

2015

**Salt Lake City, Plaintiff/Appellee, v. Samuel Lorin Jenkins,
Defendant/Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	Case No. 2014-1058-CA
SAMUEL LORIN JENKINS,	:	Dist. Ct. Case No. 141909145MO
	:	
Defendant/Appellant.	:	Defendant is not incarcerated

BRIEF OF APPELLEE

Appeal from the sentence following a plea to one count of Violation of Protective Order, a class A misdemeanor, in violation of Utah Code § 76-5-108, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Vernice Trease, presiding.

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No Oral Argument Requested

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JURISDICTIONAL STATEMENT

Defendant appealed his sentence following a plea bargain pleading to one count of Violation of a Protective Order, a Class A misdemeanor in violation of Utah Code Ann. §76-5-108 before the Honorable Judge Trease, Third District Court, Salt Lake County. This Court has Jurisdiction under Utah Code Ann. §78a-4-103(2)(e).

STATEMENT OF THE CASE

The City charged Defendant with one count of Violation of a Protective Order, a class A misdemeanor, in violation of Utah Code §76-5-108. R. 1. On October 24, 2014 Defendant pled guilty to that charge in exchange for dismissing three other Violation of a Protective Order cases: 141909264, 141909938, and 141912487. R48:1-2. (A forth violation of protective was dismissed by motion later based on the plea) Defendant waived his right under Utah Rule of Criminal Procedure 22, and was sentenced that day to 365 days in the Salt Lake County Jail and an \$800 fine and to comply with the terms of

probation that already existed under case 111905380¹. R. 26-28, The joint recommendation of sentencing between the City and Defendant was that the Defendant would be on probation 18 months of probation (supervised by Adult Probation and Parole), complete a domestic violence evaluation and pay a fine. R. 48:6. The Court clarified prior with the defendant and counsel prior to him entering a plea that “The sentence on this case [protective order violation 141909145] could run back to back, or consecutive or concurrently...” R 48:4. The district court stayed the imposition of the jail and placed Defendant at his request back on probation supervised by Adult Parole & Probation (“AP&P”) for a period of 24 months. R. 48:10-11. The court imposed the fines, fees, and numerous other conditions of probation including comply with his other probation which pre-existed this plea. *Id.* Defendant timely appealed. R. 37.

SUMMARY OF THE ARGUMENT

The trial court was well within its discretion when it sentenced Defendant to 24 months probation.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion When It Sentenced Defendant To Supervised Probation For A Period Of 24 Months.

Defendant was given the opportunity of probation when the court sentenced him to supervised probation for a period of 24 months. “An abuse of discretion results when the judge ‘fails to consider all legally relevant factors’ or if the sentence imposed

¹ The sentencing post Order to Show Cause of case 111905380 was also appealed by defendant Court of Appeals case number 2014-1048-CA

is ‘clearly excessive.’” *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990). The trial court released the defendant from custody and allowed him an opportunity for probation. “The Utah Code authorizes a court to impose probation as a sentencing alternative, but nowhere does it provide a limitation on the length of probation a court may set.” *State v. Wallace*, 2006 UT 86, ¶ 16, 150 P.3d 540, 543.

Sentencing the Defendant back to probation was particularly generous on behalf of the trial court given that he had two orders to show cause from his previous probation. See Case No. 20141048- CA. “An appellate court may only find abuse if it can be said that no reasonable [person] would take the view adopted by the trial court.” *State v. Houk*, 906 P.2d 907, 909 (Utah Ct. App. 1995). In the present case it is apparent that the trial court was being more than reasonable when after two Orders to Show Cause for failing to comply with probation, the court asked Defendant if he wanted to attempt probation again or to close the case with jail. Defendant stated he wanted to be on probation. “Your Honor. I’m very serious about doing probation...” R. 48:9-10

Defendant maintains that the trial court’s sentence of 24 months of supervised probation was too harsh in light of his “positive accomplishments” on previous probation and the non-violent nature of his crime. App brief p. 3. The defendant fails to acknowledge that he had five subsequent violations of law while on probation, all regarding the same victim. Cases:

141909145 (present case);
141909932, Violation of a protective order occurring July 6, 2014;
141912487 Violation of a protective order occurring September 8 2014;

141909264 Violation of a protective order July 16, 2014; and case
141911075 Criminal Mischief DV, Guilty plea December 1, 2014.

All of the other protective order violations were dismissed in exchange for this plea. R 48:1 and R 52-53. Defense counsel for the state case (111905380) only referenced Defendant's 'positive accomplishments' with no specifics other than completion of prime for life. R. 48: 7-8.

Defendant also fails to acknowledge that 24 months probation is well within the probation terms contemplated by the legislature. Under Utah Code Ann. §77-18-1 (10)(a)(i) a court may terminate probation "upon completion without violation of 36 months probation in... Class A misdemeanor cases..." *Utah Code Ann §77-18-1 (10(a)(i) (2014)*. Sentencing Defendant to complete two years probation for this case does not run afoul of any statutory sentencing guideline.

Further, the judge's decision was more than fair granting probation despite the Defendant's performance on his prior probation. Defendant had filed a certification of completion of the Prime for Life Program three years after his plea for a prior case R. 48:7-8. He had two orders to show cause for failing to comply with his probation. See companion case State v. Jenkins 2014-2048-CA pending before this court.

Given Defendant's marginal performance on probation with 5 new violations of law and two Orders to Show Cause while on probation in the 2011 case, requiring Defendant to be on probation for 24 months is not unreasonable.

Utah's probation statute authorizes a court to impose probation as a sentencing alternative, but nowhere does it provide a limitation on the length of probation a court may set. Indeed, as interpreted by this court in *Wallace*, a sentencing court has full discretion to determine the length of a defendant's probation under Utah's probation

statute.

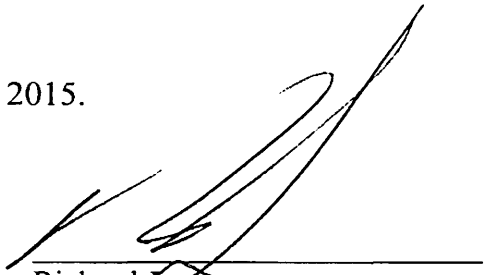
State v. Candedo, 2010 UT 32, ¶ 15, 232 P.3d 1008, 1013 (internal citation and quotation omitted)

The defendant's assertion that a shorter term of probation would allow him to be more successful is not doubted. Anyone, hopefully, can refrain from committing crime and violating probation for a short period of time. It's the true measure of reform if he can remain crime free for a long period of time.

CONCLUSION

The trial court did not abuse its discretion sentencing Defendant to probation. Despite his less than exemplary performance on his prior probation Trial Judge did not impose a sentence that was clearly excessive.

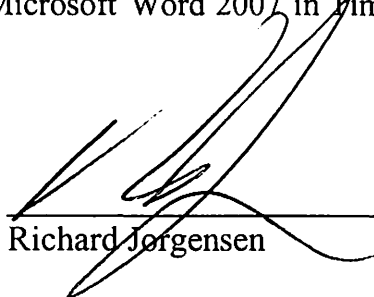
SUBMITTED this 4 day of August, 2015.



Richard Jorgensen
Attorney for Plaintiff/Appellee

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(t)(1), I certify that this brief contains 1,119 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 2007 in Times New Roman 13 point.



Richard Jorgensen

CERTIFICATE OF DELIVERY

I, Richard Jorgensen, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230, and two copies to the Salt Lake Legal Defender Association via inter-officer carrier this _____ day of August 2015.

Richard Jorgensen

ADDENDUM A: UTAH CODE ANN. §77-18-1

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

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

(2)

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

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

(ii) on probation 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 demand for services;

(iii) the availability of agency resources;

(iv) the public safety; and

(v) 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, or 12 months in cases of class B or C misdemeanors or infractions.
 - (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.
 - (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 probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.
- (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.

Amended by Chapter 413, 2015 General Session