

2016

**State of Utah, Plaintiff/ Appellee, v. Jason Michael Speed,
Defendant/Appellant.**

Utah Court of Appeals

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Case No. 20150011-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

JASON MICHAEL SPEED,
Defendant/Appellant.

Brief of Appellee

Appeal from the denial of a motion for relief from judgment and for a restitution hearing following a conviction and sentencing for attempted theft, a third-degree felony, in the Third Judicial District, Salt Lake County, the Honorable Vernice Trease presiding

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UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

JASON MICHAEL SPEED,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from the denial of a motion for relief from judgment and for a restitution hearing following a conviction and sentencing for attempted theft, a third-degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2015).

INTRODUCTION

Defendant pled guilty to attempted theft by deception and admitted that, acting as a supervisor and over the course of seven months, he discounted his employer's high-end Blackberry phones to nothing, sent them to his personal address, and disposed of them by selling and giving them away. At sentencing, the judge ordered that Defendant pay restitution amounting to \$126,547. When defense counsel stated that he and the

prosecutor had discussed having a restitution hearing, the judge invited counsel to amass his evidence and submit it with a motion for a hearing and she would set a date. The judge refused to defer monthly payments in the meantime, wanting Defendant to begin reimbursing the victim immediately. Defendant made no restitution payments for eighteen months and waited nearly four years before filing a motion for a hearing.

Sixteen months after sentencing, the judge apparently discovered that the restitution amount imposed at the sentencing hearing had been omitted from the written judgment. Accordingly, she corrected the clerical error, entering a new judgment *nunc pro tunc* with the correct restitution figure. Thereafter, the case was assigned to a new judge.

Three years after sentencing, when Adult Probation and Parole later sought to terminate probation and to transfer all outstanding payments to the State Department of Debt Collection, the new judge notified the parties and asked for input. Getting no feedback, she terminated probation and transferred the outstanding payments as requested. A year later, Defendant filed a motion for relief from the restitution order and, alternatively, for a restitution hearing. The district court denied both requests.

STATEMENT OF THE ISSUES

1. Did the trial court properly deny Defendant's motion for relief from the restitution order and request for a restitution hearing made four years after the sentencing hearing?

Standard of Review. The denial of a motion for relief from judgment is reviewed for an abuse of discretion because such motions are inherently fact intensive and involve principles of fairness and equity not easily reviewable at the appellate level. *Honie v. State*, 2014 UT 19, ¶29, 342 P.3d 182. Legal determinations made part of the ruling are reviewed for correctness. *Id.*

This Court "'will not disturb'" an order of restitution "'unless the trial court exceeds the authority prescribed by law or abuses its discretion.'" *State v. Poulsen*, 2012 UT App 292, ¶5, 288 P.3d 601 (quoting *State v. Miller*, 2007 UT App 332, ¶6, 170 P.3d 1141) (additional citations and internal quotation marks omitted).

2. Has Defendant overcome the strong presumption that his counsel performed effectively in not seeking a restitution hearing date where a legitimate strategy exists for not doing so, and Defendant shows no reasonable likelihood of a different result had he obtained a hearing?

Standard of Review. Ineffective assistance claims raised for the first time on appeal are reviewed for correctness. *State v. Bryant*, 2012 UT App

264, ¶10, 290 P.3d 33. Nevertheless, “[j]udicial scrutiny of counsel’s performance must be highly deferential.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The Court “indulge[s] a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.*

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah Code Ann. § 77-38a-102, -203, -302 (West Supp. 2005)

Utah Code Ann. § 77-38a-301 (West 2004).

STATEMENT OF THE CASE

A. Summary of facts.

Defendant’s responsibilities as a supervisor in the Salt Lake City call center of ACS, Inc. [“ACS”] included overseeing employees taking calls from Verizon Wireless customers and taking calls himself.¹ R25, 37; R121:5. Supervisors were authorized to discount phones to customers if, for example, customers complained or sought to cancel service. R37.

¹ACS is an information technology outsource service company whose Salt Lake City office worked with Verizon Wireless. R4, 37.

Defendant was one of four ACS employees who, without authorization, discounted high-end Blackberry phones to nothing, and then sent the phones to their personal addresses. R25, 37; R121:5-6. Defendant was "the big one" of the four, discounting and selling or giving away significantly more phones than any of the others during a seven-month period in 2009. R38-40; R121:5; R122:7.

B. Summary of proceedings.

The guilty plea

The State charged Defendant with second-degree felony theft by deception in violation of Utah Code Ann. § 76-6-405 (West Supp. 2004). R3-5. Defendant pled guilty to third-degree felony attempted theft by deception, and the prosecutor agreed to recommend probation. R24-32. At the State's request, Judge Judith Atherton ordered a presentence investigation report ["PSI"]. R32. It included a sentencing recommendation of 36 months' probation and payment of \$126,547 in restitution. R36. The restitution figure was calculated by ACS's Incident Response Crisis Management Department. R32, 36, 40. The PSI revealed that two of the co-defendants had already received the same plea bargain and been sentenced

to 36 months' probation and payment of restitution specific to each defendant.² R39.

Sentencing

At the sentencing hearing on October 15, 2010, defense counsel sought probation. He said that Defendant took full responsibility for his actions and had recently obtained two jobs "in anticipation of having a large financial obligation related to this case." R122:4 (transcript in Addendum B). The judge voiced concern, however, when she discovered that in the year and a half since the offense, Defendant had not saved anything with which to help repay the "huge" debt he owed to ACS. R122:5-6. The judge and defense counsel discussed the seriousness of Defendant's actions, the repetitive nature of the offense, the large number of expensive phones involved, and the adverse impact this felony conviction would have on his future job prospects. R122:5-8. Counsel also touched on restitution, noting that the amount in the PSI was based on "the full retail value" of the phones and that the defense was "a little bit in question as to whether or not" the full amount of restitution reflected in the PSI was attributable to Defendant. R122:5, 7.

²The third defendant entered the same plea but had yet to be sentenced. R39.

Judge Atherton imposed on Defendant the same sentence she had given the previous two co-defendants: a suspended sentence of zero-to-five years at the state prison with credit for time already served, 36 months' probation, fines and fees, and restitution. R39, 43-44; R122:8-10. Although restitution in each of the other two matters was less than \$6,000, the judge announced restitution in this case to be \$126,547—the amount included in the PSI. R39-40; R43-44; R122:9. The judge noted that Defendant stole and sold significantly more of the high-end Blackberry phones than the other three co-defendants. R121:5; R122:5-6. She stressed that she wanted to impose restitution immediately “rather than deferring it,” that she expected Defendant “to make monthly payments every single month toward the restitution,” that she wanted ACS “to immediately start getting reimbursed for their losses,” and that she expected Defendant “to make significant advances towards dealing with this enormous restitution” amount so as to “make your victim whole.” R122:9-10.

Defense counsel then informed the judge that he and the prosecutor had discussed the possibility of a restitution hearing. R122:10. That prompted the following exchange:

THE COURT: Well, get closer. If there are disputes I – I set a lot of these restitution hearings because it's murky. So what I want you to do is file a motion for restitution.

[DEFENSE COUNSEL]: Okay.

THE COURT: And with some specifics about what I can look at before we get to the restitution hearing —

[DEFENSE COUNSEL]: Right.

THE COURT: -- and nobody knows anything.

[DEFENSE COUNSEL]: Yeah. I don't think it's going to be a complicated hearing. The only issue is really addressing his availability to pay and those resources he has available to pay this whole amount.

R122:10-11.

Four days later, a written judgment was entered that included all the sentencing terms, including "Pay Restitution," but did not specify a specific restitution amount. R46-47 (in Addendum C).³

Correction of written judgment

Adult Probation and Parole ["AP&P"] filed progress reports four months and nine months after sentencing, each of which listed Defendant's probation conditions, including that he pay restitution. R48, 50-51. But the reports did not specify the restitution amount. *Id.* In addition to revealing Defendant's positive progress on probation and his payment of his fines and fees, both reports sought to terminate probation. R48-52. The judge

³The docket, however, includes the content of the written judgment and reflects the \$126,547 restitution amount. Docket at 8-9.

dismissed the fine but did not terminate or transfer probation.⁴ *Id.*; Docket at 10 (in Addendum D).

In February 2012, Judge Atherton apparently recognized that the original judgment erroneously failed to include the restitution amount she had imposed at sentencing. Accordingly, she entered a corrected judgment *nunc pro tunc* which mirrors the original judgment but includes the \$126,547 restitution amount from the sentencing hearing. R53-55 (in Addendum C); Docket at 10 ("Sentence, Judgment, Commitment minutes modified" and "Judgment #2 Entered \$ 126547.00") (capitalization omitted).⁵

Request for restitution hearing

In August 2013, Judge Vernice Trease was assigned this case, and AP&P filed a third progress report which included the restitution amount of \$126,547. R57-58; Docket at 11. The report also showed that Defendant had so far paid \$1,418 in restitution, that he "paid his debts religiously," and that he "understands he will be paying on" the large restitution amount "for several years, if not forever." R58. The probation officer recommended that

⁴The modified judgment appeared in the record seven months after the second report. R53-55.

⁵A copy of the modified judgment was also entered in the record next to the original judgment. R43-45 (in Addendum C); Docket at 10 (reflecting "Sentence, Judgment, Commitment minutes modified" on 10/18/10 and 2/27/12) (capitalization omitted).

the case be closed as successful and that the remaining restitution be referred to the Office of State Debt Collection. R58-59.

Before ruling on the recommendation, Judge Trease notified the parties and gave them 14 days to object. R56-57. Receiving nothing, the judge terminated probation on October 16, 2013, and referred the remaining restitution as requested by AP&P. R59. The judge noted, however, that "because restitution is still outstanding, termination cannot be successful for UCA 76-3-402 purposes." *Id.*

Two weeks later, the judge received a letter from Defendant asking for a restitution hearing. R60. He explained that he did not get one, did not know he was entitled to one, and was not told of that fact by his trial counsel. *Id.* He claimed that he did not know he owed restitution until 18 months after sentencing, at which time over \$7,000 in interest had already accrued. *Id.*

The judge notified the parties of the letter, and new defense counsel filed a motion six months later seeking relief from the restitution order or, in the alternative, a restitution hearing. R73-90; Docket at 12. More than four years after the original sentencing hearing, Judge Trease held a hearing on the motion. R123. She reviewed the entire case, heard argument, and then found that Judge Atherton had imposed restitution at sentencing in the

amount stated in the PSI.⁶ R123:3-10 (transcript in Addendum E). She also found that although Judge Atherton had ordered restitution to begin immediately, the restitution amount had been omitted from the written judgment, prompting Judge Atherton to later correct the judgment to accurately reflect her restitution order. R123:10. She further found that although Judge Atherton had left the option of a restitution hearing open for Defendant, no one ever asked her to schedule one. R123:10-12. Judge Trease noted that the case had proceeded based on the restitution imposed at sentencing and that probation was ultimately terminated while “nobody bother[ed] to do anything.” R123:11. Finally, Judge Trease found that she had received no objections from anyone in response to the notice she sent about the pending probation termination. R123:10-11. Accordingly, the judge held, Defendant was not entitled to relief from the restitution order, and he had waived his right to a restitution hearing. R123:12, 14-15.

⁶ Although the transcript for the motion hearing is labeled “Restitution Hearing,” it is actually a hearing on Defendant’s motion. R123. The transcription of an exchange between defense counsel and the court at that hearing contains two errors. First, on page 5 when defense counsel quotes from the sentencing transcript, she cites to page 8, line 6 of the sentencing transcript; the quote is actually located at page 10, line 11. R123:5 (referring to R122:10). Second, on the same page, after the court says, “Okay” on line 7, the transcript shows that the rest of the page is commentary from the court; it is actually the continuation of defense counsel’s argument. R123:5.

Defendant timely appealed and obtained new counsel. R99-101, 107.

SUMMARY OF ARGUMENT

Point I: Defendant argues that Judge Trease erred in denying his motion for relief from judgment and request for restitution hearing. He preserved only one of his arguments for appellate review, however, and his failure to argue an exception to the preservation rule for the remaining arguments prevents merits review of those arguments on appeal.

In any event, Judge Trease properly denied the motion that was filed four years after Judge Atherton imposed restitution at sentencing and six months after Judge Trease closed the case. Judge Atherton imposed complete restitution at sentencing, and its omission from the written judgment was a clerical error she later corrected *nunc pro tunc*. She did not intend to impose court-ordered restitution and was not required to do so. Hence, restitution was timely imposed.

Defendant's claim that the State proved no causal link between his criminal conduct and ACS's loss is rebutted by the record, which shows that Defendant's admitted conduct was the sole cause of ACS's loss. Hence, the loss would not have occurred but for Defendant's criminal conduct. Additionally, the losses were both factually and temporally tied to that conduct. Finally, Judge Atherton did not shift to Defendant the State's

burden of proving restitution when she required that Defendant support his challenge to the restitution order.

Defendant also argues that he was entitled to relief from the restitution order because Judge Atherton denied him a full restitution hearing when she did not immediately schedule a hearing after he objected to restitution at sentencing. The delay, he claims, was inherently unfair and contrary to the Restitution Act. His claim, however, is unpreserved, and he argues no exception to the preservation rule. Should this Court review it, the claim is entitled to no more than plain error review.

Defendant fails to show obvious prejudicial error because Judge Atherton fully complied with her statutory duty by agreeing to schedule a hearing as soon as Defendant informed her that he was ready to proceed. Further, Defendant offers no authority for his claim that the judge's actions violated her responsibilities under the Act. Finally, his claim that he is legally insulated from his trial counsel's failure to further pursue a hearing is inadequately briefed and does not warrant review.

Point II: Defendant argues that his trial counsel was ineffective for not filing a motion to set a restitution hearing. The claim fails because the record is inadequate to allow him to meet his heavy burden to overcome *Strickland's* strong presumption that counsel performed effectively.

Defendant's claim is speculative in the absence of record evidence that trial counsel would have presented favorable evidence that would have reduced the restitution amount. Accordingly, *Strickland* requires the presumption that trial counsel reasonably decided not to request the hearing due to a lack of beneficial evidence.

The record is also inadequate to show prejudice where it lacks any facts to show that the restitution amount was reasonably likely to have changed had a hearing occurred. Defendant's assumption that the amount would have changed does not demonstrate prejudice.

ARGUMENT

I.

JUDGE TREASE PROPERLY DENIED THE MOTION FOR RELIEF FROM THE RESTITUTION ORDER AND THE ALTERNATIVE REQUEST FOR A RESTITUTION HEARING FILED FOUR YEARS AFTER RESTITUTION WAS IMPOSED AND SIX MONTHS AFTER THE CASE WAS CLOSED

Defendant contends that he was entitled to relief from the sentencing court's restitution order or, alternatively, to a restitution hearing to dispute the amount of restitution owing. Specifically, he argues that, despite his objecting to restitution at sentencing, Judge Atherton did not enter a restitution order before the one-year deadline passed, did not immediately

set a restitution hearing, and did not make the State prove that his criminal conduct caused the victim's damages. Aplt.Br. 9-22.

Defendant raised only one of these arguments below: that no restitution order was entered within a year of sentencing. Because he does not acknowledge that the remaining issues are unpreserved or argue any exception to the preservation rule, this Court should not reach those claims.

Alternatively, all of Defendant's claims fail on their merits. First, the sentencing judge ordered restitution within a year of sentencing where she unequivocally ordered complete restitution at the sentencing hearing, and the omission of the restitution amount from the written judgment was a clerical error she later corrected *nunc pro tunc*. Second, Defendant forfeited the right to a restitution hearing to dispute the amount when he waited nearly four years to request one and did so after the case was closed. Finally, the causal link between Defendant's criminal conduct and the victim's loss was clear and the losses were both factually and temporally tied to Defendant's conduct.

A. This Court should decline to reach the merits of all but one of Defendant's claims because he did not preserve them, and he argues no exception to the preservation rule.

The only argument presented to Judge Trease below was that the restitution order was void because it was not entered within one year of the

sentence. R88-89; R123:5-7; *see* Point IB, *infra*. Defendant did not present any of his other arguments to Judge Trease, and he argues neither plain error nor exceptional circumstances to support their consideration on appeal. He simply presents each argument as if preserved. Aplt.Br. 9-14, 17-25.

“As a general rule, claims not raised before the trial court may not be raised on appeal.” *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346 (citation omitted). “[T]he preservation rule applies to every claim, ... unless a defendant can demonstrate that ‘exceptional circumstances’ exist or ‘plain error’ occurred.” *Id.* (citation omitted).

Defendant ignores the preservation rule. Accordingly, this Court should refuse to reach the merits of his unpreserved claims. *See State v. Rhinehart*, 2007 UT 61, ¶21, 167 P.3d 1046 (refusing to address merits of unpreserved claim where Defendant “declined to present an argument to support the application of either exception” to preservation rule); *State v. Veale*, 2012 UT App 131, ¶2, 278 P.3d 153 (refusing to address unpreserved appellate argument for which Veale argued neither plain error nor exceptional circumstances on appeal).

B. Restitution was imposed at sentencing and, therefore, well within the statutory one-year period.

1. Clerical error in written judgment.

In his only preserved argument, Defendant contends that this Court should vacate the restitution order because it was not entered within one year of sentencing. Apl't.Br. 15. According to Defendant, Judge Atherton merely "discussed" the amount of complete restitution at sentencing without including a final amount in her written order. *Id.* at 17. Defendant argues that omitting the amount from the final order was "more" than a mere clerical error, and that the judge's subsequent correction of the written judgment to include the amount she had "discussed" fell outside the one year period required by statute. *Id.* Consequently, Defendant claims that Judge Atherton lacked jurisdiction to enter a written order setting restitution when she corrected the judgment in 2012, and that Judge Trease abused her discretion in denying him relief from that judgment. *Id.* Alternatively, Defendant argues that even if complete restitution was imposed, Judge Atherton intended to impose court-ordered restitution as well, and when she failed to do so within one year of the sentence, he was entitled him to relief from the whole restitution order. *Id.* at 17-19.

As explained below, Judge Trease properly ruled that Judge Atherton imposed a set amount of restitution at sentencing, that the written judgment

did not include that amount, and that, when Judge Atherton discovered the mistaken omission, she properly corrected the written judgment to comport with her verbal order. R123:9-12.

Utah's Crime Victim's Restitution Act ["Restitution Act"] provides that the district court "shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing." Utah Code Ann. § 77-38a-302(5)(d)(i) (West Supp. 2005). This Court has held that this requires entry of a final restitution order and that a restitution order is not final absent "a sum certain." *State v. Poole*, 2015 UT App 220, ¶11, 359 P.3d 667. Entry of an order that anticipates payment of restitution but does not include a restitution amount does not meet the statute's requirement. *Id.*

The Utah Supreme Court has held that when a clerical error occurs in the recording of restitution in a final judgment, the district court has jurisdiction under rule 30(b), Utah Rules of Criminal Procedure, to amend the order of restitution to reflect what the judge intended. *See State v. Rodrigues*, 2009 UT 62, ¶¶13-34, 218 P.3d 610. Rule 30(b) provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court *at any time* and after such notice, if any, as the court may order."

Utah R. Crim. P. 30(b) (emphasis added); *see also* *Rodrigues*, 2009 UT 62, ¶13 (quoting Utah R. Crim. P. 30(b)) (emphasis in *Rodrigues*).

Rodrigues pled guilty to criminal nonsupport and agreed to pay restitution at a set rate per month. *Rodrigues*, 2009 UT 62, ¶4. At sentencing, the State provided an incorrect restitution amount to the district court, which the court ultimately used when it entered its sentencing order. *Id.* at ¶¶7-8. The State later filed a motion under rule 30(b) to amend the sentencing order, arguing that the use of an incorrect figure was a clerical error arising from the State's use of "the wrong computation" at sentencing. *Id.* at ¶9. The trial court granted the motion and increased the total restitution amount to conform to the intent of the parties under the plea agreement. *Id.* On appeal, the Utah Supreme Court held that rule 30(b) applied and that the district court therefore had jurisdiction to amend the restitution order. *Id.* at ¶13.

The purpose of rule 30(b) "is to correct clerical errors so that the record reflects what was actually 'done or intended.'" *Rodrigues*, 2009 UT 62, ¶14 (quoting *Bishop v. GenTec, Inc.*, 2002 UT 36, ¶30, 48 P.3d 218 (internal quotation marks omitted)). "A clerical error is one made in recording a judgment that results in the entry of a judgment which does not conform to the actual intention of the court." *Id.* Whether an error is clerical depends

on a three-part analysis: “(1) whether the order or judgment that was rendered reflects what was done or intended, (2) whether the error is the result of judicial reasoning and decision making, and (3) whether the error is clear from the record.” *Id.* Application of the analysis to this case establishes that a clerical error occurred in entering the written judgment, and Judge Atherton had jurisdiction to correct it at any time *nunc pro tunc*.

First, the original judgment entered after sentencing in October 2010 did not reflect what was done at sentencing and what was intended by Judge Atherton, whose intent is binding. *Id.* at ¶15. The written judgment reflected the order that Defendant “pay restitution,” but it did not include a restitution amount. R46-47. That is not an accurate reflection of what Judge Atherton did at sentencing. The judge not only established a restitution amount but “did order restitution as part of the sentence in this case in the amount of \$126,547....” R123:10. What Defendant labels a discussion was, in fact, an order requiring Defendant to begin paying restitution for the victim’s pecuniary damages immediately. The restitution amount imposed by Judge Atherton at sentencing was the amount included in the PSI as the damages calculated by ACS to be the value of the property taken. R40. She emphasized that she did not want the restitution deferred, and directed Defendant to begin making “monthly payments every single month toward

the restitution” because she wanted ACS “to immediately start getting reimbursed for their losses.” R122:9-10. She stressed to Defendant that she expected him “to make significant advances towards dealing with this enormous restitution” to “make your victim whole.” R122:10. She said this at the end of the sentencing hearing as part of imposing the sentence, placing it at the end of her recitation of Defendant’s other probation conditions. R122:9-10. In light of her directive that Defendant “[p]ay restitution” in a sum certain, her imposition of the amount provided in the PSI, her explanation of when and how often payments would be made, her directive that they begin immediately, and her placement of the pronouncement as part of her imposition of sentence, it is clear that Judge Atherton intended that Defendant pay restitution in the amount of \$126,547 beginning immediately. Thus, the written judgment did not conform to the judge’s actual intent, suggesting that the error was clerical. *See Rodrigues*, 2009 UT 62, ¶¶16-22.

Second, the error in the judgment was not the direct result of judicial reasoning and decision making. *Id.* at ¶¶23-28. Judge Atherton’s determination of restitution required judicial reasoning and decision making, but the omission of the restitution amount from the written judgment did not. *See id.* at ¶26 (acceptance of restitution figures and

imposition of a restitution amount requires judicial reasoning and decision making). The restitution noted in the PSI was the only evidence of restitution presented at sentencing. Judge Atherton imposed the PSI amount when she announced the sentence and explained why she did so, clearly demonstrating the judicial intent and reasoning behind her decision. Nothing in the transcript shows that she harbored any intent to delay or defer imposition of the restitution amount she announced, even after defense counsel voiced his concern about restitution. The absence of the restitution amount from the judgment was in no way directed by Judge Atherton and, hence, was not the result of judicial reasoning and decision making. *See id.* at ¶¶23-28.

Third, the error is abundantly clear from the record. As noted above, the record clearly reflects the requested restitution amount in the PSI and Judge Atherton's intent to order restitution in that amount. Further, when Judge Atherton corrected the judgment, she only added the restitution amount stated in the PSI and imposed by her at sentencing. *Compare* R46-47 *with* R43-45, 53-55. Her actions clearly demonstrate the clerical nature of the error in recording the judgment. *See id.* at ¶¶14, 29-34 (an error made in recording a judgment that results in entry of a judgment which does not conform to the court's intent is a clerical error).

Because omitting the restitution figure from the written judgment in this case constituted a clerical error, Judge Atherton could correct the error at any time to reflect what she intended. Utah R. Crim. P. 30(b). The *nunc pro tunc* entry to correct the judgment allowed the correction to relate back to the time the original judgment was entered so that the record would accurately reflect what originally took place. See *State v. Johnson*, 2009 UT App 382, ¶28, 224 P.3d 720 (*nunc pro tunc* correction of judgment to accurately reflect intended restitution amount related back to time original judgment was entered, and no new notice of appeal was required to perfect Johnson's direct appeal). Thus, Judge Trease did not abuse her discretion in denying Defendant's motion for relief from the restitution order.

Defendant likens this situation to *State v. Poole*, 2015 UT App 220. Aplt.Br. 15-17. There, this Court held that the Restitution Act requires entry of a restitution order with a sum certain within a year of sentencing. 2015 UT App 220, ¶11. *Poole* does not establish error in this case, however. Unlike this case, *Poole* involved a decision by the trial court to order payment of restitution but to leave the amount unspecified until the State was able to provide something more than a preliminary estimate. *Id.* at ¶¶2, 10. The State provided the information almost a year later, and the restitution order was not entered until fifteen months after sentencing. *Id.* at

¶4. This Court vacated the restitution order, holding that without a sum certain in the written judgment, the district court lost authority to impose restitution once the one-year statutory limitation period passed. *Id.* at ¶21; Utah Code Ann. § 77-38a-302(5)(d)(i).

Here, Judge Atherton did not leave the restitution amount in limbo; she imposed a sum certain at sentencing. It was only through a clerical error—which may be corrected at any time—that the amount was not reflected in the sentencing order. Accordingly, *Poole* does not govern here.

2. Allegedly incomplete restitution order.

Defendant alternatively claims that the restitution order should have been vacated because Judge Atherton determined only a partial restitution amount and never imposed a final restitution amount within the statutory one-year period. Aplt.Br. 17-19. This Court should not reach the merits of this argument because Defendant does not acknowledge that it is unpreserved, and he argues no exception to the preservation rule. *See Veale*, 2012 UT App 131, ¶2. In any event, the claim fails.

Section 77-38a-302(2) creates two categories of restitution—complete and court-ordered. “Complete restitution” is “restitution necessary to compensate a victim for all losses caused by the defendant.” *Id.* at § 77-38a-302(2)(a). “Court-ordered restitution” is the restitution the court “orders the

defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.” *Id.* at § 77-38a-302(2)(b).

Defendant argues that the judge accepted ACS’s damages as reported in the PSI as the amount of complete restitution and that she wanted Defendant to start paying it immediately. *Id.* at 18-19. He claims, however, that the judge intended to add court-ordered restitution once she got the necessary documentation on the issue that she requested from defense counsel. *Id.* Because the restitution hearing never occurred, he argues, the judge lacked the information necessary to determine court-ordered restitution and could not, therefore, determine a final restitution amount. *Id.* Because the court-ordered amount was not imposed within one year after sentencing, he argues, the order should have been vacated. *Id.*

The Utah Supreme Court has interpreted section 77-38a-302(2) to require a trial court to calculate complete restitution, but not court-ordered restitution. *State v. Laycock*, 2009 UT 53, ¶23, 214 P.3d 104. Rather, the “imposition of court-ordered restitution is discretionary....” *Id.* at ¶28.

Defendant’s claim that Judge Atherton intended to exercise that discretion in favor of determining court-ordered restitution misconstrues the record. First, the only record citation he provides for his claim that the judge intended to “focus” on court-ordered restitution at the eventual

hearing are two lines in the sentencing transcript that state, "...testing as deemed appropriate. Pay restitution in the amount of \$126,547." R122:9 (cited in Aplt.Br. 18-19). This citation has no bearing on the issue of court-ordered restitution.

Second, nowhere in the record did the judge determine court-ordered restitution or indicate an intent to do so. She was within her discretion not to do so under *Laycock*, particularly where Defendant never raised the issue.

Third, the sentencing transcript and the PSI not only show that Judge Atherton did not intend to determine court-ordered restitution but reveal her reasoning as well. See Utah Code Ann. § 77-38a-302(3) (if the court finds restitution inappropriate, it shall make its reasons part of the record). Her concern at sentencing centered on having Defendant reimburse ACS for all the damage caused by his seven-month crime spree. She commented more than once on the excessive size of the debt, was adamant that Defendant repay the entire amount to make his victim "whole," recognized it would take quite some time, and tried to help ensure that he could make his payments to the victim by allowing him to pay his remaining fines and fees through community service. R122:5-6, 10. Further, she corrected the written judgment to reflect only the complete restitution amount, making no provision for court-ordered restitution. R43-45, 53-55.

By her efforts, Judge Atherton emphasized the need for total reimbursement to the victim and her intent to avoid any drain on Defendants' income that would hinder his ability to pay complete restitution. This would include foregoing imposition of court-ordered restitution. This represents a proper exercise of the judge's discretion and does not require that the restitution order be vacated.

3. Clear causal link between Defendant's criminal conduct and ACS's loss.

Defendant claims that Judge Trease should have granted him relief from the restitution award because the State did not prove that his criminal conduct caused the damage suffered by ACS. Aplt.Br. 19-22. He does not claim that his conduct did not cause any damage or loss to ACS. He argues that the State was required to prove that his actions caused the entire restitution amount claimed and that the burden was not met by the information contained in the PSI. *Id.* at 21-22.

This Court should not reach the merits of this argument because Defendant does not acknowledge that it is unpreserved, and he argues no exception to the preservation rule. *See Veale*, 2012 UT App 131, ¶2. In any event, the claim fails.

“‘[T]o include an amount in a restitution order, the State must prove that the victim has suffered economic injury and that the injury arose out of

the defendant's criminal activities.'" *State v. Poulsen*, 2012 UT App 292, ¶11, 288 P.3d 601 (quoting *State v. Brown*, 2009 UT App 285, ¶10, 221 P.3d 273). Criminal activities are "any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct." Utah Code Ann. § 77-38a-102(2). Restitution may be awarded "'only in cases where liability is clear as a matter of law and where the commission of the crime clearly establishes causality of the injury or damages.'" *Poulsen*, 2009 UT App 285, ¶10 (quoting *State v. Robinson*, 860 P.2d 979, 983 (Utah App. 1993)).

To assess causality, Utah courts have adopted a modified 'but for' test that requires a showing that: (1) the damages would not have occurred but for the conduct underlying the defendant's conviction; and (2) the causal nexus between the criminal conduct and the loss is not too attenuated (either factually or temporally). *Id.* (quotations and citations omitted).

In this case, both prongs of the test are met. First, the record demonstrates that but for Defendant's criminal conduct, ACS would not have suffered the losses. Defendant admitted to police and to the court that as a supervisor with ACS, he discounted phones so that he would get them for free. R37-38; R121:5-6. He then took them and never returned them to

ACS. *Id.* It is readily apparent that ACS lost the entire value of each of the phones Defendant took and that but for Defendant's criminal conduct, none of the damage would have occurred.

Second, there is a direct causal nexus between Defendant's criminal activities and the losses suffered by ACS. The losses were both factually and temporally tied to Defendant's conduct—he took the phones directly from ACS without paying any value for them. The losses increased with each stolen phone, and there were no intervening forces, events, or delays. This is not like *Poulsen*, cited by Defendant, in which this Court found no obvious causal nexus between Poulsen's admitted participation in a pyramid scheme and the victims' losses. *See Poulsen*, 2012 UT App 292, ¶16. The direct relationship between Defendant's criminal conduct here and the immediately resulting loss to ACS readily satisfies the second part of the causality test.

Moreover, the PSI provides ample support for the claimed damages. It shows that the figure came from ACS and represents a sum certain based on business records related to Defendant's actual activities. ACS kept sufficiently detailed records that it was able to identify the specific employees who were stealing phones, the type of phones being stolen, and the amount of loss attributed to each individual's actions. R37-40.

Detective Knight of the Salt Lake City Police Department reviewed ACS records and verified the losses incurred because of Defendant over part of the seven months. R38. With nothing before her to bring the requested amount into question, Judge Atherton did not abuse her discretion in relying on the amount as an accurate representation of ACS's pecuniary damages. *See, e.g., State v. Weeks*, 61 P.3d 1000, 1004-06 (Utah 2002).

Finally, Defendant claims that by accepting the PSI representations and asking defense counsel for more information about restitution, Judge Atherton impermissibly shifted the burden of proving restitution to the defense. Aplt.Br. 21-22. Judge Atherton did not, however, ask defense counsel to carry the State's burden of proving restitution; she required the defense to carry its own burden of proving its claim that the requested amount was inaccurate. The judge asked defense counsel to include in his request for a hearing date "some specifics" that she could review before the hearing to prepare for his challenge to the State's requested amount. R122:10-11. In context, her discussion with defense counsel made it clear that she wanted to be prepared to address the merits of his challenge when the hearing occurred.

C. Defendant was not entitled to relief from the restitution order because the sentencing court complied with its duty to allow a hearing.

Defendant argues that he was entitled to relief from the restitution order because the sentencing court denied him a full restitution hearing. Aplt.Br. 11-15. He contends that the judge was required to schedule a hearing when he objected to the restitution amount imposed at sentencing. *Id.* at 13-14. Requiring him to later formally move for a restitution hearing, he claims, was inherently unfair, contrary to the relevant statute, and an abuse of discretion. *Id.* at 14. Finally, he argues that he should not be bound by his counsel's failure to file the motion. *Id.*

1. Defendant did not preserve his arguments below.

Defendant's claim fails because it is not preserved, and he has not argued plain error or any other exception to the preservation rules.

When defense counsel told Judge Atherton that he and the prosecutor had discussed the possibility of a restitution hearing, the following exchange occurred:

THE COURT: Well, get closer. If there are disputes I – I set a lot of these restitution hearings because it's murky. So what I want you to do is file a motion for restitution.

[DEFENSE COUNSEL]: Okay.

THE COURT: And with some specifics about what I can look at before we get to the restitution hearing –

[DEFENSE COUNSEL]: Right.

THE COURT: -- and nobody knows anything.

[DEFENSE COUNSEL]: Yeah. I don't think it's going to be a complicated hearing. The only issue is really addressing his availability to pay and those resources he has available to pay this whole amount.

THE COURT: Well, let's get all of that documentation then.

[DEFENSE COUNSEL]: Okay.

THE COURT: I will set it for hearing.

[DEFENSE COUNSEL]: Okay. And, Your Honor, how long do we have to file that motion, just so -

THE COURT: Whenever you want.

[DEFENSE COUNSEL]: Okay. Thank you.

R122:10-11. Nowhere in this exchange did defense counsel preserve a claim of error in the judge's invitation to prepare before scheduling a hearing.

To "preserve an issue for appeal, a defendant must raise the issue before the district court in such a way that the court is placed on notice of potential error and then has the opportunity to correct or avoid the error."

State v. Diaz-Arevalo, 2008 UT App 219, ¶10, 189 P.3d 85. This generally requires a party to make "a timely and specific objection" in the trial court. *State v. Low*, 2008 UT 58, ¶17, 192 P.3d 867 (quotation and citation omitted).

An appellate argument is not preserved unless the objection below was based on the same grounds as the appellate argument. *See id.*

Here, Defendant did not alert Judge Atherton to the specific “error” complained of. Defendant did not ask that a hearing be scheduled immediately, did not claim to be ready to proceed without further investigation, and did not object to the delay or to the need to file a motion for a hearing. R122:10-11. The trial court thus was not put on notice that Defendant had further complaint and had no opportunity to remedy Defendant’s perceived problems.

Instead, Defendant’s exchange with the judge smacks of invited error. Defense counsel knew of the restitution amount requested in the PSI prior to sentencing and had ample opportunity at sentencing to request that a hearing be set. R40; R122:3. He did not do so. He affirmatively and repeatedly embraced the grace period to prepare his challenge, and then did not subsequently request a hearing. *See State v. Person*, 2006 UT App 288, ¶11, 140 P.3d 584 (invited error prevented appellate review when defense counsel affirmatively indicated he had no objection to proceeding without a hearing then did not request one thereafter); *see also State v. McNeil*, 2016 UT 3, ¶¶17-23, 803 Utah Adv. Rep. 40 (a defendant invites error if it can be said that he “paint[s] himself into his current corner”).

Further, Defendant did not raise these arguments when he moved for relief from the restitution order before Judge Trease. R87-89; R123:4-9, 12-

14. Absent an objection in the district court asserting the same grounds as the appellate argument, the issue is not preserved for review on direct appeal. *Low*, 2008 UT 58, ¶17.

Yet Defendant presents his arguments as if they were preserved, presenting no argument under any exception to the preservation rule. See Aplt.Br. 11-15. Because Defendant has failed to preserve this claim or argue an exception to the preservation rule on appeal, this Court should reject it on this ground alone. See *State v. Pinder*, 2005 UT 15, ¶45, 114 P.3d 551, *reh'g denied* 6/1/2005; *State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995); *Marcroft v. Labor Commission*, 2015 UT App 174, ¶4 n.1, 356 P.3d 164 (“An appellant proceeds at his peril if preservation or plain error is not dealt with in his opening brief.”). Should this Court elect to review his arguments, they are entitled to no more than plain error review.

2. Defendant shows no obvious prejudicial error.

Defendant claims that Judge Atherton denied him a full restitution hearing, that it was a violation of the relevant statute and inherently unfair to require that he do anything more than object to the restitution amount in order to get a hearing, and that Judge Trease abused her discretion by not granting him relief from the restitution order on these bases. Aplt.Br. 11-15.

It is in the trial court's discretion to impose sentence, which may include restitution. *See State v. Weeks*, 2000 UT App 273, ¶7, 12 P.3d 110; Utah Code Ann. § 76-3-201(2) & (4) (West Supp. 2010). If "the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue." Utah Code Ann. § 77-38a-302(4).

Here, the sentencing court fully complied with its statutory duty, and Defendant cites no authority to the contrary. The sentencing judge imposed restitution and, after Defendant objected, expressed her willingness to "allow the defendant a full hearing on the issue." *Id.* The judge discussed with defense counsel the need for specific information with which to challenge the restitution, then invited counsel to let the court know when the documentation was collected, at which point she would "set it for hearing." R122:10-11. Thus, far from denying Defendant a hearing, Judge Atherton agreed to schedule one as soon as Defendant informed her that he was ready to proceed. Defendant need only formally seek a hearing later.

Not immediately scheduling a hearing was entirely rational where it was obvious that Defendant was not yet ready to challenge the restitution amount. He told Judge Atherton that "we're still a little bit in question as to whether or not that full amount [of restitution] was attributable to him. But

it's absolutely clear that it was a lot more than \$5,000 attributable to him." R122:5. He informed the court that the requested restitution was based on "the full retail value" of the stolen phones and explained "that almost nobody ever pays" that amount. R122:7. He did not, however, suggest a more appropriate amount for use in estimating restitution. Further, he explained that he had spoken with the prosecutor "a little while ago" and that they "talked about having a restitution hearing to determine what court-ordered restitution and total restitution would be." R122:10. But he never indicated what they decided, if anything. Thus, Defendant appeared to need additional time to investigate – an impression reinforced by defense counsel's ready agreement with Judge Atherton's invitation to prepare for the hearing before setting a date. R122:10-11 (*see* invited error argument, subsection 1, *supra*).

Defendant cites no authority establishing that the sentencing court's handling of the issue in this case violates the court's responsibilities under Utah's Restitution Act. And the two cases he mentions provide no guidance. He cites *State v. Haga*, where this Court remanded the case to the trial court to hold a restitution hearing because Haga requested one, the court "informed him he could have one," and no hearing was ever held. 954 P.2d 1284, 1286, 1289 (Utah App. 1998). The opinion is silent about why the

hearing never materialized and, hence, provides no guidance concerning the challenged conduct in this case.

He also cites *State v. Gibson*, where the trial court immediately scheduled a hearing after the parties requested one to settle the restitution amount to be paid under Gibson's plea agreement. 2009 UT App 108, ¶¶3-4, 208 P.3d 543. Defendant says that *Gibson* is relevant because it contains no indication that Gibson had to file a motion before the hearing was scheduled. Aplt.Br. 12. But merely because one judge does not invite the defense to file a motion to schedule a restitution hearing does not show error on the part of another judge who does.

Finally, Defendant's general claim that Utah law somehow insulates him from his trial counsel's failure to further pursue a restitution hearing is inadequately briefed. See *State v. Davie*, 2011 UT App 380, ¶16, 264 P.3d 770 (issue is inadequately briefed when its overall analysis is "so lacking as to shift the burden of research and argument to the reviewing court.") (citation and quotation omitted); Utah R. App. P. 24(a)(9). He cites nothing to support this claim. Aplt.Br. 14-15. His attempt to distance himself from his trial counsel's conduct echoes his ineffectiveness claim, which the State addresses in Point II, *infra*.

In sum, Judge Atherton offered—as required by law—to give Defendant a restitution hearing and, with it, “a full opportunity” to examine and challenge the restitution amount imposed by the court. *See* Utah Code Ann. §77-38a-302(4); *State v. Gomez*, 887 P.2d 853, 854 (Utah 1994) (holding that fundamental principles of procedural fairness in sentencing were met when Defendant was provided such an opportunity). Defendant only had to ask for it. He did not. He therefore has not shown that he was denied a hearing in violation of the Utah Restitution Act.

II.

DEFENDANT CANNOT MEET HIS HEAVY BURDEN TO OVERCOME *STRICKLAND*’S STRONG PRESUMPTION THAT COUNSEL PERFORMED EFFECTIVELY

Defendant alternatively argues that his trial counsel was ineffective for not timely filing a motion to set a restitution hearing.⁷ Aplt.Br. 22-25. Defendant’s claim fails under both prongs of the *Strickland* analysis.

⁷ Defendant also claims that his counsel performed deficiently when he failed to “clearly object” to the restitution order at sentencing. Aplt.Br. 22, 24. The record is clear, however, that counsel objected sufficiently to alert the trial court to the need for a restitution hearing. R122:5, 7, 10-11. Defendant admits as much, stating that he “clearly indicated his objection to the amount of restitution recommended in the pre-sentence report.” Aplt.Br. 12.

A. The burden is on Defendant to provide an adequate record to prove both deficient performance and prejudice.

To show ineffective assistance, Defendant must first demonstrate that trial counsel performed deficiently—i.e. that even with the “strong presumption that [trial] counsel’s conduct falls within the wide range of reasonable professional assistance,” the challenged action was objectively unreasonable and “could not be considered sound trial strategy.” *Strickland v. Washington*, 466 U.S. 688, 689 (1984) (citation omitted); *State v. Gerber*, 2015 UT App 76, ¶9, 347 P.3d 852; *State v. Daniels*, 2014 UT App 230, ¶10, 336 P.3d 1074. This burden requires Defendant to demonstrate that “there was *no conceivable tactical basis* for counsel’s actions.” *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162 (emphasis in original) (quotations and citation omitted); *see also Daniels*, 2014 UT App 230, ¶9.

Defendant must also prove prejudice—i.e., that absent counsel’s deficient performance, there is a reasonable probability that he would have received a more favorable result below. *See State v. Chacon*, 962 P.2d 48, 50 (Utah 1998). Again, Defendant “bears the burden of establishing prejudice as a demonstrable reality,” and “the likelihood of a different result must be substantial, not just conceivable.” *State v. McNeil*, 2013 UT App 134, ¶30, 302 P.3d 844 (quotations and citations omitted); *see also Harrington v. Richter*, 131 S. Ct. 770, 792 (2011).

If a defendant fails to establish either deficient performance or prejudice, his claim of ineffective assistance of counsel fails as a matter of law. *Gerber*, 2015 UT App 76, ¶9.

Defendant bears the added burden of assuring that “the record is adequate.” An “appellate court will presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which [the] defendant is aware.” *State v. Litherland*, 2000 UT 76, ¶¶ 16-17, 12 P.3d 92. “Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively.” *Id.*

B. Defendant cannot prove deficient performance on this record.

Defendant claims that his counsel performed deficiently when he did not file a motion requesting that a restitution hearing be set. Aplt.Br. 22-24. He argues that this inaction was objectively unreasonable because counsel knew that Defendant disputed the amount and wanted a hearing. *Id.* at 24.

Defendant cannot prove deficient performance on this record. Although the record reflects that trial counsel did not move for a restitution hearing, nothing in the record reveals why he did not do so. Defendant assumes that his trial counsel would have presented favorable evidence that would have reduced the “incredibly large amount of restitution” that Judge

Atherton imposed. *Id.* at 23-24. Nothing in the record supports such an assumption, and Defendant has not sought a rule 23B remand to establish record support for his claim. *See* Utah R. App. P. 23(b).

Absent record evidence to the contrary, *Strickland* requires this Court to presume that counsel reasonably decided not to request the hearing because he did not have evidence to rebut the accuracy of the restitution amount. *Strickland*, 466 U.S. at 689; *see also Lafferty v. State*, 2007 UT 73, ¶26, 175 P.3d 530 (court presumes counsel acted reasonably absent contrary evidence), *reh'g denied* 1/4/2008.

Defense counsel knew the large restitution amount that ACS sought, knew the underlying facts, was familiar with Defendant's financial situation, and embraced an opportunity to investigate further before challenging the restitution amount. His comments at sentencing suggest that he intended to investigate how much of the restitution was attributable to Defendant, the appropriate valuation of the phones for restitution purposes, and Defendant's ability to pay such a large amount. R122:5, 7, 10-11. His failure to later pursue a hearing is entirely consistent with a strategic determination based on his discoveries that the answers to these issues would not benefit, or perhaps would even harm, Defendant. Indeed, it is entirely possible that upon review, counsel concluded that if

challenged, ACS could show even higher losses than those submitted. R38, 40 (showing increase in estimated losses attributable to Defendant).

It is equally possible on this record that counsel found the restitution amount to be accurate. The requested sum came directly from the victim's business records and extended over seven months. R37-38, 40. The victim was able to identify the amounts owing by each of the co-defendants, suggesting the existence of detailed records. *Id.* Where Defendant took a large number of new, high-end Blackberries, use of the full retail value of the phones would accurately reflect the damage suffered by ACS. R40; R122:3-4, 7. Thus, defense counsel may have found that the PSI amount reflected an accurate assessment of the financial harm ACS suffered as a result of Defendant's actions, negating the need for a hearing.

And while Defendant may well have difficulty paying the entire amount of restitution, that difficulty does not bear on the order for complete restitution. *See* Utah Code Ann. § 77-38a-302(5)(b) (listing relevant facts for determining complete restitution; no mention of accused's ability to pay). In any event, Defendant is not destitute: he has two jobs, the support of several people willing to "help out," in-laws who provide rent-free living, and a supportive wife who also works. R38-39; R122:7. Thus, defense

counsel may have reasonably determined that he had no legitimate basis upon which to challenge Defendant's ability to pay the restitution.

Defendant's claim is, therefore, purely speculative, and this Court must presume that counsel performed effectively. *See Litherland*, 2000 UT 76, ¶17 ("Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively."); *State v. McHugh*, 2011 UT App 62, ¶5, 250 P.3d 1006 (rejecting ineffective assistance claim where claim was speculative absent evidence of the content of recordings that were not before the court); *Person*, 2006 UT App 288, ¶14 (rejecting speculative prejudice claim that was without insight or record support to show what information counsel could have provided had he sought to have Defendant's plea withdrawn).

C. Defendant cannot prove prejudice on this record.

Similarly, Defendant cannot establish on this record that he was prejudiced by his trial counsel's decision not to pursue a restitution hearing. As noted, Defendant must show that absent counsel's deficient performance, there is a reasonable probability that he would have received a more favorable result below. *See Chacon*, 962 P.2d at 50. Here, he can prevail only by showing that there is a reasonable probability that the

amount of complete restitution would have been reduced if his trial counsel had obtained a restitution hearing.

Defendant cannot do so because the record lacks any facts showing that the restitution amount was reasonably likely to have changed. He identifies no evidence that would have reduced the restitution amount. Instead, he recognizes the heavy financial burden he carries because of the “incredibly large” restitution amount, then summarily asserts that he has been “extremely prejudiced” by the absence of a full restitution hearing. Aplt.Br. 24. He merely assumes, without establishing, that a restitution hearing would have altered the restitution amount and, therefore, lessened his burden. And, as noted, the record provides no reason to believe a different outcome is reasonably likely to have occurred.

In sum, Defendant has shown no probability, let alone a reasonable one, that defense counsel could have reduced the complete restitution determination had he filed a motion to set a restitution hearing. Defendant’s ineffective assistance claim thus fails.


CONCLUSION

Because Judge Trease did not abuse her discretion in denying Defendant’s motion for relief from the restitution order and his request for a

restitution hearing, and because Defendant's trial counsel was not constitutionally ineffective, this Court should affirm Judge Trease's ruling.

Respectfully submitted on March 4, 2016.


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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 9,377 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



KRIS C. LEONARD
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on March 4, 2016, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

Joel J. Kittrell
Kristina H. Ruedas
Richards Brandt Miller Nelson
Wells Fargo Center, 15th Floor
299 s. Main Street
P. O. Box 2465
Salt Lake City, Utah 84110-2465

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.

Lee Nakamura

Addenda

Addendum A

CHAPTER 38a

CRIME VICTIMS RESTITUTION ACT

Part 1. General Provisions

Section

Part 3. Restitution Requirements

Section

77-38a-102. Definitions.

77-38a-302. Restitution criteria.

Part 2. Restitution Determination

77-38a-203. Restitution determination—Department of Corrections—Presentence investigation.

PART 1. GENERAL PROVISIONS

§ 77-38a-102. Definitions

As used in this chapter:

(1) "Conviction" includes a:

- (a) judgment of guilt;
- (b) a plea of guilty; or
- (c) a plea of no contest.

(2) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(3) "Department" means the Department of Corrections.

(4) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program, make restitution to the victim, or fulfill some other condition.

(5) "Party" means the prosecutor, defendant, or department involved in a prosecution.

(6) "Pecuniary damages" means all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.

(7) "Plea agreement" means an agreement entered between the prosecution and defendant setting forth the special terms and conditions and criminal charges upon which the defendant will enter a plea of guilty or no contest.

(8) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(9) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

(10) "Plea disposition" means an agreement entered into between the prosecution and defendant including diversion, plea agreement, plea in abeyance agreement, or any agreement by which the defendant may enter a plea in any other jurisdiction or where charges are dismissed without a plea.

(11) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including prejudgment interest, the accrual of interest from the time of sentencing, insured damages, reimbursement for payment of a reward, and payment for expenses to a governmental entity for extradition or transportation and as may be further defined by law.

(12)(a) "Reward" means a sum of money:

(i) offered to the public for information leading to the arrest and conviction of an offender; and

(ii) that has been paid to a person or persons who provide this information, except that the person receiving the payment may not be a codefendant, an accomplice, or a bounty hunter.

(b) "Reward" does not include any amount paid in excess of the sum offered to the public.

(13) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

(14)(a) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(b) "Victim" may not include a codefendant or accomplice.

Laws 2001, c. 137, § 3, eff. April 30, 2001; Laws 2003, c. 278, § 2, eff. May 5, 2003; Laws 2005, c. 96, § 3, eff. May 2, 2005.

PART 2. RESTITUTION DETERMINATION

§ 77-38a-203. Restitution determination—Department of Corrections—Presentence investigation

(1)(a) The department shall prepare a presentence investigation report in accordance with Subsection 77-18-1(5). The prosecutor and law enforcement agency involved shall provide all available victim information to the department upon request. The victim impact statement shall:

(i) identify all victims of the offense;

(ii) itemize any economic loss suffered by the victim as a result of the offense;

(iii) include for each identifiable victim a specific statement of the recommended amount of complete restitution as defined in Section 77-38a-302, accompanied by a recommendation from the department regarding the payment by the defendant of court-ordered restitution with interest as defined in Section 77-38a-302;

(iv) identify any physical, mental, or emotional injuries suffered by the victim as a result of the offense, and the seriousness and permanence;

(v) describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(vi) identify any request for mental health services initiated by the victim or the victim's family as a result of the offense; and

(vii) contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(b) The crime victim shall be responsible to provide to the department upon request all invoices, bills, receipts, and other evidence of injury, loss of earnings, and out-of-pocket loss. The crime victim shall also provide upon request:

(i) all documentation and evidence of compensation or reimbursement from insurance companies or agencies of the state of Utah, any other state, or federal government received as a direct result of the crime for injury, loss, earnings, or out-of-pocket loss; and

(ii) proof of identification, including date of birth, Social Security number, drivers license number, next of kin, and home and work address and telephone numbers.

(c) The inability, failure, or refusal of the crime victim to provide all or part of the requested information shall result in the court determining restitution based on the best information available.

(2)(a) The court shall order the defendant as part of the presentence investigation to submit to the department any information determined necessary to be disclosed for the purpose of ascertaining the restitution.

(b) The willful failure or refusal of the defendant to provide all or part of the requisite information shall constitute a waiver of any grounds to appeal or seek future amendment or alteration of the restitution order predicated on the undisclosed information.

(c) If the defendant objects to the imposition, amount, or distribution of the restitution recommended in the presentence investigation, the court shall set a hearing date to resolve the matter.

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

Laws 2001, c. 137, § 6, eff. April 30, 2001; Laws 2005, c. 96, § 4, eff. May 2, 2005.

PART 3. RESTITUTION REQUIREMENTS

§ 77-38a-302. Restitution criteria

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5)(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;

(v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and:

§ 77-38a-302

CODE OF CRIMINAL PROCEDURE

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines may make restitution inappropriate.

(d)(i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.

(ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.

(e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

Laws 2001, c. 137, § 8, eff. April 30, 2001; Laws 2002, c. 35, § 13, eff. May 6, 2002; Laws 2002, c. 185, § 51, eff. May 6, 2002; Laws 2003, c. 285, § 1, eff. May 5, 2003; Laws 2005, c. 96, § 5, eff. May 2, 2005.

Utah Code Ann. (West 2004)

§ 77-38a-301. Restitution – Convicted defendant may be required to pay

In a criminal action, the court may require a convicted defendant to make restitution.

Laws 2001, c. 137, § 7, eff. April 30, 2001.

Addendum B

THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

VS.

JASON SPEED,

Defendant.

Case No. 101901272

SENTENCE, JUDGMENT, &
COMMITMENT

BEFORE THE HONORABLE JUDITH ATHERTON

SCOTT M. MATHESON COURTHOUSE
450 South State Street
Salt Lake City, Utah 84111

OCTOBER 15, 2010


FILED
UTAH APPELLATE COURTS

APR 22 2015

FILED DISTRICT COURT
Third Judicial District

FEB 28 2015

SALT LAKE COUNTY

By  Deputy Clerk

20150011-CA

 ORIGINAL

242-02-0-10

A P P E A R A N C E S

FOR THE STATE:

Nathaniel J. Sanders
SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: 801.363.7900

FOR THE DEFENSE:

Brock A. Van De Camp
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South Suite 300
Salt Lake City, Utah 84111
Telephone: 801.532.5444

1 October 15, 2010

2 * * *

3 THE COURT: Mr. Speed, Your Honor, if you would
4 please call that case.

5 THE COURT: Yeah. This is sentencing?

6 MR. VAN DE CAMP: It is, Judge. And you may have --
7 are pretty familiar with this situation because I think you
8 sentenced a couple of the co-defendants already.

9 THE COURT: Oh, I'm very familiar.

10 MR. VAN DE CAMP: Right.

11 THE COURT: And I thought the last time was the last
12 person but Mr. Speed isn't even the last person.

13 MR. VAN DE CAMP: And according to this, there is
14 actually one more between --

15 THE COURT: One more coming up.

16 MR. VAN DE CAMP: -- scheduled for the 29th.

17 THE COURT: In a couple weeks.

18 All right. Mr. Speed, you're before me today for
19 sentencing. Entered a plea of guilty to attempted theft by
20 deception, a third degree felony. I have reviewed the
21 presentence report.

22 Mr. Van De Camp, have you and Mr. Speed, done that as
23 well?

24 MR. VAN DE CAMP: We have gone through it, Judge.

25 THE COURT: And Mr. Sanders, have you reviewed that?

1 **MR. SANDERS:** Yes, Your Honor. We will submit on the
2 PSR recommendations.

3 **THE COURT:** Okay.

4 **MR. VAN DE CAMP:** Actually, I think that's incorrect.
5 I spoke with Mr. Renteria this morning and the State's position
6 is that they're going to recommend probation without any
7 additional jail time.

8 **THE COURT:** Okay.

9 **MR. SANDERS:** Actually -- well, Your Honor, unless
10 Mr. Renteria comes, the State's position will remain that we
11 submit on the recommendations.

12 **THE COURT:** Thank you.

13 **MR. VAN DE CAMP:** Okay. I mean, he was just here. I
14 don't know why he left but...

15 **THE COURT:** That's fine.

16 **MR. VAN DE CAMP:** We're asking the Court to not
17 impose jail time. He's done six days. This is really his
18 first incident. And if you look in terms of timing, he's on
19 probation on it for another case, but that probation occurred
20 after the -- after this offense date.

21 Jason has taken full responsibility for this. He's
22 gotten two jobs recently to -- in anticipation of having a
23 large financial obligation related to this case. As he said in
24 his statement -- and I don't think there is an issue of him
25 taking responsibility.

1 And I think that this situation spiraled out of
2 control for him as well as everyone else that was working
3 there. A lot more money has been attributed to him, and we're
4 still a little bit in question as to whether or not that full
5 amount was attributable to him. But it's absolutely clear that
6 it was a lot more than \$5,000 attributable to him.

7 And it's really just a matter of what kind of
8 punishment the Court would like to impose for this crime.
9 Jason, because of these two jobs, he's really doing very well.
10 It's been about a year and half since these incidents and since
11 the --

12 **THE COURT:** What has he put aside for restitution
13 then?

14 **MR. VAN DE CAMP:** I don't know that.

15 How much have you put aside?

16 **THE DEFENDANT:** Actually, nothing aside. I've just
17 been trying to catch up on previous debt that I've had.

18 **THE COURT:** Well, this debt is huge. I mean, you are
19 more responsible, by far, than any of your co-defendants.
20 Ten, 15 times more -- more restitution than the others. And
21 I'm concerned that you've done nothing to address the issue of
22 restitution that exceeds \$126,000. I don't even know how someone
23 could steal that many phones and not get caught earlier.

24 It's -- I'm baffled by every one of you and I've seen
25 every one of you. Now that you were all in supervisory

1 positions at this phone company, you were given
2 responsibilities and each of you violated the trust of your
3 employer dramatically. You the most dramatically. I'm
4 stunned, really, when I see this type of an offense of just
5 simply taking and taking and taking to your own benefit. I
6 don't know.

7 Mr. Van De Camp.

8 MR. VAN DE CAMP: I mean, Judge, it really speaks for
9 itself. It got out of control and it's hard to stop when free
10 money is available. It is something that they hadn't done --

11 THE COURT: Well, it's free money because you steal
12 something.

13 MR. VAN DE CAMP: Right.

14 THE COURT: You sell something that you don't --

15 MR. VAN DE CAMP: Right.

16 THE COURT: So it's not really free.

17 MR. VAN DE CAMP: It seemed free to them at the time
18 and --

19 THE COURT: It's a two-part theft.

20 MR. VAN DE CAMP: -- certainly wasn't.

21 THE COURT: You're not just -- you didn't just steal
22 it, you then sold it to your own benefit and so --

23 MR. VAN DE CAMP: Yeah.

24 THE COURT: It's --

25 MR. VAN DE CAMP: Well it --

1 **THE COURT:** And did it many, many, many, many times.

2 **MR. VAN DE CAMP:** I hate to back up, but, I mean, he
3 gave some to friends, he gave some to family. He made a lot of
4 very serious mistakes. He sold some for cash. He certainly
5 didn't receive this much money.

6 This is the full retail value of these phones. I
7 mean, we all know that full retail value is an amount that
8 almost nobody ever pays. It's always re-couped through bills
9 and things like that. But this is based on full value for all
10 of these phones, and they're just not cheap phones, if you do
11 pay full retail value. And that's why they added up so
12 quickly. It's probably hundred phones or so is --

13 **THE COURT:** That's --

14 **MR. VAN DE CAMP:** -- the total amount.

15 **THE COURT:** That's a few.

16 **MR. VAN DE CAMP:** It's a lot. It's more than a few.
17 It's a lot of phones and it's a very serious offense.

18 And the reality with Jason is that he's doing very
19 well. He just got married. His wife is very supportive. She
20 works. He works. He's got two jobs. He works at TGI Friday's
21 and then PETCO. He makes \$7.50 an hour at PETCO. He makes,
22 you know, not very good wages at Friday's. It's -- he just
23 doesn't do that well there.

24 **THE DEFENDANT:** For the record, I have been looking
25 for other employment for more opportunity for money. Just it's

1 not a lot [inaudible] out there. But I mean, I'm not going to
2 stop looking just because it's not available. I'm going to
3 keep looking. Keep that drive.

4 **MR. VAN DE CAMP:** I think the Court knows that this
5 is going to result in a felony conviction. It's going to enter
6 on this record today. He got these jobs before it was going to
7 enter. His likelihood of getting more jobs to pay this
8 restitution off is going to decrease in the future.

9 **THE COURT:** Indeed.

10 **MR. VAN DE CAMP:** I mean, there is no doubt about
11 that. He's willing to -- I mean, I think maybe in this case
12 rather than him doing the extra 24 days as AP&P recommends,
13 assuming the Court would follow that recommendation, rather
14 than him doing that, community service would benefit him and
15 the community more than him spending 24 days in our Salt Lake
16 County Jail.

17 **THE COURT:** All right. Mr. Speed, anything you wish
18 to say?

19 **THE DEFENDANT:** I would just like to express my
20 sincere apologizes for the actions that I have taken that have
21 gotten me here. I know I have nothing to say that can justify
22 the things that I have done, but I would like ask for mercy for
23 the reason of wanting a chance [inaudible] court can do.

24 **THE COURT:** Okay. Sentencing as follows: I'm
25 ordering that you serve an indeterminate term at the Utah State

1 Prison of 0 to 5 years. I am suspending all but six days of
2 that with credit for six days served.

3 In lieu of further jail time, I'm ordering that you
4 perform 150 hours of community service to be completed by
5 January the 1st of next year; no leeway. And that means that
6 you're going to have to work double hard. We're going into a
7 season where there should be plenty of community service
8 available, more than other times of the year.

9 I'm placing you on probation for 36 months through
10 the supervision of Adult Probation and Parole. During that
11 period of time, you are to be on good behavior. That means
12 that you are not to come before this court or any other court
13 on anything other than a minor traffic offense. You are to
14 comply with all conditions placed upon you, including but not
15 limited to having no contact with co-defendants, maintain full
16 time employment, no drugs, no alcohol, submit to random drug
17 testing as deemed appropriate. Pay restitution in the amount
18 of \$126,547.

19 Mr. Van De Camp, I will let you approach later.

20 **MR. VAN DE CAMP:** Right.

21 **THE COURT:** But I want to get this on --

22 **MR. VAN DE CAMP:** Right.

23 **THE COURT:** -- rather than deferring it. I want you
24 to make monthly payments every single month toward the
25 restitution. I will let you work with AP&P towards that, but I

1 want them to immediately start getting reimbursed for their
2 losses. A fine and surcharge of \$750. Attorneys fees of \$250.
3 So I will work your fine off in community service at a rate of
4 \$7 per hour and you can work with that.

5 But I'm -- I'm giving you that opportunity,
6 Mr. Speed, and I really expect you to make significant advances
7 towards dealing with this enormous restitution, that you need
8 to make your victim whole. Wait for a moment. We will give
9 you the information. You need to check in at AP&P on Monday.

10 **MR. VAN DE CAMP:** And Your Honor, speaking with
11 Mr. Renteria a little while ago, we talked about having a
12 restitution hearing to determine what court-ordered restitution
13 and total restitution would be.

14 **THE COURT:** Well, get closer. If there are disputes
15 I -- I set a lot of these restitution hearings because it's
16 murky. So what I want you to do is file a motion for
17 restitution.

18 **MR. VAN DE CAMP:** Okay.

19 **THE COURT:** And with some specifics about what I can
20 look at before we get to the restitution hearing --

21 **MR. VAN DE CAMP:** Right.

22 **THE COURT:** -- and nobody knows anything.

23 **MR. VAN DE CAMP:** Yeah. I think -- it's not a
24 complicated -- I don't think it's going to be a complicated
25 hearing. The only issue is really addressing his availability

1 to pay and those resources he has available to pay this whole
2 amount.

3 **THE COURT:** Well, let's get all of that documentation
4 then.

5 **MR. VAN DE CAMP:** Okay.

6 **THE COURT:** I will set it for hearing.

7 **MR. VAN DE CAMP:** Okay. And, Your Honor, how long do
8 we have to file that motion, just so --

9 **THE COURT:** Whenever you want.

10 **MR. VAN DE CAMP:** Okay. Thank you.

11 (End of hearing.)

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C E R T I F I C A T E

STATE OF UTAH)
) SS
COUNTY OF SALT LAKE)

I, KATIE HARMON, a Certified Shorthand Reporter in
and for the State of Utah, do hereby certify that I received
the audio recording in this matter, and that I transcribed it
into typewriting and that a full, true and correct
transcription of said audio recording so recorded and
transcribed is set forth in the foregoing pages, inclusive
except where it is indicated that the recording was inaudible.

DATED this 13th day of February, 2015.

KATIE HARMON, RPR, CSR

Addendum C

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

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
vs. :
JASON M SPEED, : Case No: 101901272 FS
Defendant. : Judge: JUDITH S. ATHERTON
: Date: October 15, 2010

PRESENT

Clerk: jennifaj
Prosecutor: SANDERS, NATHANIEL J
Defendant
Defendant's Attorney(s): VAN DE KAMP, BROCK A

DEFENDANT INFORMATION

Date of birth: March 11, 1984
Sheriff Office#: 334008
Video
Tape Number: s45 Tape Count: 11:23-

CHARGES

1. ATTEMPTED THEFT BY DECEPTION (amended) - 3rd Degree Felony
Plea: Guilty - Disposition: 08/13/2010 Guilty

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED THEFT BY DECEPTION 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.

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED THEFT BY DECEPTION a 3rd Degree Felony, the defendant is sentenced to a term of 6 day(s)
Credit is granted for time served.
Credit is granted for 6 day(s) previously served.

SENTENCE FINE

Charge # 1 Fine: \$750.00
Suspended: \$0.00
Surcharge: \$362.43
Due: \$750.00

Total Fine: \$750.00
Total Suspended: \$0
Total Surcharge: \$362.43
Total Principal Due: \$750.00
Plus Interest

SENTENCE FINE SUSPENDED NOTE

Court will allow for fine to be worked off in community service at a rate of \$7 per hour

COMMUNITY SERVICE

Complete 150 hour(s) of community service.
Community service is to be completed by February 1, 2011.

Attorney Fees Amount: \$250.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURE

Restitution: Amount: \$126547.00
Pay in behalf of: ACS, INC

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 6 day(s) jail.

Defendant is to pay a fine of 750.00 which includes the surcharge.
Interest may increase the final amount due.


PROBATION CONDITIONS

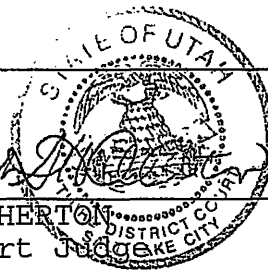
Usual and ordinary conditions required by Adult Probation & Parole.
Violate no laws.
Comply with all standard drug & alcohol conditions imposed by probation agency.
Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.
Do not frequent any place where drugs are used, sold or otherwise distributed illegally.
Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer.
Refrain from the use of alcoholic beverages.
No contact with Co-Defendants
Maintain full time employment

Case No: 101901272 Date: Oct 15, 2010

Pay Restitution

Date: 10-15-10


JUDITH S. ATHERTON
District Court Judge



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

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
vs. :
JASON M SPEED, : Case No: 101901272 FS
Defendant. : Judge: JUDITH S. ATHERTON
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Clerk: jennifaj
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Defendant's Attorney(s): VAN DE KAMP, BROCK A

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Total Suspended: \$0
Total Surcharge: \$362.43
Total Principal Due: \$750.00
Plus Interest

SENTENCE FINE SUSPENDED NOTE

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COMMUNITY SERVICE

Complete 150 hour(s) of community service.
Community service is to be completed by February 1, 2011.
Attorney Fees Amount: \$250.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURE

ORDER OF PROBATION

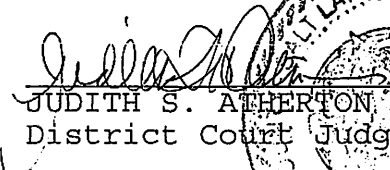
The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 6 day(s) jail.

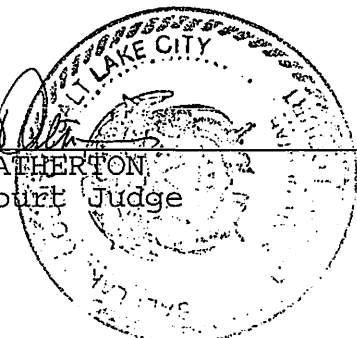
Defendant is to pay a fine of 750.00 which includes the surcharge.
Interest may increase the final amount due.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation & Parole.
Violate no laws.
Comply with all standard drug & 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.
Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer.
Refrain from the use of alcoholic beverages.
No contact with Co-Defendants
Maintain full time employment
Pay Restitution

Date: 10/15/10


JUDITH S. ATHERTON
District Court Judge



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

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
 :
vs. : Case No: 101901272 FS
JASON M SPEED, : Judge: JUDITH S. ATHERTON
Defendant. : Date: October 15, 2010

PRESENT

Clerk: jennifaj
Prosecutor: SANDERS, NATHANIEL J
Defendant
Defendant's Attorney(s): VAN DE KAMP, BROCK A

DEFENDANT INFORMATION

Date of birth: March 11, 1984
Sheriff Office#: 334008
Video
Tape Number: s45 Tape Count: 11:23-

CHARGES

1. ATTEMPTED THEFT BY DECEPTION (amended) - 3rd Degree Felony
Plea: Guilty - Disposition: 08/13/2010 Guilty

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED THEFT BY DECEPTION 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.

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED THEFT BY DECEPTION a 3rd Degree Felony, the defendant is sentenced to a term of 6 day(s)

Credit is granted for time served.

Credit is granted for 6 day(s) previously served.

SENTENCE FINE

Charge # 1 Fine: \$750.00
Suspended: \$0.00
Surcharge: \$362.43
Due: \$750.00

Total Fine: \$750.00
Total Suspended: \$0
Total Surcharge: \$362.43
Total Principal Due: \$750.00
Plus Interest

SENTENCE FINE SUSPENDED NOTE

Court will allow for fine to be worked off in community service at a rate of \$7 per hour

COMMUNITY SERVICE

Complete 150 hour(s) of community service.
Community service is to be completed by February 1, 2011.

Attorney Fees Amount: \$250.00 Plus Interest
Pay in behalf of: SALT LAKE COUNTY TREASURE

Restitution: Amount: \$126547.00
Pay in behalf of: ACS, INC

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 6 day(s) jail.

Defendant is to pay a fine of 750.00 which includes the surcharge.
Interest may increase the final amount due.


PROBATION CONDITIONS

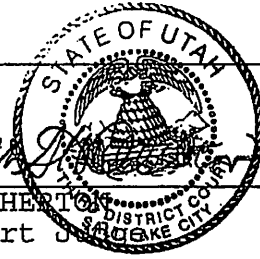
Usual and ordinary conditions required by Adult Probation & Parole.
Violate no laws.
Comply with all standard drug & alcohol conditions imposed by probation agency.
Do not use, consume, or possess alcohol or illegal drugs; nor associate with any persons using, possessing or consuming alcohol or illegal drugs.
Do not frequent any place where drugs are used, sold or otherwise distributed illegally.
Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer.
Refrain from the use of alcoholic beverages.
No contact with Co-Defendants
Maintain full time employment

Case No: 101901272 Date: Oct 15, 2010

Pay Restitution

Date: 10-15-10


JUDITH S. ATHERTON
District Court Judge



Addendum D

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

APPEALED: CASE #20150011

STATE OF UTAH vs. JASON M SPEED

CASE NUMBER 101901272 State Felony

Defendants DANIEL SCOTT MURRAY, SERGIO JOEL MENDOZA, TINA MARIE INGER,
JASON M SPEED, are linked.

CHARGES

Charge 1 - 76-6-405 - ATTEMPTED THEFT BY DECEPTION 2nd Degree
Felony (amended) to 3rd Degree Felony
Offense Date: June 01, 2009
Plea: August 13, 2010 Guilty
Disposition: August 13, 2010 Guilty

CURRENT ASSIGNED JUDGE

VERNICE TREASE

PARTIES

Bondsman - DEWEY'S BAIL BOND COMPANY
Defendant - JASON M SPEED
Represented by: JOAN C WATT
Represented by: BROCK A VAN DE KAMP
Represented by: ALLYSON L BARKER
Plaintiff - STATE OF UTAH

DEFENDANT INFORMATION

Defendant Name: JASON M SPEED
Offense tracking number: 33905449
Date of Birth: March 11, 1984
Jail Booking Number: 10011395
Law Enforcement Agency: SALT LAKE CITY PD
LEA Case Number: 09-197107
Prosecuting Agency: SALT LAKE COUNTY
Agency Case Number: 10004490
Sheriff Office Number: 334008

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	20.00
	Amount Paid:	20.00
	Credit:	0.00

Printed: 03/04/16 11:17:13

Page 1

CASE NUMBER 101901272 State Felony

Balance:	0.00
PAPER BOND TOTALS Posted:	10,000.00
Forfeited:	0.00
Exonerated:	10,000.00
Balance:	0.00
REVENUE DETAIL - TYPE: AUDIO TAPE COPY	
Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00
REVENUE DETAIL - TYPE: AUDIO TAPE COPY	
Amount Due:	10.00
Amount Paid:	10.00
Amount Credit:	0.00
Balance:	0.00
NONMONETARY BOND DETAIL - TYPE: Surety	
Posted By:	DEWEY'S BAIL BOND COMPANY (#N/A)
Posted:	10,000.00
Forfeited:	0.00
Exonerated:	10,000.00
Balance:	0.00

CASE NOTE

DAO#10004490

PROCEEDINGS

02-19-10 Case filed
02-19-10 Filed: From an Information
02-19-10 Notice - WARRANT for Case 101901272 ID 12773424
02-19-10 Judge DENO HIMONAS assigned.
02-19-10 Filed: Information
02-19-10 Note: CASE FILED BY DET BOELTER OF SLCPD. WARRANT ACTIVE
02-19-10 Warrant ordered on: February 19, 2010 Warrant Num: 985189728
Bail Allowed
Bail amount: 10000.00
02-19-10 Warrant issued on: February 19, 2010 Warrant Num: 985189728
Bail Allowed
Bail amount: 10000.00
Judge: ANTHONY B QUINN
Issue reason: Based on the probable cause statement.

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CASE NUMBER 101901272 State Felony

02-24-10 Judge JUDITH S ATHERTON assigned.

02-24-10 Note: Assigned judge changed on the filing screen per Admin
Rule 04-01

03-02-10 Warrant recalled on: March 02, 2010 Warrant num: 985189728
Recall reason: Warrant recalled because defendant was
booked.

03-02-10 INITIAL APPEARANCE/JAIL scheduled on March 03, 2010 at 09:00 AM
with Judge ARR.

03-03-10 ROLL CALL scheduled on March 11, 2010 at 02:00 PM with Judge
HILDER.

03-03-10 Minute Entry - Minutes for Appointment of Counsel

Judge: TYRONE E. MEDLEY

PRESENT

Clerk: tinaa

Prosecutor: PETRIK, HOLLY A

Defendant

Audio

Tape Number: cr s31 Tape Count: 10.02

INITIAL APPEARANCE

A copy of the Information is given to the defendant.

The Information is read.

Advised of charges and penalties.

The defendant is advised that this offense may be used as an
enhancement to the penalties for a subsequent offense.

APPOINTMENT OF COUNSEL

Court finds the defendant indigent and appoints Salt Lake Legal
Defenders to represent the defendant.

Appointed Counsel:

Name: Salt Lake Legal Defenders

Address: 424 East 500 South Suite #101

City: Salt Lake City UT 84111

Phone: 532-5444

Printed: 03/04/16 11:17:13

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Affidavit of indigency is to be submitted by the defendant
Instructions to the defendant:

1. You are to immediately contact and consult with appointed counsel.
2. You are to cooperate with the appointed counsel in the defense of this case.
3. You are to keep appointed counsel advised at all times of an address and a telephone number where you can be reached.
4. Attorney's fees for services of counsel may be assessed at the time of sentence.

ROLL CALL is scheduled.

Date: 03/11/2010

Time: 02:00 p.m.

Location: To Be Determined

Third District Court

450 South State

Salt Lake City, UT 84111

Before Judge: ROBERT K HILDER

03-03-10 Note: BAIL REMAINS THE SAME

03-03-10 Filed: DEF'S INFORMATION FROM PTS

03-03-10 Note: Affidavit of Indignecy filed and approved by Judge Medley

03-08-10 Note: Dewey's Bail Bond #N/A \$10,000.00 posted bond on
03/06/10. A Roll Call has been set for 03/11/10 before
Judge Hilder. Bond was posted on 03/08/10.

03-08-10 Bond Account created Total Due: 10000.00

03-08-10 Bond Posted Non-Monetary Bond: 10,000.00

03-09-10 Filed: Appearance Of Counsel

03-09-10 Filed: Formal Request For Discovery Pursuant To Rule 16 Of The
Rules Of Criminal Procedure

03-11-10 Minute Entry - Minutes for Roll Call

Judge: ROBERT K HILDER

PRESENT

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Clerk: terryb
Prosecutor: BLAYLOCK, ROGER S
Defendant
Defendant's Attorney(s): VAN DE KAMP, BROCK A

Video
Tape Number: N 45 Tape Count: 3.35

HEARING

C/O Case set for Resolution hearing.
Defendant appeared out of custody.
RESOLUTION HEARING is scheduled.

Date: 04/08/2010
Time: 02:00 p.m.
Location: To Be Determined
Third District Court
450 South State
Salt Lake City, UT 84111

Before Judge: ROBIN W. REESE

03-12-10 RESOLUTION HEARING scheduled on April 08, 2010 at 02:00 PM with
Judge REESE.

04-08-10 Preliminary Hearing scheduled on May 04, 2010 at 09:00 AM in
FOURTH FLOOR-W45 with Judge TREASE.

04-08-10 Minute Entry - Minutes for Resolution Hearing

Judge: ROBIN W. REESE
PRESENT
Clerk: terryb
Prosecutor: ROSE, MANDY L
Defendant
Defendant's Attorney(s): VAN DE KAMP, BROCK A

Video
Tape Number: S 32 Tape Count: 4.18

HEARING

TAPE: S 32 COUNT: 4.18
Court Orders Case set for Preliminary Hearing

Defendant appeared out of custody.
PRELIMINARY HEARING is scheduled.

Date: 05/04/2010

Time: 09:00 a.m.

Location: Fourth Floor - W45

Before Judge: TREASE, VERNICE

05-04-10 Minute Entry - Minutes for Preliminary Hearing

Judge: VERNICE TREASE

PRESENT

Clerk: jennifew

Prosecutor: SANCHEZ, CORAL

Defendant

Defendant's Attorney(s): VAN DE KAMP, BROCK A

Video

Tape Number: cd Tape Count: 10:40

HEARING

This matter is before the court for a preliminary hearing.
Defendant waives his right to a preliminary hearing. Defendant
waives his right to a speedy trial.

CASE BOUNDOVER

Defendant waived preliminary hearing, State consenting thereto.
This case is bound over. An Arraignment hearing has been set on
7/9/2010 at 9:00 AM in courtroom S45 before Judge JUDITH S.
ATHERTON.

05-04-10 ARRAIGNMENT scheduled on July 09, 2010 at 09:00 AM in FOURTH
FLOOR-S45 with Judge ATHERTON.

05-04-10 Note: Case Bound Over

07-09-10 Minute Entry - Minutes for Arraignment

Judge: JUDITH S. ATHERTON

PRESENT

Clerk: jennifaj

Prosecutor: SHUMAN, JON D

Defendant

Defendant's Attorney(s): VAN DE KAMP, BROCK A

Video

Tape Number: S45 Tape Count: 11:46-

ARRAIGNMENT

Defendant waives reading of Information.

Counsel requests for a disposition date

DISPOSITION is scheduled.

Date: 08/13/2010

Time: 09:00 a.m.

Location: Fourth Floor - S45

Third District Court

450 South State

SLC, UT 84114-1860

Before Judge: JUDITH S. ATHERTON

07-09-10 DISPOSITION scheduled on August 13, 2010 at 09:00 AM in FOURTH FLOOR-S45 with Judge ATHERTON.

08-13-10 Filed order: Statment of defendant in support of guilty plea and certificate of counsel

Judge JUDITH S ATHERTON

Signed August 13, 2010

08-13-10 SENTENCING scheduled on October 15, 2010 at 09:00 AM in FOURTH FLOOR-S45 with Judge ATHERTON.

08-13-10 Charge 1 Disposition is Guilty

08-13-10 Charge 1 amended to 3rd Degree Felony

08-13-10 Minute Entry - Minutes for Change of Plea

Judge: JUDITH S. ATHERTON

PRESENT

Clerk: jennifaj

Prosecutor: GIBBON, STEVEN C

Defendant

Defendant's Attorney(s): VAN DE KAMP, BROCK A

Video

Tape Number: s45 Tape Count: 11:37-

The Information is read.

Court advises defendant of rights and penalties.

Defendant waives time for sentence.

A pre-sentence investigation was ordered.

The Judge orders Adult Probation & Parole to prepare a Pre-sentence report.

Change of Plea Note

Defendant pleas guilty to count one as amended by motion of the state

SENTENCING is scheduled.

Date: 10/15/2010

Time: 09:00 a.m.

Location: Fourth Floor - S45

Third District Court

450 South State

SLC, UT 84114-1860

Before Judge: JUDITH S. ATHERTON

08-13-10 Filed: PSR Referral

10-12-10 **** PRIVATE **** Filed: AP&P Pre-Sentence Report

10-15-10 Bond Exonerated -10,000.00

10-15-10 Minute Entry - Minutes for SENTENCE, JUDGMENT, COMMITME

Judge: JUDITH S. ATHERTON

PRESENT

Clerk: jennifaj

Prosecutor: SANDERS, NATHANIEL J

Defendant

Defendant's Attorney(s): VAN DE KAMP, BROCK A

Sheriff Office#: 334008

Video

Tape Number: s45 Tape Count: 11:23-

SENTENCE PRISON

Based on the defendant's conviction of ATTEMPTED THEFT BY DECEPTION 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.

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED THEFT BY DECEPTION a 3rd Degree Felony, the defendant is sentenced to a term of 6 day(s)

Credit is granted for time served.

Credit is granted for 6 day(s) previously served.

SENTENCE FINE

Charge # 1 Fine: \$750.00

 Suspended: \$0.00

 Surcharge: \$362.43

 Due: \$750.00

 Total Fine: \$750.00

 Total Suspended: \$0

 Total Surcharge: \$362.43

 Total Principal Due: \$750.00

 Plus Interest

SENTENCE FINE SUSPENDED NOTE

Court will allow for fine to be worked off in community service at
a rate of \$7 per hour

COMMUNITY SERVICE

Complete 150 hour(s) of community service.

Community service is to be completed by February 1, 2011.

Attorney Fees Amount: \$250.00 Plus Interest

Pay in behalf of: SALT LAKE COUNTY TREASURE

Restitution: Amount: \$126547.00

Pay in behalf of: ACS, INC

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).

Probation is to be supervised by Adult Probation & Parole.

Defendant to serve 6 day(s) jail.

Defendant is to pay a fine of 750.00 which includes the surcharge.

Interest may increase the final amount due.

PROBATION CONDITIONS

Usual and ordinary conditions required by Adult Probation & Parole.

Violate no laws.

Comply with all standard drug & 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.

Submit to breath and/or urine testing for drugs or alcohol upon the request of any law enforcement officer.

Refrain from the use of alcoholic beverages.

No contact with Co-Defendants

Maintain full time employment

Pay Restitution

10-18-10 Note: SENTENCE, JUDGMENT, COMMITMENT minutes modified.

10-19-10 Judgment #1 Entered \$ 250.00

Creditor: SALT LAKE COUNTY TREASURE

Debtor: JASON M SPEED

250.00 Attorneys Fee's

250.00 Judgment Grand Total

10-19-10 Filed judgment: Minutes Sentence, Judgment, Commitment

Judge JUDITH S ATHERTON

Signed October 15, 2010

02-16-11 Note: AP&P PV Rec'd

02-22-11 Filed order: Court orders for fine to be dismissed, and probation to remain supervised through ap&p

Judge JUDITH S ATHERTON

Signed February 17, 2011

07-12-11 Note: SLCPS Stay Report

07-26-11 Filed order: AP&P Progress Violation Report - Denied -

Probation may Not Terminate

Judge JUDITH S ATHERTON

Signed July 22, 2011

02-27-12 Note: SENTENCE, JUDGMENT, COMMITMENT minutes modified.

02-27-12 Judgment #2 Entered \$ 126547.00

Creditor: ACS INC

Debtor: JASON M SPEED

126,547.00 Restitution

126,547.00 Judgment Grand Total

02-27-12 Filed judgment: Minutes Sentence, Judgment, Commitment

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Judge JUDITH S ATHERTON

Signed October 15, 2010

08-02-13 Judge VERNICE TREASE assigned.

10-01-13 Minute Entry - MINUTE ENTRY (PVR INPUT)

Judge: VERNICE TREASE

The Court has received a Progress/Violation Report from AP&P with the recommendation that defendant's probation be allowed to terminate successfully on October 14, 2013.

In addition AP&P's interest be closed and any remaining financial obligations be referred to Office of State Debt Collection.

The Court gives the prosecution and defense 14 calendar days from the date of this minute entry to submit any objections or other input regarding AP&P's recommendation.

Date: _____

Judge VERNICE TREASE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 101901272 by the method and on the date specified.

MAIL: STATE OF UTAH, UT

MAIL: BROCK A VAN DE KAMP 424 E 500 S SALT LAKE CITY UT 84111

10/01/2013

/s/ JENNIFER WILLIAMS

Date: _____

Deputy Court Clerk

10-16-13 Filed order: AP&P Progress/Violation Report - Having rec'd no obj from DA, the court grants the request to term probation and to have remaining restitution, etc sent to OSDC. The court notes however that b/c rest is outstanding, termination cannot be suc

Judge VERNICE TREASE

Signed October 16, 2013

10-16-13 Case Closed

Disposition Judge is VERNICE TREASE

10-30-13 Filed: Letter from Defendant

10-30-13 Minute Entry - MINUTE ENTRY (LETTER FROM DEFENDANT)

Judge: VERNICE TREASE

The court has received from the defendant, Jason Speed, a letter filed October 30, 2013. It appears that copies of the letter have not been provided to counsel for the State nor Defendant's own counsel.

Accordingly, my clerk will provide copies of the letter and this minute entry to counsel for the State and Defense.

Date: _____

Judge VERNICE TREASE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 101901272 by the method and on the date specified.

MAIL: STATE OF UTAH, UT

MAIL: BROCK A VAN DE KAMP 424 E 500 S SALT LAKE CITY UT 84111

10/30/2013

/s/ JENNIFER WILLIAMS

Date: _____

Deputy Court Clerk

03-20-14 Note: CD request for the 10/15/10 hearing completed for LDA.

04-15-14 Note: Cd & or VHS paid for on case number 071901961 04/15/14
check #40239 \$635.00

04-21-14 Fee Account created Total Due: 10.00

04-21-14 AUDIO TAPE COPY Payment Received: 10.00

04-23-14 Filed: Motion for Relief from Judgment, Request for Restitution
Hearing, and Memorandum in Support
Filed by: SPEED, JASON M

04-23-14 Filed: Attachment to Motion for Relief from Judgment, Request
for Restitution Hearing and Memorandum Support

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CASE NUMBER 101901272 State Felony

04-23-14 Filed: Return of Electronic Notification

09-11-14 Filed: Motion for Relief from Judgment, Request for Restitution
Hearing and Memorandum in Support
Filed by: SPEED, JASON M

09-11-14 Filed: Return of Electronic Notification

10-21-14 Filed: Notice to Submit for Decision

10-21-14 Filed: Return of Electronic Notification

10-27-14 RESTITUTION HEARING scheduled on November 14, 2014 at 02:00 PM
in FOURTH FLOOR-W45 with Judge TREASE.

10-27-14 Filed: Notice for Case 101901272 ID 16266977

11-14-14 Minute Entry - Minutes for INCOURT NOTE

Judge: VERNICE TREASE

PRESENT

Clerk: jennifew

Defendant not present

Sheriff Office#: 334008

Audio

Tape Number: W45 Tape Count: 2:28

No parties present at today's hearing. The court strikes today's
restitution hearing. Counsel may contact and reset the hearing.

12-01-14 RESTITUTION HEARING scheduled on December 05, 2014 at 02:00 PM
in FOURTH FLOOR-W45 with Judge TREASE.

12-05-14 Minute Entry - Minutes for Restitution Hearing

Judge: VERNICE TREASE

PRESENT

Clerk: amyb

Prosecutor: BLAYLOCK, ROGER S

Defendant

Defendant's Attorney(s): BARKER, ALLYSON L

Sheriff Office#: 334008

Audio

Tape Number: CR W45 Tape Count: 2:42-3:02

This matter is before the Court based on the Defense's Motion. The
parties are present stating their appearances. Counsel makes their

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argument.

2:51 PM The Court makes a record of the restitution judgment that was entered.

2:53 PM The Court makes a finding that the restitution was entered as a judgment correctly.

2:56 PM The defendant's probation has been terminated and the outstanding debt will go to the OSDC. The Court denies the Motion for relief of Judgment.

2:57 PM Counsel addresses the Motion for a Restitution Hearing.

2:58 PM The State responds

3:01 PM The Court denies the Motion for a restitution hearing.

12-23-14 Note: *CD made for DA and put in their box (12/05/14 hrg)*

12-24-14 Filed: Notice of Appeal - Criminal (not Interlocutory) Notice of Appeal

12-24-14 Note: The Notice of Appeal was sent to the Appeals Department via e-filing.

12-24-14 Filed: Return of Electronic Notification

01-05-15 Filed: Appearance of Counsel/Notice of Limited Appearance

01-05-15 Filed: Notice of Appeal - Criminal (not Interlocutory) Amended Notice of Appeal

01-05-15 Filed: Return of Electronic Notification

01-08-15 Note: Notice of Appeal filed 12/24/2014 & 01/05/2015 emailed to COA, ca

01-09-15 Filed: Utah Court of Appeals Letter dated 1/9/2015 to Allyson Barker - (Appeal filed - Case #20150011 should be indicated on future filings - rules/info etal)

01-09-15 Filed: Designation of Record

01-09-15 Filed: Certificate

01-09-15 Filed: Return of Electronic Notification

01-14-15 Fee Account created Total Due: 10.00

01-14-15 AUDIO TAPE COPY Payment Received: 10.00

Note: Mail Payment;

02-13-15 Filed: TRANSCRIPT for Hearing of 08-13-2010

02-13-15 Filed: TRANSCRIPT for Hearing of 10-15-2010

02-13-15 Filed: TRANSCRIPT for Hearing of 12-05-2014

02-20-15 Filed: TRANSCRIPT for Hearing - Change of Plea - 08/13/10 -

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Judge Atherton, Katie Harmon RPR

02-20-15 Filed: TRANSCRIPT for Sentence, Judgment, & Commitment -
10/15/10 - Judge Atherton, Katie Harmon RPR

02-20-15 Filed: TRANSCRIPT for Restitution Hearing - 12/05/14 - Judge
Atherton, Katie Harmon RPR

04-17-15 Note: Appealed: Case #20150011

04-17-15 Filed: Clerk's Certificate (Judgment Roll & Index)

04-22-15 Note: Certified Record Index and Record to COA - Files - 1,
Transcripts - 3, Exhibits - 0, ca

05-26-15 Filed: Minutes for Restitution Hearing dated 12/5/2014 and
signed by Judge Trease on 1/2/2015

05-26-15 Filed: Supplemental Index with Clerk's Certificate

05-26-15 Note: Certified Supplemental Index and Record to COA -
Paginated Pages - 124-125, ca

Addendum E

10-00-242

THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

VS.

JASON SPEED,

Defendant.

Case No. 101901272

RESTITUTION HEARING

BEFORE THE HONORABLE JUDITH ATHERTON

SCOTT M. MATHESON COURTHOUSE
450 South State Street
Salt Lake City, Utah 84111

FILED DISTRICT COURT
Third Judicial District

DECEMBER 5, 2014

FEB 20 2015

SALT LAKE COUNTY

By

Deputy Clerk

FILED
UTAH APPELLATE COURTS

APR 22 2015

20150611.CA

ORIGINAL



A P P E A R A N C E S

FOR THE STATE:

Roger Blaylock
SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: 801.363.7900

FOR THE DEFENSE:

Allyson L. Barker
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South Suite 300
Salt Lake City, Utah 84111
Telephone: 801.532.5444

1 DECEMBER 5, 2014

2 * * *

3 THE COURT: Case 101901272. State versus
4 Jason M. Speed. Parties please state their appearances for the
5 record. Mr. Speed is present.

6 Allyson Barker on behalf of Jason Speed.

7 MR. BLAYLOCK: Roger Blaylock for the State.

8 THE COURT: Okay. Thank you. This is set today
9 based on a motion that was filed by the defense. The motion is
10 titled "Motion for relief from judgment, request for
11 restitution hearing and memorandum in support."

12 I've reviewed everything that has been filed in this
13 case. And we'll hear any further argument that the parties
14 have. So let me just talk out loud here for a minute and maybe
15 that will help direct things.

16 I've looked at the transcript of the sentencing
17 hearing. Judge Atherton, in my opinion, did order restitution.
18 And in fact, she stated an amount at the sentencing, according
19 to the transcript, right?

20 And during that she also said: "Mr. Van De Camp, I
21 will let you approach later, but I want to get this on rather
22 than deferring it. I want you to make monthly payments every
23 single month toward the restitution. I will let you work with
24 AP&P towards that, but I want them to immediately start getting
25 reimbursed for their losses."

1 And then there was a statement the regarding the
2 attorneys fees and so forth. Subsequent to that, the court
3 docket doesn't show anything taking place. I'm assuming
4 Mr. Speed went to AP&P and so forth.

5 Subsequent to that judgment, sentence, and commitment
6 and the sentencing hearing, on October 16, 2013, AP&P submitted
7 a progress violation report requesting that probation be
8 terminated and that any remaining money that is owed be sent to
9 debt collection.

10 As my usual practice, when I received that, I sent a
11 minute entry out to all parties. The minute entry is scanned
12 into the court docket and it says something to the effect of:
13 "AP&P has made a recommendation, they -- and to terminate
14 probation successfully. That in addition, AP&P's interest be
15 closed. That any remaining financial obligation be referred to
16 the Office of State Debt Collection."

17 There was no input given and so the Court granted
18 that and sent any outstanding money owed, including the
19 restitution to the State Debt Collection. That was October 16,
20 of 2013. And then April in 2014 is when the motion was filed.

21 And so those are the things that are pertinent to
22 this hearing today.

23 Ms. Barker?

24 **MS. BARKER:** Your Honor, I'd just like to point out
25 in the transcript of the sentencing hearing, on the subject of

1 restitution, and it's following Judge Atherton's sentencing
2 order, that the defense -- counsel for the defense talked
3 about -- says at line six: "We talked about having a
4 restitution hearing to determine" --

5 **THE COURT:** What page are are you on?

6 **MS. BARKER:** I am on Page 8.

7 **THE COURT:** Okay. At line six: "Talked about having
8 a restitution hearing to determine what court-ordered
9 restitution and total restitution would be." And the Judge
10 said, "Well, get closer. There are disputes. I set a lot of
11 these restitution hearings because it's murky. So what I want
12 you to do is file a motion for restitution with some specifics
13 about what I can look at before we get to the restitution
14 hearing and nobody knows anything."

15 And the Judge ultimately directs the parties to get
16 that documentation. And at that point, my position is, is that
17 the burden is then on the State to find out how much money
18 actually they want to request for restitution. And that the
19 intent in this case was to have some sort of further proceeding
20 on restitution and that was never initiated by the State.

21 There are several progress violations reports that
22 AP&P submits prior to asking for the matter to be terminated
23 where the amount of restitution is specifically listed in the
24 report as "to be terminated." And that once an amount was
25 determined, Mr. Speed began making restitution payments.

1 The first progress violation report was filed on
2 filed -- in October. I want to make sure I'm getting this
3 right. No, that's the last one. I beg your pardon.

4 The final report has the restitution included because
5 it was made after the Court entered that order. But the
6 previous ones do not include any other discussion of the
7 restitution except that it was to be determined. I think that
8 despite Judge Atherton saying that she order -- that she is
9 telling -- directing him to pay restitution in the amount of
10 \$126,000, roughly, that the intention of the Court was to have
11 the parties submit an amount for a restitution hearing and that
12 would be initiated by the State and then have Mr. Speed's
13 counsel respond to that.

14 And that -- that was never done until the year
15 deadline for determining restitution went by. The Judge's
16 minutes for the initial sentencing, the minutes of sentence,
17 judgment, and commitment do not include the ones entered on
18 October 15th of 2010, do not include an order for him to pay
19 restitution. That was -- that was not included in that minute
20 entry and there was no entry of a judgment and commitment,
21 including the restitution until more than a year had passed.

22 Mr. Speed has continued to make payments on that
23 since it's been sent to the Office of State Debt Collection.
24 He made payments on it as soon as AP&P made him aware of it.
25 But I think that the intention of the Court was that that was

1 going to be a matter that would be addressed later and the
2 State never initiated that process. And now, there is an order
3 for restitution that was entered after the year deadline.

4 **THE COURT:** Input from the State?

5 **MR. BLAYLOCK:** Your Honor, I think the Court's
6 interpretation is accurate that Judge Atherton did, in fact,
7 say in her words: Pay restitution in the amount of \$126,547 --
8 \$126,547. She also goes on to talk about the fact that she
9 expects the defendant to make significant advances towards
10 dealing with this enormous restitution.

11 Reflected on our file was that exact amount as being
12 owed in restitution. Generally, the procedure in this court is
13 that counsel can request a restitution hearing if there is an
14 objection to the amount of restitution ordered. That amount
15 was ordered. Counsel for the defense did nothing to test that
16 amount of restitution.

17 The fact that it wasn't included in the further
18 documentation of the court was a clerical error. It certainly
19 wasn't, I would suggest, fatal to the fact that restitution
20 needed to be paid.

21 We'll submit it, Your Honor.

22 **THE COURT:** Okay. Thank you.

23 Ms. Barker.

24 **MS. BARKER:** Your Honor, I think that the Judge's
25 further remarks following the sentencing order and the fact

1 that it's not in the minutes indicates that although that
2 amount was stated as the restitution amount and the Judge did
3 want Mr. Speed to begin paying on that, that there was going to
4 be some dispute about that, the Judge knew it, tasked the State
5 with -- and counsel for the defense with coming closer to a
6 resolution.

7 But, I think that the -- there were other defendants
8 in this case. Mr. Speed is liable for restitution that is the
9 consequence of his actions. There were other defendants -- and
10 this isn't like multiple people damaging a piece of property.
11 These were cell phones that were taken from a business. It --
12 they -- by employees. It could have been accounted for, who
13 took the phones.

14 And \$126,000 is an enormous amount of restitution,
15 but that's not Mr. Speed's portion of the restitution and he
16 was never afforded an opportunity to have a restitution hearing
17 on this. If -- I think the State's position is, is that as
18 soon as, you know, Judge Atherton said "You're ordered to pay
19 \$126,000" then an objection and a request for a restitution
20 hearing should have been filed.

21 It seems like that counsel for defense attempted to
22 make the Judge aware that there would be disputes and attempted
23 to set a restitution hearing and the Judge specifically said,
24 "I'm not going to set one yet until you get closer on an
25 amount." And it's on the State to initiate that process.

1 **THE COURT:** Okay. So as I have stated -- and you
2 keep referring to the commitment or the judgment, sentence and
3 commitment does not say that there is restitution. And I don't
4 know if this was a clerical error or not, but there is a
5 judgment, sentence, and commitment that is entered February 27,
6 2000 -- well, it -- it's shows that date on the docket.

7 He was still on probation at the time. And it -- the
8 J and C says October 15, 2010. And it does state restitution
9 in the amount of \$126,547. That's says -- that's what it says
10 on that. Now, granted --

11 **MS. BARKER:** Is that on the docket?

12 **THE COURT:** Yes. You want me to print it for you?

13 **MS. BARKER:** No, I've seen that on the docket and
14 I -- I questioned that when I saw it so I pulled up the actual
15 sentence, judgment, and commitment. It was dated October 15th.
16 And it does not include restitution.

17 **THE COURT:** So there are two. That's my point is:
18 There is one that was entered October 19, 2010. That was
19 probably around the time he was sentenced. But there is a
20 subsequent one that is entered February 27, 2012. And I think
21 that's what Mr. Blaylock refers to as maybe a clerical error.

22 Because as you've outlined, the -- the transcript of
23 the sentencing that took place on October 15, 2010, does state
24 that Judge Atherton ordered the restitution in that amount.
25 The J and C that was signed and filed on October 19th, doesn't

1 include restitution -- the restitution order.

2 And it appears that subsequently, when AP&P filed the
3 progress violation, after that -- they filed a progress
4 violation report to terminate probation in July of 2011, a new
5 judgment, sentence, and commitment was signed by Judge Atherton
6 that then included the restitution that was ordered.

7 So I'm finding based on the transcript that
8 Judge Atherton did order restitution as part of the sentence in
9 this case in the amount of \$126,547 that that restitution
10 amount did not make it on the original judgment, sentence, and
11 commitment and I don't know why.

12 Subsequent to that, Judge Atherton did sign and file
13 a judgment, sentence, and commitment. I'm referring to the one
14 that appears to have been entered February 27, 2012 that shows
15 the judgment -- or excuse me, the restitution that was ordered
16 on the day of sentencing accurately.

17 Secondly, when AP&P asked to terminate probation in
18 this case and file the progress violation report, prior to my
19 terminating probation as requested, there was an indication in
20 there about the restitution being sent to debt collection.
21 There was never an objection by anyone, including the
22 defendant, pursuant to the minute entry that was sent out by
23 the court on October 1, 2013.

24 And also, that the transcript -- regardless, I mean,
25 once the judge orders restitution and orders that it be paid in

1 a particular amount, the judgment, sentence, and commitment --
2 or excuse me, the transcript says, when defendant counsel asked
3 for a restitution hearing, there is a colloquy with
4 Judge Atherton that Judge Atherton says, something like: "I
5 will let you approach later, but I want to get this on rather
6 than deferring it. I want you to make monthly payments."

7 Then the discussion later is defense counsel saying,
8 "We've talked about having a restitution hearing to determine
9 what court-ordered restitution and total restitution should
10 be."

11 The Judge says, "Well, get closer. There are
12 disputes. So what I want you to do is file a motion for
13 restitution and with some specifics about what I can look at
14 before we get into a restitution hearing and nobody knows
15 anything."

16 So I'm not saying that the onus shouldn't be on the
17 State. I, frankly, look at that and I think: Well, the onus
18 is on the defense because the response by Judge Atherton was in
19 response to Mr. Van De Camp saying, "We talked about having a
20 restitution hearing." And Judge Atherton says, "Well, get
21 closer and then file a motion."

22 And then nobody bothers to do anything, but in the
23 meantime restitution is going on, probation is terminated based
24 on, my assumption, that the restitution will be sent to Utah
25 State Debt Collection and nobody objects to that and so forth.

1 And lastly, this restitution amount would be a civil
2 judgment. Total restitution not necessarily court-ordered
3 because it's unclear to me what Judge Atherton decided in that
4 regard. But I'm going to deny the motion for relief from
5 judgment and the restitution amount will remain as it is and
6 will remain with Utah State Debt Collection.

7 **MS. BARKER:** And, Your Honor, the second part of the
8 motion was a request for a restitution hearing. And if I
9 understand the Court's position on denying the motion for
10 relief from judgment, but in the alternative, I had argued that
11 Mr. Speed was entitled to a restitution hearing, that the -- a
12 request -- I don't know what type of request for restitution,
13 if any, was ever made following Judge Atherton's colloquy with
14 the parties.

15 It appears that a motion of some type was
16 anticipated, which is typically precipitated by a request from
17 the State for a specific amount of restitution, that is then
18 related to the defense. And I don't see any motion to that
19 effect. So based on the fact that there was never a hearing on
20 this issue and there was no notice given to Mr. Speed prior to
21 the restitution amount being --

22 **THE COURT:** Did you read the presentence report?

23 **MS. BARKER:** There --

24 **THE COURT:** I think that's where the amount comes
25 from.

1 **MS. BARKER:** That is where the amount comes from, but
2 I think that as far as Mr. Speed would have been aware, at the
3 time of his sentencing, there was going to be some ongoing
4 proceedings to determine restitution that were never held. And
5 because they weren't, the restitution amount was ultimately
6 entered in the full amount stated in the presentence report.

7 But I would ask that Ms. Speed be allowed to have a
8 restitution hearing on this issue, even though the matter is
9 closed.

10 You want to respond, Mr. Blaylock?

11 **MR. BLAYLOCK:** I think that's been waived. He's had
12 two or three opportunities. He had the opportunity through
13 counsel when the amount was originally stated to request a
14 restitution hearing. And when this matter come up for
15 termination of the probation, again he had an opportunity at
16 that time if he contested the amount of restitution to have a
17 restitution hearing. That wasn't done in due time and I would
18 suggest that's waived.

19 **THE COURT:** Okay. Anything further?

20 **MS. BARKER:** Your Honor, I don't think that Mr. Speed
21 has waived that because there was no request for restitution
22 ever filed by the State. I don't know exactly what he was told
23 by AP&P as far as the full amount of the restitution being
24 entered. He did start paying on that and that when it was --
25 when the matter was closed, I don't know what advice or counsel

1 he was given on that to know whether he had knowledge of the
2 legal ramifications of how this would effect him.

3 So I think that without actual notice to an attorney
4 of a restitution amount being sought in a hearing or without
5 some legal notice to Mr. Speed notifying him that he had an
6 opportunity to challenge amounts that were entered by the court
7 pursuant to the presentence report, that he has not waived.

8 **THE COURT:** Okay. So I'm looking at the last
9 progress violation report that I received that precipitated the
10 termination of probation. In that report it states on one of
11 of the pages the money that is owed. There is -- in
12 particular, in regards to restitution. The original amount was
13 \$126,547. The interest was \$8,908.56. The payments that were
14 made by the defendant was \$1,418. This is only as to
15 restitution. There were other payments made.

16 Remaining amount was \$134.37 and 56 -- or \$37.56. So
17 with that, I again, sent out a minute entry asking any party to
18 object to the recommendation from AP&P. No objection was filed
19 and subsequently the matter was closed, and the request by AP&P
20 was granted. Before that, as I stated, there was a restitution
21 amount stated in the presentence report.

22 There was a restitution amount ordered by
23 Judge Atherton. And again, until well after the case was
24 closed, other than the colloquy at the sentencing, nothing was
25 made of the restitution. And so the Court finds that the

1 defendant has waived any issue regarding restitution. I don't
2 know that I even have jurisdiction to reconsider that because
3 it might open up a whole lot of other things, including --

4 I mean, if I terminated probation based on those
5 representations, does that mean if I change the restitution or
6 do something of that case, I can re-instate his probation and
7 order that he pay restitution or --

8 I mean, a lot of those things that have come and
9 gone, I think, have effected the way that the case has gone.
10 And so based on that, I'm denying the request for a restitution
11 hearing in this matter.

12 Ms. Barker, anything further?

13 **MS. BARKER:** No, Your Honor.

14 **THE COURT:** Okay. Thank you.

15 (End of hearing.)
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C E R T I F I C A T E

STATE OF UTAH)
) SS
COUNTY OF SALT LAKE)

I, KATIE HARMON, a Certified Shorthand Reporter in
and for the State of Utah, do hereby certify that I received
the audio recording in this matter, and that I transcribed it
into typewriting and that a full, true and correct
transcription of said audio recording so recorded and
transcribed is set forth in the foregoing pages, inclusive
except where it is indicated that the recording was inaudible.

DATED this 13th day of February, 2015.

KATIE HARMON, RPR, CSR