

2016

**The State of Utah, Plaintiff/Appellee, v Daniel Wayne Fakatou,
Defendant/Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

DANIEL WAYNE FAKATOU,
Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from a sentence following a guilty plea to one count of aggravated assault, a third degree felony, in violation of Utah Code § 76-5-103(1), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Mark Kouris presiding.

Appellant is incarcerated.

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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this Court pursuant to Utah Code § 78A-4-103(2)(e). *See* Addendum A (Sentence, Judgment, Commitment).

ISSUE AND STANDARD OF REVIEW

Issue: Whether the trial court plainly erred by requiring Mr. Fakatou to complete an inpatient treatment program as a condition of his probation.

Standard of Review: “The sentencing decision of a trial court is reviewed for abuse of discretion.” *State v. Valdovinos*, 2003 UT App 432, ¶14, 82 P.3d 1167. “However, the exercise of that discretion is not unlimited.” *State v. Howell*, 707 P.2d 115, 117 (Utah 1985). A trial court’s “[a]buse of discretion may be manifest if the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence.” *State v. Schweitzer*, 943 P.2d 649, 651 (Utah Ct. App. 1997) (quotations omitted).

Preservation: This issue is not preserved. Unpreserved claims may be reached under the doctrine of plain error. *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346; *but see* R.88:2-4 (defense counsel arguing in favor of treatment and informing the court of the recommendation that Fakatou “go to the First Step House”); *State v. Alfatlawi*, 2006 UT App 511, ¶26, 153 P.3d 804 (“invited error prevents [this Court’s] review of [] issue[s] under plain error”).

STATUTORY PROVISIONS

The following are attached at Addendum B: Utah Code § 77-18-1.

STATEMENT OF THE CASE AND FACTS

On September 3, 2014, the State filed an information charging Mr. Fakatou with one count of aggravated burglary, a first degree felony, in violation of Utah Code § 76-6-203; one count of aggravated assault, a third degree felony, in violation of Utah Code § 76-5-103(1); one count of sexual battery, a class A misdemeanor, in violation of Utah Code § 76-9-702.1; one count of criminal mischief, a class B Misdemeanor, in violation of Utah Code § 76-6-106(2)(c); and one count of interference with an arresting officer, a class B misdemeanor, in violation of Utah Code § 76-8-305. R.1-3.

Mr. Fakatou waived his right to a preliminary hearing, and on October 28, 2014, he pleaded guilty to aggravated assault, a third degree felony. R.33-39, 87:1-4. The following facts provided a basis for his guilty plea: “on or about August 29, 2014[,] ... [Mr. Fakatou] put his hands in a choking manner on the

neck of a person [who] he had lived with previously.” R.34, 87:3. The remaining counts were dismissed pursuant to a plea agreement. R.34.

The sentencing hearing was originally scheduled for January 12, 2015, but the trial court granted the defense a continuance to allow them “to look into treatment options.” R.56, 87:5.

On March 23, 2015, a sentencing hearing was held. R.76-77, 88. There, defense counsel argued that Mr. Fakatou “need[s] some treatment and ... help.” R.88:2; *see also* R.88:4 (Mr. Fakatou telling the court that “I see that I ... needed ... some help”). Defense counsel told the court that it was recommended that Mr. Fakatou “go to the First Step House,” where he was on the waiting list. R.88:2.¹ Counsel also said that the victim would like to see Mr. Fakatou enter a residential treatment program. R. 88:2-3; *see also* R.48, 53-55.²

The trial court then sentenced Mr. Fakatou to 0-5 years in the Utah State Prison. R.61-63. The court suspended that prison term and placed Mr. Fakatou on probation for 48 months to be supervised by Adult Probation and Parole. R.61-63. The court ordered that Fakatou serve one year in the Salt Lake County Jail with no credit for time served and “early release as soon as a bed at First Step House opens up.” R.61-63, 88:6. Moreover, as a condition of his probation, the

¹ On its website, the First Step House describes itself as a “leading organization in the field of addiction recovery. We help people who are struggling with substance use and behavioral health disorders. We offer a range of services including residential treatment, outpatient treatment, long-term recovery management, transitional housing, case management, and evidence-based therapies.” *See* <http://www.firststephouse.org/>

² The presentence report recommended imprisonment. R.41.

court ordered that Fakatou complete inpatient treatment and aftercare at the First Step House. R.61-63, 88:6. Mr. Fakatou timely appealed his sentence. R.76-77.³

SUMMARY OF THE ARGUMENT

Mr. Fakatou claims that the trial court plainly erred when it ordered that he complete inpatient treatment at the First Step House as a condition of his probation.

ARGUMENT

The trial court committed plain error by requiring that Mr. Fakatou complete inpatient treatment at the First Step House as a condition of his probation.

Mr. Fakatou feels strongly that the court plainly erred when it ordered that he complete inpatient treatment at the First Step House as a condition of his probation. *But see* R.88:2-4 (defense counsel arguing in favor of treatment and

³ On appeal, Mr. Fakatou also sought to challenge the voluntariness of his guilty plea. *See* docketing statement. However, he did not file a motion to withdraw that plea prior to sentencing in accordance with the Plea Withdrawal Statute. *See* Utah Code § 77-13-6 .

His case was subsequently stayed pending the Utah Supreme Court's decision in *State v. Gailey*, which was determinative of whether Mr. Fakatou could directly appeal the voluntariness of plea in the absence of a timely withdrawal motion. That stay was lifted upon resolution of *Gailey*.

In *Gailey*, the court “reaffirm[ed] [its] prior caselaw holding that after sentencing is entered, a defendant may not file a motion to withdraw a guilty plea or directly appeal the plea, but must pursue postconviction relief.” 2016 UT 35, ¶20. Thus, Mr. Fakatou is barred from challenging the validity of his plea in this appeal.

informing the court of the recommendation that Fakatou “go to the First Step House”); *Alfatlawi*, 2006 UT App 511, ¶26 (“invited error prevents [this Court’s] review of [] issue[s] under plain error”).

To prevail on a claim of plain error, a defendant must demonstrate that “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.” *State v. Dean*, 2004 UT 63, ¶15, 95 P.3d 276.

Moreover, “[t]he sentencing decision of a trial court is reviewed for abuse of discretion.” *Valdovinos*, 2003 UT App 432, ¶14. In its exercise of discretion, the trial court may, “as a condition of probation, ... require that the defendant ... participate in available treatment programs.” Utah Code § 77-18-1(8)(a)(iv). However, a trial court’s “[a]buse of discretion may be manifest if the actions of the judge in sentencing were inherently unfair or if the judge imposed a clearly excessive sentence.” *Schweitzer*, 943 P.2d at 651 (quotations omitted). “[A] trial court’s sentencing decision will not be overturned unless it exceeds statutory or constitutional limits, the judge failed to consider all the legally relevant factors, or the actions of the judge were so inherently unfair as to constitute abuse of discretion.” *State v. Killpack*, 2008 UT 49, ¶59, 191 P.3d 17 (quotations omitted).

Mr. Fakatou strongly believes that the trial court erred by ordering him to complete inpatient treatment at the First Step House as a condition of his probation. He feels that requiring impatient treatment—as opposed to a less-

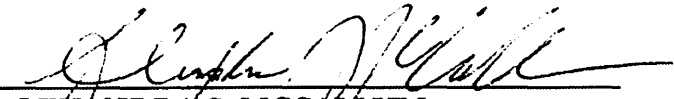
intensive outpatient treatment program—was “excessive” and was not the best option to suit his personal needs. *Schweitzer*, 943 P.2d at 651-52; *see also* Motoi Hayashida, M.D., Sc.D., *An Overview of Outpatient and Inpatient Detoxification*, 22 Alc. Health & Res. World 44, 45 (1998) (“A number of factors should be considered in determining” whether the inpatient or outpatient setting is “appropriate ... for a particular patient. An important consideration is how the setting might influence the overall treatment outcome. For each case, treatment professionals must consider whether inpatient or outpatient treatment would contribute more positively to [the] recovery process.”).

It is Fakatou’s position that the trial court’s decision to send him to inpatient treatment was error of an obvious nature. *But see Valdovinos*, 2003 UT App 432, ¶14 (“[t]he sentencing decision of a trial court is reviewed for abuse of discretion”); R.88:2-4 (defense counsel arguing in favor of treatment and informing the court of the recommendation that Fakatou “go to the First Step House”). He further maintains that he suffered prejudice because absent the court’s error, he would have enjoyed a treatment program that better comported with his personal needs.

CONCLUSION

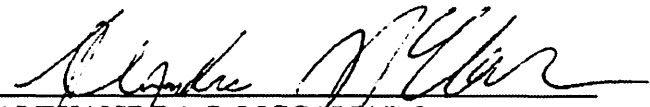
For the reasons given above, Mr. Fakatou respectfully asks this Court to reverse the trial court’s condition of probation requiring him to complete inpatient treatment at the First Step House.

SUBMITTED this 13th day of October, 2016.


ALEXANDRA S. MCCALLUM
Attorney for Defendant/Appellant

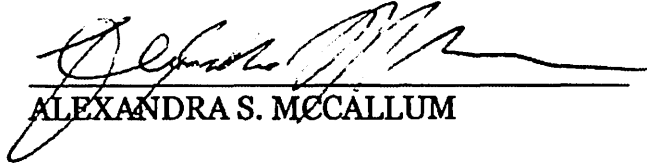
CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains less than 14,000 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 Georgia 13 point.

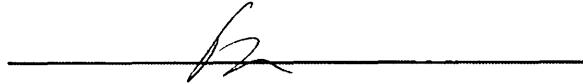

ALEXANDRA S. MCCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. MCCALLUM, hereby certify that I have caused to be hand-delivered an original and six copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 13th day of October, 2016.


ALEXANDRA S. MCCALLUM

DELIVERED this 13 day of October, 2016.



Tab A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 141909742 FS
DANEIL WAYNE FAKATOU,	:	Judge: MARK KOURIS
Defendant.	:	Date: March 23, 2015

PRESENT

Clerk: jennifaj
Prosecutor: WATABE, JAMES M
Defendant
Defendant's Attorney(s): SHUEY, RAYMOND S

DEFENDANT INFORMATION

Date of birth: July 28, 1977
Sheriff Office#: 217463
Audio
Tape Number: w48 Tape Count: 841-850

This case involves domestic violence.

CHARGES

1. AGGRAVATED BURGLARY - 1st Degree Felony
- Disposition: 10/28/2014 Dismissed w/ Prejudi
2. AGGRAVATED ASSAULT - 3rd Degree Felony
- Disposition: 10/28/2014 Guilty
3. SEXUAL BATTERY - Class A Misdemeanor
- Disposition: 10/28/2014 Dismissed w/ Prejudi
4. CRIMINAL MISCHIEF: INTENTIONAL DAMAGE, DEFACE, DESTROY PROPERTY - Class B Misdemeanor
- Disposition: 10/28/2014 Dismissed w/ Prejudi
5. INTERFERENCE WITH ARRESTING OFFICER - Class B Misdemeanor
- Disposition: 10/28/2014 Dismissed w/ Prejudi

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

The prison term is suspended.

ALSO KNOWN AS (AKA) NOTE

000058

RAYMOND MARTINEZ

SENTENCE JAIL RELEASE TIME NOTE

court will allow for early release to LDA with bed becoming available at first step inpatient treatment program

SENTENCE JAIL SERVICE NOTE

NO credit for time served, good time, or ankle monitoring
COMMUNITY SERVICE

Complete 50 hour(s) of community service.
Community service to be completed through Adult Probation and Parole.
SENTENCE COMMUNITY SERVICE NOTE

community service to be complete at a minimum rate of 10 hours a month beginning 2 months after complete First step house treatment program
ORDER OF PROBATION

The defendant is placed on probation for 48 month(s).
Probation is to be supervised by Adult Probation and Parole.
Defendant to serve 365 day(s) jail.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation and Parole.
Violate no laws.
No contact with victim(s).
Comply with all standard drug and alcohol conditions imposed by probation agency.
Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.
Do not frequent any place where drugs are used, sold or otherwise distributed illegally.
Do not use, consume or possess alcohol or frequent any place alcohol is the chief item of sale.
90 aa class in 90 days after release
complete first step inpatient treatment and aftercare
CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

000059

Case No: 141909742 Date: Mar 23, 2015

Date: _____

MARK KOURIS
District Court Judge

000060

Tab B

Utah Code § 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 under the supervision of an agency of local government or with a private organization; or

(iii) on court 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.

(iv) Court probation may include an administrative level of services, including notification to the court of scheduled periodic reviews of the probationer's compliance with conditions.

(c) Supervised probation services provided by the department, an agency of local government, or a private organization shall specifically address the offender's risk of reoffending as identified by a validated risk and needs screening or assessment.

(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 or a graduated sanction imposed under Section 63M-7-404.

(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 be modified as is consistent with the graduated sanctions and incentives developed by the Utah Sentencing Commission under Section 63M-7-404, but the length of probation may not be 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 reinstated for all or a portion of the original term of probation.

(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 validated risk and needs screening and 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.

Credits

Laws 1980, c. 15, § 2; Laws 1981, c. 59, § 2; Laws 1982, c. 9, § 1; Laws 1983, c. 47, § 1; Laws 1983, c. 68, § 1; Laws 1983, c. 85, § 2; Laws 1984, c. 20, § 1; Laws 1985, c. 212, § 17; Laws 1985, c. 229, § 1; Laws 1987, c. 114, § 1; Laws 1989, c. 226, § 1; Laws 1990, c. 134, § 2; Laws 1991, c. 66, § 5; Laws 1991, c. 206, § 6; Laws 1992, c. 14, § 3; Laws 1993, c. 82, § 7; Laws 1993, c. 220, § 3; Laws 1994, c. 13, § 24; Laws 1994, c. 198, § 1; Laws 1994, c. 230, § 1; Laws 1995, c. 20, § 146, eff. May 1, 1995; Laws 1995, c. 117, § 2, eff. May 1, 1995; Laws 1995, c. 184, § 1, eff. May 1, 1995; Laws 1995, c. 301, § 3, eff. May 1, 1995; Laws 1995, c. 337, § 11, eff. May 1, 1995; Laws 1995, c. 352, § 6, eff. May 1, 1995; Laws 1996, c. 79, § 103, eff. April 29, 1996; Laws 1997, c. 390, § 2, eff. May 5, 1997; Laws 1998, c. 94, § 10, eff. May 4, 1998; Laws 1999, c. 279, § 8, eff. May 3, 1999; Laws 1999, c. 287, § 7, eff. May 3, 1999; Laws 2001, c. 137, § 1, eff. April 30, 2001; Laws 2002, c. 35, § 7, eff. May 6, 2002; Laws 2002, 5th Sp.Sess., c. 8, § 137, eff. Sept. 8, 2002; Laws 2003, c. 290, § 3, eff. May 5, 2003; Laws 2005, 1st Sp.Sess., c. 14, § 3, eff. July 1, 2005; Laws 2007, c. 218, § 3, eff. July 1, 2007; Laws 2008, c. 3, § 252, eff. Feb. 7, 2008; Laws 2008, c. 382, § 2193, eff. May 5, 2008; Laws 2009, c. 81, § 3, eff. May 12, 2009; Laws 2011, c. 366, § 176, eff. May 10, 2011; Laws 2014, c. 120, § 3, eff. May 13, 2014; Laws 2014, c. 170, § 1, eff. May 13, 2014; Laws 2015, c. 412, § 205, eff. Oct. 1, 2015; Laws 2015, c. 413, § 1, eff. May 12, 2015; Laws 2016, 3rd Sp. Sess., c. 4, § 1, eff. July 17, 2016.