

2015

**State of Utah, Plaintiff/Appellee v. Samuel Lorin Jenkins,
Defendant/Appellant**

Utah Court of Appeals

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Case No. 20141048-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

SAMUEL LORIN JENKINS,
Defendant/Appellant.

Brief of Appellee

Appeal from an order revoking and reinstating probation on a conviction for unauthorized control of a vehicle, a class A misdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Vernice Trease presiding

ALEXANDRA S. MCCALLUM
MCCAYE CHRISTIANSON
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, UT 84111-3336

Counsel for Appellant

DEBORAH L. BULKELEY (13653)

Assistant Attorney General

SEAN D. REYES (7969)

Utah Attorney General

160 East 300 South, 6th Floor

P.O. Box 140854

Salt Lake City, UT 84114-0854

Telephone: (801) 366-0180

DAWN W. EMERY

Salt Lake County District Attorney's
Office

Counsel for Appellee

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UTAH APPELLATE COURTS

JUL 14 2015

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Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
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Counsel for Appellant

DEBORAH L. BULKELEY (13653)
Assistant Attorney General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

DAWN W. EMERY
Salt Lake County District Attorney's
Office

Counsel for Appellee

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STATE OF UTAH,
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Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from an order revoking and reinstating probation on a conviction for unauthorized control of a vehicle, a class A misdemeanor. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2015).

INTRODUCTION

Defendant pled guilty to violating a protective order while on probation for unauthorized control of a vehicle. Defendant admitted that his guilty plea was a probation violation. Defendant had already had his probation revoked and reinstated once before. Yet, when given the choice between terminating his probation after a short jail term or reinstating probation, Defendant chose probation.

STATEMENT OF THE ISSUE

Should this Court review Defendant's claim that the trial court plainly erred by revoking and restarting his probation term where Defendant invited any error by asking that his probation be reinstated?

Standard of Review. This court will not review a claim, even for plain error, "when counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings]." *State v. Winfield*, 2006 UT 4, ¶14, 128 P.3d 1171 (alterations in original) (quotation marks and citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute is reproduced in Addendum A: Utah Code Ann. § 77-18-1 (West Supp. 2015).¹

STATEMENT OF THE CASE²

Defendant was charged and convicted in two cases. This appeal is related to a 2011 case in which he pled guilty to unauthorized control of a

¹ Because subsequent amendments did not change relevant provisions, the State cites the current version of the Utah Code.

² Because Defendant pled guilty the facts are taken from the pleadings and the transcript of the 2014 change of plea and sentencing hearing, which is the only transcript included in the record.

vehicle, a class A misdemeanor. In the 2014 case, he pled guilty to one count of violating a protective order, a class A misdemeanor.³

The 2011 case. When Defendant asked to borrow his mother's car, she said no. R2. So Defendant pushed his mother, grabbed her hands, snatched her keys from her pocket, and drove off in her car. *Id.* Defendant was charged with aggravated robbery, a first degree felony. R1-2. Defendant pled guilty to a reduced charge of unauthorized control of a vehicle, a class A misdemeanor. R25, 29-38.

Defendant was sentenced on January 20, 2012, to 365 days in jail with credit for 55 days served. R64. The trial court suspended that sentence and ordered Defendant to serve 24 months' probation and to pay a \$750 fine. R64-65. His probation conditions included that he violate no laws, pay all fines and fees, not use or possess alcohol or illegal drugs, and that he follow all ordinary conditions. R65. One of those ordinary conditions is that probationers get permission before changing residence. *See* Probation Standard Conditions, *available at* <http://corrections.utah.gov/images/Brooke/ProbationStandardConditions2015.pdf>.

³ Defendant is separately appealing the trial court's probation order in the 2014 case. *See* Case No. 20141058-CA.

The 2012 violation. In November 2012, Adult Probation and Parole (AP&P) issued a violation report and an affidavit in support of an order to show cause that alleged Defendant had violated his probation by changing residence without permission, by possessing alcohol, by not paying fines or fees, and by not paying a recoupment fee to Salt Lake Legal Defender's Association. R72-77.

The trial court issued an order to show cause and an arrest warrant. R78-80. At the hearing, Defendant admitted to three of the four alleged violations. R83-85. The trial court revoked Defendant's probation and reinstated his probationary term for 24 months, starting on January 4, 2013. R83. In doing so, it imposed the same conditions as his original probationary term and ordered Defendant to serve 29 days in jail, with credit for 29 days served. *Id.*

The 2014 violation. On July 14, 2014, AP&P alleged in a violation report and in an affidavit supporting an order to show cause that Defendant had again violated his probation by using marijuana and by committing the offenses of criminal mischief and violating a protective order. R94-99. The trial court issued an order to show cause and an arrest warrant. R100-104.

At a consolidated change of plea and sentencing hearing, Defendant pled guilty to one count of violating a protective order, a class A

misdemeanor. R138:5. Defendant admitted that his guilty plea violated his probation for the 2011 case. R138:6. Based on Defendant's admission, the trial court revoked his probation. *Id.*

Defense counsel asked that the court reinstate Defendant's probation to run concurrently to a requested 18-month probation for the violating a protective order conviction. R138:6-7. The State recommended that "given his attitude on probation," the court should order Defendant to serve 120 days in jail and then close both cases. R138:8.

The trial court asked Defendant whether he'd prefer the jail term or probation. R138:9. In doing so, the trial court warned that it would impose the sentences consecutively: "If you can do probation, the consecutive time's not going to mean much, right? But if you can't, it's going to mean a huge deal. Because if you come back on a probation violation, I will likely not consider 120 days or a 180 days and close. It will be a lot longer than that." *Id.*

Defendant stated: "Your Honor, I'm very serious about doing probation and getting [inaudible]." R138:10. The court repeated its warning that if Defendant were unsuccessful he could serve two years in jail. *Id.* Defendant affirmed that he understood and that he wanted

probation. *Id.* The trial court then revoked and reinstated Defendant's 24-month probation term with all previously ordered conditions in force. *Id.*

SUMMARY OF ARGUMENT

Defendant argues that the trial court committed plain error by revoking and reinstating his 24-month probation term. But Defendant invited any error by asking the trial court to reinstate probation. In any event, Defendant has not met his burden of persuasion to show plain error because he cites no controlling authority to support his position that reinstating probation for 24 months was "too harsh."

ARGUMENT

Defendant invited any error by asking the trial court to reinstate his probation.

Defendant argues that it was plain error for the trial court to reinstate his 24-month probation term because that length of time is "too harsh," given that his most recent violation was "non-violent" and came after serving 18 months of probation. Br.Aplt. 4.

To show plain error, a defendant must demonstrate that the trial court committed an obvious and harmful error. *See State v. Holgate*, 2000 UT 74, ¶13, 10 P.3d 346. But "review under the plain error doctrine is not available when counsel invites the error by affirmatively representing to the district court that there is no objection to the proceedings." *See State v.*

Brooks, 2012 UT App 34, ¶14, 271 P.3d 831. This prevents a party from taking “advantage of an error committed at trial when that party led the trial court into committing the error.” *State v. Hamilton*, 2003 UT 22, ¶54, 70 P.3d 111 (quotation marks and citations omitted).

Defendant is not entitled to plain error review because he invited any error in the probation reinstatement. First, trial counsel asked that probation be reinstated. R138:7. Then, the trial court warned Defendant that it would order his sentence for the protective order violation to run consecutively to the sentence for the instant case. R138:9. The court asked whether Defendant would prefer probation or a shorter jail term to close out both cases. *Id.* Defendant replied, “Your Honor, I’m very serious about doing probation” R138:10. Thus, because Defendant affirmatively requested reinstatement of probation, he invited any error in the court’s reinstatement.

In any event, Defendant cannot meet his burden of persuasion to show error, let alone plain error. ““The decision to grant, modify, or revoke probation is in the discretion of the trial court.”” *State v. Peterson*, 869 P.2d 989, 991 (Utah App. 1994) (quoting *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990)). And Defendant cannot show plain error unless she shows that it “should have been obvious to the trial court,” in other words, “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.

Defendant admitted that he violated the conditions of his probation by pleading guilty to violating a protective order. R138:6. As Defendant acknowledges, on “finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.” Utah Code Ann. § 77-18-1(12)(e)(ii) (West Supp. 2015); *see also* Br.Aplt. 4. Thus, the trial court acted within its discretion to order that his “entire probation term commence anew.” *See* Utah Code Ann. § 77-18-1(12)(e)(ii).


Defendant cites no controlling authority that suggests a trial court’s discretion to restart the entire probation term is limited where a probation violation is non-violent and committed near the end of the probationary term. *See* Br.Aplt. 3-5. Thus, Defendant has not met his burden of persuasion to show the trial court plainly erred by reinstating his 24-month probation term. *See State v. Roberts*, 2015 UT 24, ¶18, 345 P.3d 1226 (appellants who do not cite relevant authority “will likely fail to persuade the court of the validity of their position”).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on July 14, 2015.

SEAN D. REYES
Utah Attorney General


DEBORAH L. BULKELEY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on July 14, 2015, two copies of the Brief of Appellee were

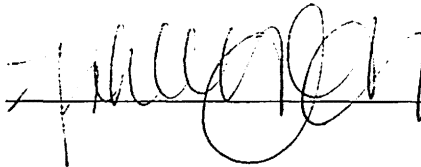
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Alexandra S. McCallum
McCaye Christianson
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, UT 84111-3336

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

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



Addenda

Addenda

Addendum A

**§ 77-18-1. Suspension of sentence--Pleas held in abeyance--Probation--
Supervision--Presentence investigation--Standards--Confidentiality--Terms
and conditions--Termination, revocation, modification, or extension--
Hearings--Electronic monitoring**

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2)(a) On a plea of guilty, guilty with a mental illness, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

(b)(i) The legal custody of all probationers under the supervision of the department is with the department.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.

(iii) The court has continuing jurisdiction over all probationers.

(3)(a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:

(i) the type of offense;

(ii) the results of a risk and needs assessment;

(iii) the demand for services;

(iv) the availability of agency resources;

(v) public safety; and

(vi) other criteria established by the department to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the department is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(5)(a) Before the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.

(b) The presentence investigation report shall include:

(i) a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family;

(ii) a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act;

(iii) findings from any screening and any assessment of the offender conducted under Section 77-18-1.1;

(iv) recommendations for treatment of the offender; and

(v) the number of days since the commission of the offense that the offender has spent in the custody of the jail and the number of days, if any, the offender was released to a supervised release or alternative incarceration program under Section 17-22-5.5.

(c) The contents of the presentence investigation report are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

(6)(a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional 10 working days to resolve the alleged inaccuracies of the report with the department. If after 10 working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that the defendant:

(a) perform any or all of the following:

- (i) pay, in one or several sums, any fine imposed at the time of being placed on probation;
- (ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;
- (iii) provide for the support of others for whose support the defendant is legally liable;
- (iv) participate in available treatment programs, including any treatment program in which the defendant is currently participating, if the program is acceptable to the court;
- (v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;
- (vi) serve a term of home confinement, which may include the use of electronic monitoring;
- (vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 76-6-107.1;
- (viii) pay for the costs of investigation, probation, and treatment services;
- (ix) make restitution or reparation to the victim or victims with interest in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act; and
- (x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997:

(i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or

(ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:

(A) a diagnosed learning disability; or

(B) other justified cause.

(9) The department shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest and any other costs assessed under Section 64-13-21 during:

(a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and

(b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection (10).

(10)(a)(i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, 12 months in cases of class B or C misdemeanors or infractions, or as allowed pursuant to Section 64-13-21 regarding earned credits.

(ii)(A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the

defendant on bench probation for the limited purpose of enforcing the payment of the account receivable. If the court retains jurisdiction for this limited purpose, the court may order the defendant to pay to the court the costs associated with continued probation under this Subsection (10).

(B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why the defendant's failure to pay should not be treated as contempt of court.

(b)(i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation is being requested by the department or will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(11)(a)(i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(iii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation constitutes service of time toward a term of incarceration imposed as a result of the revocation of probation.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12)(a)(i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b)(i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for the defendant's arrest or a copy of the affidavit and an order to

show cause why the defendant's probation should not be revoked, modified, or extended.

(c)(i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed if the defendant is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d)(i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in the defendant's own behalf, and present evidence.

(e)(i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.

(iii) If a period of incarceration is imposed for a violation, the defendant shall be sentenced within the guidelines established by the Utah Sentencing Commission pursuant to Subsection 63M-7-404(4), unless the judge determines that:

(A) the defendant needs substance abuse or mental health treatment, as determined by a risk and needs assessment, that warrants treatment services that are immediately available in the community; or

(B) the sentence previously imposed shall be executed.

(iv) If the defendant had, prior to the imposition of a term of incarceration or the execution of the previously imposed sentence under this Subsection (12), served time in jail as a condition of probation or due to a violation of probation under Subsection 77-18-1(12)(e)(iii), the time the probationer served in jail constitutes service of time toward the sentence previously imposed.

(13) The court may order the defendant to commit himself or herself to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or the superintendent's designee has certified to the court that:

(a) the defendant is appropriate for and can benefit from treatment at the state hospital;

(b) treatment space at the hospital is available for the defendant; and

(c) persons described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

(14) Presentence investigation reports are classified protected in accordance with Title 63G, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63G-2-403 and 63G-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

- (a) ordered by the court pursuant to Subsection 63G-2-202(7);
- (b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;
- (c) requested by the Board of Pardons and Parole;
- (d) requested by the subject of the presentence investigation report or the subject's authorized representative; or
- (e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

(15)(a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).

(16)(a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

(b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

- (i) the defendant to wear an electronic monitoring device at all times; and
- (ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

(i) place the defendant on probation under the supervision of the Department of Corrections;

(ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and

(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.