

2015

**State of Utah, Plaintiff/Appellee v. Donnie J. Malone, Defendant/
Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DONNIE J. MALONE,
Defendant/Appellant.

Case Number: 20150092-CA

BRIEF OF THE APPELLANT

Appeal from a conviction for possession or use of a controlled substance, a third degree felony and theft, a class A misdemeanor, in the Second District Court, State of Utah, the Honorable W. Brent West, Judge, presiding.

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FILED
UTAH APPELLATE COURTS

JUN 01 2015

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DONNIE J. MALONE
Defendant/Appellant.

Case Number: 20150092-CA

NATURE OF THE PROCEEDINGS AND JURISDICTION

Appeal from a conviction for possession or use of a controlled substance, a third degree felony and theft, a class A misdemeanor, in the Second District Court, State of Utah, the Honorable, W. Brent West, Judge, presiding.

This court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e).

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

1. Whether the district court abused its discretion in failing to fully appreciate the realities of Mr. Malone's drug addiction.
 - a. Standard of Review: "The [district] court has substantial discretion in conducting sentencing hearings and imposing a sentence, and we will in general overturn the [district] court's sentencing decisions only if we find an abuse of discretion." *State v. Bryant*, 2012 UT App 264, ¶ 9, 290 P.3d 33 (quoting *State v. Patience*, 944 P.2d 381, 389 (Utah Ct. App. 1997)).

- b. Preservation of the Argument: Mr. Malone told the court repeatedly that he needed institutional support for his drug addiction. R. 148:6, 8-9; 151:3-4, 6, 7-8. The court even acknowledged that Mr. Malone's violations were the result of "addictive behavior." R. 151:10. While Mr. Malone did not specifically object that the court failed to account for the realities of his drug addiction, the court clearly acknowledged that was the underlying reason for Mr. Malone's violations. As noted, Mr. Malone told the court he needed support. Thus, the issue was properly before the district court who had an opportunity, and indeed did, rule on the issue.

CONSTITUTIONAL OR STATUTORY PROVISIONS

The texts of the relevant Constitutional provisions and statutes are in Addendum A and B.

STATEMENT OF THE CASE

In case 20150092-CA, Mr. Malone was charged on March 17, 2014. R. 3-4. On April 9, 2014, Mr. Malone entered a guilty plea to an amended count of the information. R. 19-25. On May 21, 2014, Mr. Malone was sentenced to 180 days of home confinement. R. 38-40. On August 14, 2014, Mr. Malone obtained new charges which were the basis for case 20150093-CA. R. 1-2 (20150093-CA).¹ On November 26, 2014, Mr. Malone admitted various probation violations on the first

¹ All record citations will be to the record index for case 20150092-CA unless otherwise noted.

case and pled guilty to one count on the second case. R. 98; 150:3-7. On January 21, 2015, the court imposed sentence on both cases. R. 151. The judgment was entered on January 22, 2015. R. 110-11; 93 (20150093-CA). On February 3, 2015, the defendant filed a notice of appeal to this Court. R. 123-24; 104-05 (20150093-CA)

STATEMENT OF THE FACTS

On May 21, 2014, the district court sentenced Mr. Malone. Defense counsel noted that Mr. Malone was “taking care of his parents,” which involved “mowing, clean[ing] the house[,] cook[ing] their meals, [and] tak[ing] them to and from their doctor appointments, to the grocery store.” R. 145:3. Defense counsel also noted that Mr. Malone “strikes me as the kind of person who could be taken advantage of, could find himself in situations that are not appropriate and when they got caught everybody else ran and Donnie sat there in the driver's seat of his truck.” R. 145:4. The court imposed a suspended sentence of one year in jail and put Mr. Malone on 18 months probation. R. 145:5.

A few months later, Mr. Malone requested a hearing with the district court. He indicated that he was having difficulty paying for the ankle bracelet. R. 146:3. The State asked that Mr. Malone be drug tested and the court continued the matter. R. 146:4-6.

The next week, Mr. Malone came up dirty for methamphetamine. R. 147:3. He explained that he had been taking Sudafed. R. 147:3. Mr. Malone

expressed that it was the “first time I feel like a failure,” apologizing to the court “for the mistakes I’ve made.” R. 147:5. Mr. Malone said that “I have confined myself to my mom's house. I've given my keys up to my truck. If I need to go anywhere, my sister-in-law has volunteered to take me wherever I need to go.” R. 147:5. The court replied that it would “probably take you into custody,” but that given Mr. Malone had a cracked hip which caused him “the most pain I’ve ever felt in my life,” the court decided to wait, so the taxpayers would not have to “pick up your hip operation.” R. 147:5. The court noted that “[u]p until recently when you ran into economic problems on your ability to do your home confinement, you have done everything I've asked you to do.” R. 147:6. The court ordered another drug test at the State’s request. R. 147:7.

At a hearing a few months later, it was noted that the second test came back positive and that he picked up a new charge. R. 148:5, 6-7. The court also added Mr. Malone had been sick and “went to the hospital.” R. 148:4. Mr. Malone added that he had some programming set up, and that his truck had been stolen in the interim. R. 148:6. The court added that Mr. Malone had now failed “three times,” but Mr. Malone noted his difficulties with transportation, taking care of his parents and being stuck at home, but still needing treatment. R. 148:8-9. The court took Mr. Malone into custody. R. 148:9.

At a hearing for an order to show cause, held November 26, 2014, Mr. Malone admitted five violations of probation. R. 150:7. Mr. Malone also resolved the new felony case. He entered a guilty plea to one felony count with a

recommendation that the sentence run concurrently with his pending misdemeanor matter. R. 150:3.

At Mr. Malone's sentencing, he provided the court with copies of the treatment he was receiving. R. 151:3-4. He had a job at Cornerstone and took care of his parents. R. 151:4. He had been clean for a few months and participated in physical therapy. R. 151:4. "[H]e feels like he's got a lot of support to help him turn his life around," counsel told the court. R. 151:4. One of the problems is that Mr. Malone "associates with people who are not good influences on him" who would take advantage of him. R. 151:5-6. He asked the court to impose house arrest but allow him to continue with his programming. R. 151:6.

The State asked to terminate the case with the custodial sentence. R. 151:6.

Mr. Malone spoke to the court of his problem:

I've surrounded myself with good people. I've been going to church. For the first time in my life I feel real well. These people are pretty good. They make you feel good inside. They've done everything to help me. They've set me up with a 12-step program. They've helped me find employment. I'm overwhelmed with this where in the past the people that [my attorney] spoke of, bad people I hung out with, they just took advantage and used me for my money, for my truck and destroyed everything I own. I no longer have a truck. I have no way to get around. My trailer is gone. My truck—they're both gone.

I'm asking the Judge—I have an addiction. I do good for a while and I turn back. I need, and I'm asking, for help. Jail is not the answer that the State is recommending. It's not the answer. There is no help in jail. I've been there. They have no program. They have no classes. To do anything in there you've got to have levels and all they've got is church.

I need a program. I'm going to Weber Human Services. They're going to set me up in different programs there. I've got the church

behind me. I've got my family behind me and there's no way I'm going to turn back to these people. I stay away from Ogden. The only time I come into Ogden is when I need to come into Ogden for Court and other things, but all my therapy is out in Far West. My doctor is in Far West. So there's no reason for me to come into town unless it's Court.

I'm asking you Judge. Me and you go back a long ways with Gary Geller. [inaudible] I'm asking for you to give me this opportunity and I swear to you you'll never see me in this Courtroom or any other Courtroom in this building again. This is my hope to get clean and stay clean.

R. 151:7-8. The court said it this was not asking for a break but for a "gift" since the court thought he got a break with a non-prison recommendation given his record. R. 151:8. The court was troubled by Mr. Malone's statement:

So now to come in and say geez, Judge, not only did I come to your Court under the influence of alcohol or drugs, not only did I screw around, you've allowed me to continue this out five months and now don't punish me for my failure to keep my probation. Don't punish me for coming to your Court on drugs, not once, but probably twice, but only once I can prove and then you delay this thing out because I'm kind enough to give you time to do your surgery and to get your hip replaced and all of that. Then you turn your life around and now you come back in and say Judge don't give me any jail at all. I find that hard to bite.

When I look at your record Donnie, you belong in prison. So I think putting you on probation with some jail time is a break. I don't think that I'm willing to give you a gift and just put you on probation with no jail time.

R. 151:8-9. Mr. Malone asked if the court would allow him to keep his job since it was "hard to find jobs" and given his success at day reporting. R. 151:9.

"You have success stories along the way," the court said, but noted that the "difficulty" was that the sentence "deals with addictive behavior." R. 151:10. "You

go along so far and then you regress back, but you don't just go two steps forward and one step back. You go two steps forward and then you explode.” R. 151:10. With that, the court sentenced Mr. Malone to 180 days in jail on both cases, with a period of probation and suspending a prison term. R. 151:10-11.

SUMMARY OF THE ARGUMENT

The court acknowledged that Mr. Malone’s failures were the result of “addictive behavior,” yet it punished him for the very realities of that disease, rather than giving him the treatment that he needed and repeatedly asked for.

ARGUMENT

POINT I

The trial court abused its discretion in punishing Mr. Malone for his failures which were the result of realities of his drug addiction rather than pure willfulness

Mr. Malone made genuine efforts to comply with probation, but had positive test results and picked up new charges. These were not the result of a willful violation of probation but were part of the realities of drug addiction as Mr. Malone told the court. Granted, Mr. Malone admitted several violations of probation, including two dirty urinalysis and a new drug charge. However, the trial court failed to adequately consider the realities of drug addiction compliance before finding this to be a violation of probation worthy of a return to custodial status.

Drug addiction is a serious disease and there is an extremely high likelihood of relapse among patients just out of treatment. “Not long ago, discussions about relapse were categorically avoided in addiction treatment programs [for] fear[] that discussing the possibility of relapse would only make it more likely to happen. ... Now it is openly acknowledged by addiction treatment professionals that relapses can and do happen.”²

One national study showed that after five years of successfully completing rehabilitative treatment for drug dependency, only 21 percent actually reported reduced usage, meaning that 79 percent of treated offenders relapsed.³ Of a group of 967,012 drug users completing treatment, the study found that only 155,689 individuals were able to successfully avoid a relapse.⁴ “Following treatment for chemical dependency or substance abuse, individuals experience a high relapse rate. Relapse rates vary from one treatment program to another but these rates can be as high as 90 percent.”⁵ According to another researcher, “[a]pproximately two-thirds of clients will use their drugs of choice within a year of leaving

² ARNOLD M. WASHTON & JOAN E. ZWEBEN, COCAINE & METHAMPHETAMINE ADDICTION: TREATMENT, RECOVERY, AND RELAPSE PREVENTION 153 (2009).

³ Services Research Outreach Survey, <http://www.samhsa.gov/data/sros/sros8020.htm#E28E16> (last visited January 15, 2014) (“Those using any illicit drug decreased from 75 percent before treatment to 59 percent after treatment”).

⁴ *Id.*

⁵ STEPHANIE L. BROOKE, THE USE OF THE CREATIVE THERAPIES WITH CHEMICAL DEPENDENCY ISSUES 139–40 (2009); William A. Hunt et al., *Relapse Rates in Addiction Programs*, 27 J. CLIN. PSYCHOL. 455 (1971); GRIFFITH EDWARDS & MALCOLM HAROLD LADER, ADDICTION: PROCESSES OF CHANGE (1994).

treatment.”⁶ The period soon after leaving treatment is the period “of highest risk, and it needs the greatest attention.”⁷

Factors that increase the risk of relapse include “family conflict, lack of family support, drug use among other family members, lack of involvement in nondrug leisure activities, association with substance-abusing peers, skill deficits, high life stress, and lack of needed services.”⁸ People just out of drug treatment lack “adequate social support,” given that their families and friends are often criminogenic.⁹ “With little social support, low tolerance for stress and frustration, and a high degree of impulsiveness, many [drug-abusing] clients relapse or continue to use drugs”¹⁰ As one expert opined, most people relapse because they lack the ability to transition to normal life events and ordinary stresses force them back to old coping mechanisms:

It is evident that finding ways to manage these experiences and feelings is essential in the process of treating individuals with a chemical addiction. Without adequately addressing and treating these coping styles, the individual will leave treatment unable to manage stressful life events; thus, simply relying on old, maladaptive patterns and methods of coping.¹¹

As one researcher found, the current method is to treat individuals and leave them little to no support in their transition from therapy:

⁶ ROBERT R. PERKINSON, CHEMICAL DEPENDENCY COUNSELING: A PRACTICAL GUIDE 130 (2011).

⁷ *Id.*

⁸ ZILI SLOBODA & WILLIAM J. BUKOSKI, HANDBOOK OF DRUG ABUSE PREVENTION 179 (2003).

⁹ *Id.*

¹⁰ *Id.*

¹¹ BROOKE, *supra* note 6, at 140; PERKINSON, *supra* note 7, at 131.

[P]ostdischarge relapse and eventual readmission are also the norm (Godley, Godley, Dennis, Funk, & Passetti, 2002; Lash, Petersen, O'Connor, & Lehlmann, 2001; McKay et al., 1997, 1998). Substance abuse is increasingly seen as similar in course and outcome to chronic health problems such as diabetes, hypertension, and asthma (Donovan 1998; O'Brien & McLellan, 1996). Although the risk for relapse is greatest during the first 3 to 6 months following initiation of abstinence (Hunt, Barnett, & Branch, 1971), recovering substance abusers are still at relatively high risk for 2 years (Moos, Finney, & Cronkite, 1990) and as some risk even after that (Vaillant et al., 1983). *In spite of this evidence of chronicity and multiple episodes of care, most substance abuse treatment continues to be characterized as relatively self-encapsulated, serial episodes of acute treatment with post-discharge aftercare typically limited to passive referrals to self-help groups* (Dennis, Perl, Huebner, & McLellan, 2000; Godley et al., 2002; McLellan et al., 2000; White, 1996; Etheridge, Hubbard, Anderson, Craddock, & Flynn, 1997).¹²

The trial court erred in failing to assess whether Mr. Malone had adequate support and the tools to help him function in society. Rather, the court expressed its frustration that Mr. Malone had relapsed and concluded, in spite of all the scientific evidence to the contrary, that Mr. Malone deserved to be in custody.

Mr. Malone was wandering without virtually any support or the structure he needed to prevent relapse. Had the trial court properly evaluated the realities of drug addiction, it would have been more sympathetic and helped Mr. Malone obtain the tools he needed to succeed which would likely include increased supervision and assistance on probation.

Mr. Malone could not succeed without more institutional support. To expect him to conquer his addiction without that assistance was unrealistic from

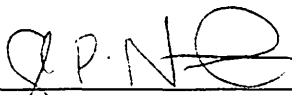
¹² G. Alan Marlatt et al., *Relapse Prevention Therapy With Substance Abusing Offenders*, QUAL. IMPROV. DRUG COURTS (2008) (emphasis added).

the outset. The court abused its discretion in finding that the violations were based on addictive behavior, but then punishing Mr. Malone for that very addictive behavior.

CONCLUSION

Mr. Malone asks that Court to find that the trial court abused its discretion in sentencing him to a period of incarceration for having a drug addiction.

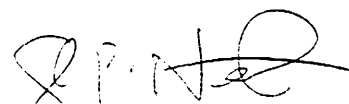
RESPECTFULLY SUBMITTED this 30 day of May, 2015.



SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

RULE 24 CERTIFICATE OF COMPLIANCE

Pursuant to rule 24(f)(1)(C), Utah Rules of Appellate Procedure, I certify that this brief has been prepared in a proportionally-spaced font using Microsoft Word for Mac 2011 in Baskerville 13 point, and contains 2763 words, excluding the table of contents, table of authorities, and addenda.



SAMUEL P. NEWTON
Attorney for the Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on 1ST ^{JUNE} ~~MAY~~, 2015, I have caused to be ☐ mailed ☒

hand-delivered eight copies of the foregoing to:


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I certify that on 1ST ^{JUNE} ~~MAY~~, 2015, two copies of the foregoing brief were

☐ mailed ☒ hand-delivered to:

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A digital copy of the brief was also included: ☒ Yes ☐ No

A handwritten signature in black ink, appearing to be "H. B.", written over a horizontal line.

Tab A

ADDENDUM A

Constitutional Provisions

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UTAH CONSTITUTION

ARTICLE I, SECTION 7. [DUE PROCESS OF LAW.]

No person shall be deprived of life, liberty or property, without due process of law.

Tab B

ADDENDUM B

Transcript of Sentencing

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

Case No. 141900605

vs.

Case No. 141901741

DONNIE JAY MALONE,

Defendant.

~~~~~  
TRANSCRIPT OF SENTENCING HEARING  
~~~~~

BEFORE THE HONORABLE W. BRENT WEST

JANUARY 21, 2015

50 West Broadway, Suite 900, Salt Lake City, UT 84101
801-983-2180

Page 1

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1 OGDEN, UTAH; WEDNESDAY, JANUARY 21, 2015; 11:05 A.M.

2 MR. BOUWHUIS: Donnie Malone, numbers 5 and 6.

3 COURT CLERK: State of Utah v. Donnie Jay Malone, Case No.
4 141901741, time set for sentencing and 141900605, time set for
5 sentencing on affidavit.

6 THE COURT: All right. Bailiff, you can give Mr. Malone
7 back that card. He'll need it. I have a letter here attached
8 to all of Mr. Malone's stuff that doesn't make any sense to me.
9 Bailiff, will you give that back to Mr. Bouwhuis? I don't know
10 who Henry Uman is.

11 MR. BOUWHUIS: I don't either.

12 THE COURT: Okay. Everything else that was submitted to
13 me this morning, which for the record was one of the reasons why
14 I was late was I was reading all of Mr. Malone's materials, plus
15 I had a phone call, but in any event, all right. I've read
16 everything Mr. Malone has submitted. This is the time set for
17 sentencing. Any legal reason why sentence should not be
18 imposed?

19 MR. BOUWHUIS: No, Your Honor.

20 THE COURT: Would you and Mr. Malone like to address it?

21 MR. BOUWHUIS: Probably both of us. Let me just indicate
22 a couple things. I don't have all the materials he submitted to
23 the Court, but did get--I had a conversation with his physical
24 therapist's office yesterday and I think they faxed over a
25 couple of letters, an order from the doctor and a letter from

1 the therapist regarding the treatment that he's going through.

2 He indicates to me that he's got a job at Cornerstone and
3 he also is helping to take care of his parents. I think we
4 talked about that before. He says he's been clean since August.
5 He's in the 12-step program as well as physical therapy and he
6 indicates that he feels like he's got a lot of support to help
7 him turn his life around.

8 So I think he has requested the Court will be--he's on
9 probation. This is a probation sentencing. Is that correct?

10 MR. SAUNDERS: He's got two cases. One is a new
11 sentencing. One's--

12 THE COURT: Yes. No. APP sentencing on the new charge
13 and a probation violation on the old charge.

14 MR. BOUWHUIS: [inaudible]

15 THE COURT: Case ending in 1741, number 5 on the calendar,
16 is a new charge that he picked up during all this period of
17 time. He was before me on probation violation after probation
18 violation in the C&D thing and he came and he tested positive
19 here and he had the back surgery and all that other stuff and so
20 in the meantime he picked up a new offense.

21 MR. BOUWHUIS: They dated their PSI wrong. So it threw me
22 off.

23 THE COURT: Okay.

24 MR. BOUWHUIS: I thought this was a year old.

25 MR. SAUNDERS: That is the new one as far as I know.

1 MR. BOUWHUIS: Well the problem, I haven't reviewed the
2 PSI with him. I--

3 THE COURT: Do you want some more time?

4 MR. BOUWHUIS: Yeah. Let me--let's pass it.

5 THE COURT: We'll pass it for a moment. What is your
6 recommendation going to be from C&D?

7 WOMAN: Your Honor we are recommending that we revoke and
8 terminate him unsuccessful and impose the original jail
9 sentence.

10 THE COURT: Okay, thank you.

11 MR. BOUWHUIS: Timothy Frye, number 32.

12 [The Court hears other matters.]

13 THE COURT: All right. Did you get a chance to go over it
14 with him?

15 MR. BOUWHUIS: I did.

16 THE COURT: All right. Go ahead. You may address it.

17 MR. BOUWHUIS: All right. So in addition to the comments
18 indicated before about the programs he's in and the things he's
19 doing, he's working, helping his mom, but I think the PSI points
20 out something that we kind of talked about on a prior case of
21 Donnie's. He associates with people who are not good influences
22 on him.

23 That doesn't excuse what he's doing. I think the people I
24 talked to previously indicated that--in fact there was a
25 gentleman that came here before. I think it was your boss.

1 MR. MALONE: Yeah.

2 MR. BOUWHUIS: He talked about that he was trying to help
3 Donnie out because he recognized he was hanging around with
4 people that were taking advantage of Donnie to some degree.
5 Donnie's got a bad history. There's no question about that.
6 He's trying to turn the corner and do things a little bit
7 differently. So he's asking the Court to consider suspending
8 all the time or imposing it as a house arrest allowing him to
9 continue with the programs that he's doing with his physical
10 therapy, with work and with his parents. So that's his request
11 to the Court.

12 THE COURT: Okay.

13 MR. MALONE: Judge, is there anything--can I speak?

14 THE COURT: Yeah, but I let you go last so you can hear
15 what everybody has to say about you first. Does the State want
16 to go first or next?

17 MR. SAUNDERS: That's fine Your Honor. I think the
18 question is whether the Court just terminate the one case
19 unsuccessfully and impose the year. I think the minimum ought
20 to be the 180 days if the Court is inclined to allow him to stay
21 on probation and complete that. I think C&D is done with him.
22 I'd ask that that case be terminated.

23 THE COURT: Okay.

24 MR. SAUNDERS: I think the minimum ought to be the 180
25 days, that he do that and get back with AP&P and try to complete

1 that. I know he has some health issues, but just based on his
2 history and his failure to complete probation, I think the
3 recommendation is justified.

4 THE COURT: Okay. Ms. Rodriguez?

5 MS. RODRIGUEZ: Nothing to add Your Honor. Thank you.

6 THE COURT: Mr. Malone?

7 MR. MALONE: Sir, we're past five months. I've surrounded
8 myself with good people. I've been going to church. For the
9 first time in my life I feel real well. These people are pretty
10 good. They make you feel good inside. They've done everything
11 to help me. They've set me up with a 12-step program. They've
12 helped me find employment. I'm overwhelmed with this where in
13 the past the people that Bouwhuis spoke of, bad people I hung
14 out with, they just took advantage and used me for my money, for
15 my truck and destroyed everything I own. I no longer have a
16 truck. I have no way to get around. My trailer is gone. My
17 truck--they're both gone.

18 I'm asking the Judge--I have an addiction. I do good for
19 a while and I turn back. I need, and I'm asking, for help.
20 Jail is not the answer that the State is recommending. It's not
21 the answer. There is no help in jail. I've been there. They
22 have no program. They have no classes. To do anything in there
23 you've got to have levels and all they've got is church.

24 I need a program. I'm going to Weber Human Services.
25 They're going to set me up in different programs there. I've

1 got the church behind me. I've got my family behind me and
2 there's no way I'm going to turn back to these people. I stay
3 away from Ogden. The only time I come into Ogden is when I need
4 to come into Ogden for Court and other things, but all my
5 therapy is out in Far West. My doctor is in Far West. So
6 there's no reason for me to come into town unless it's Court.

7 I'm asking you Judge. Me and you go back a long ways with
8 Gary Geller. [inaudible] I'm asking for you to give me this
9 opportunity and I swear to you you'll never see me in this
10 Courtroom or any other Courtroom in this building again. This
11 is my hope to get clean and stay clean.

12 THE COURT: Well and the problem that I'm having Mr.
13 Malone, the problem that I have is there's a difference between
14 giving somebody a break and giving somebody a gift and you're
15 asking me to give you a gift. You're not asking me to give you
16 a break because you come in here--

17 MR. MALONE: [inaudible]

18 THE COURT: Hear me out. Hear me out because here's our
19 different perspectives. You come in here saying Judge, look.
20 They're going to recommend probation, but don't give me any jail
21 and I'm coming in here looking at this saying they recommended
22 probation, which I think is a break as opposed to prison. Your
23 record is horrendous Donnie and you're right. You and I have
24 been down this road before.

25 So now to come in and say geez, Judge, not only did I come

1 to your Court under the influence of alcohol or drugs, not only
2 did I screw around, you've allowed me to continue this out five
3 months and now don't punish me for my failure to keep my
4 probation. Don't punish me for coming to your Court on drugs,
5 not once, but probably twice, but only once I can prove and then
6 you delay this thing out because I'm kind enough to give you
7 time to do your surgery and to get your hip replaced and all of
8 that. Then you turn your life around and now you come back in
9 and say Judge don't give me any jail at all. I find that hard
10 to bite.

11 When I look at your record Donnie, you belong in prison.
12 So I think putting you on probation with some jail time is a
13 break. I don't think that I'm willing to give you a gift and
14 just put you on probation with no jail time.

15 MR. MALONE: Sir, if you do, I'd like to be able to keep
16 my job.

17 THE COURT: I don't have a problem with keeping your job.

18 MR. MALONE: It's hard to find jobs. I'm just wondering
19 if there's any way you can give me daily report or Kiesel where
20 I can keep my job.

21 THE COURT: Does the State want to be heard?

22 MR. SAUNDERS: We wouldn't object to work release as long
23 as his probation officer agrees. I'm sure he would.

24 MR. MALONE: I mean, I've successfully completed daily
25 report. I successfully completed Kiesel.

1 THE COURT: I know. You have success stories along the
2 way. The difficulty that, and you hit it right on the head Mr.
3 Malone because this deals with addictive behavior. You go along
4 so far and then you regress back, but you don't just go two
5 steps forward and one step back. You go two steps forward and
6 then you explode. I mean it's pretty brazen to come to Court
7 under the influence of alcohol or drugs and particularly try and
8 pull the eye--you know, from back here it's hard for me to tell,
9 but when the Bailiff can tell that you're under the influence of
10 alcohol or drugs, she's experienced in that Mr. Malone and
11 that's just--I can't let people come to Court under the
12 influence.

13 Be that as it may Mr. Malone, it's going to be the order
14 and sentence of the Court, on the C&D I'm imposing 180 days in
15 the Weber County Jail. You may have credit for time served and
16 you may have a work release and I'm terminating that case
17 unsuccessfully.

18 MR. MALONE: How soon will I be able to go to Kiesel?

19 THE COURT: On the new case--well let's finish and we'll
20 tell you what we're going to do. It's going to be the order and
21 sentence of the Court that you are to serve an indeterminate
22 term of zero to five years at the Utah State Prison. I will
23 suspend that on the condition that you serve a satisfactory term
24 of probation to Adult Probation & Parole. That will be for a
25 period of 36 months. You are to comply with the standard terms

1 of probation as well as the following special terms of
2 probation. You are to serve 180 in the Weber County Jail. You
3 can have credit for time served and you may have a work release
4 there. You may also earn your right to go to Kiesel.

5 You are to enroll in and complete and pay for an alcohol
6 and drug treatment program, the one you're in, as long as Adult
7 Probation & Parole approves. It's fine with me. You are to
8 refrain absolutely from the use of alcohol or drugs. In order
9 to enforce that you are subject to search and seizure and
10 chemical testing. You are not to frequent with persons or
11 places where alcohol or drugs are available.

12 What's his preference, a \$500.00 fine or 50 hours of
13 community service? I don't know what his physical condition is?

14 MR. MALONE: I've been working on community hours with the
15 church Your Honor.

16 THE COURT: All right. I'll give you 50 hours of
17 community service and you may do that at your church. There is
18 a \$50.00 security fee. You've got to reimburse the county
19 \$500.00 for the public defender. By law there's a \$150.00 DNA.
20 They can impose a curfew and there's no like offense. The 180
21 days is running concurrent with one another. How long will it
22 take you to get your affairs in order and report to the Weber
23 County Jail so you can start your work release?

24 MR. MALONE: Can I have at least three weeks Your Honor?

25 THE COURT: Does the State want to be heard?

1 MR. SAUNDERS: Was it three weeks you said?

2 THE COURT: Yeah, get him through his therapy. I don't
3 have a problem with that. I know you probably do, but I know
4 he's got some intensive therapy. All right Mr. Malone. No
5 excuses. Don't come see Ms. Wood. Don't write me a letter.
6 You report on what day of the week is better, Friday?

7 MR. MALONE: Yes, Sir.

8 THE COURT: All right. You will report on February 13th
9 at 7:00 P.M.

10 MR. MALONE: Is this the Weber County Jail?

11 THE COURT: Yes, Sir and they will process you out to the
12 work release program.

13 MR. MALONE: Okay.

14 THE COURT: In the meantime you need to talk to Ms.
15 Rodriguez because you're on probation. In the meantime, C&D
16 does he owe you any money or--

17 MR. MALONE: I've got your phone number to buy the
18 bracelet and the phone number does not--it's a cancelled phone
19 number. So I need a phone number so I can set up payments to
20 pay that money that I owe you, set up payments.

21 THE COURT: Apparently he does owe you money.

22 WOMAN: That's what he needs to do.

23 THE COURT: Okay. All right.

24 WOMAN: I can give him a phone number right now.

25 THE COURT: All right. Mr. Pasik here? All right. Bring

1 him out and we'll do the preliminary hearing.
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C E R T I F I C A T E

I, Ruby Rudisill, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability.

Ruby Rudisill

I, Kelly Thacker, do certify this transcription was prepared under my supervision and direction.

Kelly Thacker

