ing] that a single violation of probation is legally sufficient to support a probation revocation." (citation omitted)). The inherent assumption is that it may not have been reasonable for the trial court to revoke in these circumstances.

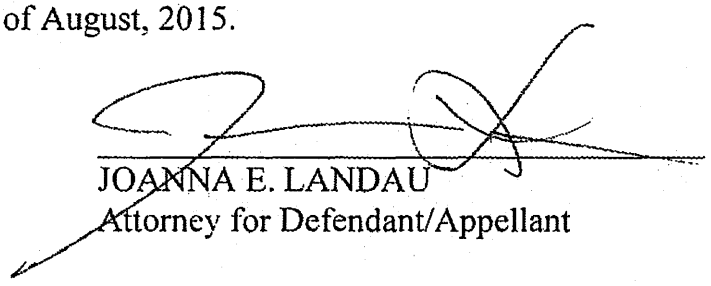
Second, the state supports its argument that no reasonable person would not

revoke Mr. Legg's probation by quoting the assessments made by Mr. Legg's AP&P agent Jeremy Jepson in the probation violation report. *See* SB.34-35; *see also* SB.34 n.6 (noting "[t]he quoted material is from the April 24, 2012 amended probation violation report."). However, when this Court first considered Mr. Legg's claims, it had the benefit of already reviewing those assessments in the full record, yet it nonetheless remanded. *See Legg*, 2014 UT App 80, ¶¶ 14,19 (finding insufficient evidence in the record to support the trial court's other conclusions that Mr. Legg's probation should be revoked). Mr. Jepson's assessments were not enough to affirm the probation violation in the first appeal and they have not gained any new persuasive power.

CONCLUSION

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

SUBMITTED this 25th day of August, 2015.



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CERTIFICATE OF DELIVERY

I, JOANNA E. LANDAU, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South state, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 26th day of August, 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 2,062 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 this 26 day of August, 2015.