

2018

**The State of Utah, Plaintiff/Appellee v. Travis Scott Murray,
Defendant/Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

TRAVIS SCOTT MURRAY,
Defendant/Appellant.

Appellant is not incarcerated

REPLY BRIEF OF APPELLANT

An appeal from an order revoking and reinstating probation for Driving Under the Influence of Alcohol/Drugs, a third degree felony, in violation of Utah Code §41-6a-503(2)(b), in the Third District Court, Salt Lake County, State of Utah, the Honorable Ann Boyden presiding.

DIANA PIERSON (16241)
SHARLA DUNROE (9708)
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 200
Salt Lake City, Utah 84111
appeals@sllda.com
(801) 532-5444

THOMAS B. BRUNKER (4804)
Deputy Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellant

Attorneys for Appellee

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SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellant

Attorneys for Appellee

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REPLY BRIEF OF APPELLANT

INTRODUCTION

In the opening brief, Murray argues that the trial court abused its discretion by revoking and reinstating his probation and imposing 180 days in jail. *See* Aplt.Br.7-10. Murray contends that the trial court's decision was so inherently unfair as to constitute an abuse of discretion because the court failed to appropriately weigh Murray's commitment to sobriety and history of treatment compliance on probation. *See* Aplt.Br.7-9. Murray argues that the trial court should have allowed him to complete probation without a revocation, jail sentence, or reinstatement. *See* Aplt.Br.7-9. Accordingly, Murray asks this Court to reverse and remand for a new sentencing hearing. *See* Aplt.Br.7-10.

Further, Murray argues that this error was preserved by trial counsel's argument to continue on probation. *See* Aplt.Br.9. But, if it is unpreserved, then

Murray contends that the trial court plainly erred in light of the record and clearly established sentencing law. *See* Aplt.Br.9-10.

In response, the State argues that this Court should affirm the trial court's sentencing decision. *See* Aple.Br.8-14. First, the State argues that Murray's appeal became moot after he served the jail sentence that was a part of the trial court's sentencing decision. *See* Aple.Br.10 n.1. Second, the State argues that Murray's prejudice argument is inadequately briefed because it lacks reasoned analysis of why Murray's probation would end sooner under the original probation than under the revoked and reinstated probation. *See* Aple.Br.13-14. Finally, the State argues that Murray did not preserve this issue because he did not ask the trial court to continue on the original probation. *See* Aple.Br.12-13 & n.2. Further, the State argued that the trial court did not plainly abuse its discretion by not continuing probation. *See* Aple.Br.12-13 & n.2.

This reply brief addresses the following points: (A) Murray's appeal is not moot; (B) Murray's prejudice argument is adequately briefed; and (C) Murray's appellate argument is preserved, or may be reviewed for plain error. This reply brief is "limited to responding to the facts and arguments raised in the appellee's . . . principal brief." Utah R. App. P. 24(b). Matters not addressed were either adequately addressed in the opening brief or do not merit reply. For the reasons stated here and in the opening brief, this Court should reverse and remand for a new sentencing hearing. *See* Aplt.Br.7-11.

ARGUMENT

I. The trial court's decision to revoke and reinstate probation and impose 180 days of jail was an abuse of discretion and requires reversal.

A. Murray's appeal is not moot.

In a footnote, the State contends that Murray's appeal became moot after he served the imposed jail term. *See* Aple.Br.10 n.1. But Murray's appeal is not moot. "The defining feature of a moot controversy is the lack of capacity for the court to order a remedy that will have a meaningful impact on the practical positions of the parties." *Utah Transit Authority v. Local 382*, 2012 UT 75, ¶24, 289 P.3d 582. "An appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect." *In re Adoption of L.O.*, 2012 UT 23, ¶8, 282 P.3d 977 (internal quotation marks omitted).

Here, Murray's completion of the jail sentence did not moot his appeal. This is because he challenges the trial court's sentencing decision as a whole; that is, the decision to revoke and reinstate probation for 12 months *and* impose a jail sentence. Aplt.Br.7 ("Murray argues that the trial court abused its discretion when it revoked and reinstated probation and sentenced him to 180 days in jail."). As argued in the opening brief, the trial court should have allowed him to continue on the original probation, instead of revoking and reinstating. Aplt.Br.9.

Moreover, Murray's challenge to the trial court's decision to revoke and reinstate probation is not moot because he is still on probation. *See* Aple.Br.10

n.1. Indeed, during the pendency of Murray's appeal, the trial court extended Murray's probation for a second time to December 11, 2018.¹ Because Murray is still serving his probation sentence, Murray's request for this Court to reverse his sentence would release him from the terms and conditions of that probation. Therefore, Murray's requested remedy will have "a meaningful impact." *Local* 382, 2012 UT 75, ¶24. Thus, Murray's appeal is not moot.

B. Murray's prejudice argument is adequately briefed.

The State argues that Murray's prejudice argument is inadequately briefed because it lacks reasoned analysis of why Murray's probation would end sooner under the original probation than under the revoked and reinstated probation. Aple.Br.13-14. The State is incorrect because Murray adequately briefed his prejudice argument. *See* Aplt.Br.10.

Utah rules and caselaw define adequate briefing. "Rule 24 of the Utah Rules of Appellate Procedure governs the contents and format of briefs submitted to the court." *Broderick v. Apartment Mgmt. Consultants, L.L.C.*, 2012 UT 17, ¶9, 279 P.3d 391. Rule 24 states that "[t]he argument must explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal." Utah R. App. P. 24(a)(8). Adequate briefing requires

¹ Although not included in the record on appeal, this Court may take judicial notice of the trial court's order extending probation, dated November 17, 2017. *See* Utah R. Evid. 201 (court may judicially notice fact that is not subject to dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned); *see also State ex rel. F.M.*, 2002 UT App 340, ¶3 n.2, 57 P.3d 1130 ("Courts may take judicial notice of the records and prior proceedings in the same case.")

that “a party must plead his claims with sufficient specificity for this court to make a ruling on the merits’ and that a brief ‘must provide the reasoning and legal authority that will assist this court in resolving th[e] concerns’ on appeal.” *Broderick*, 2012 UT 17, ¶9 (footnotes and citations omitted). “A party must cite the legal authority on which its argument is based and then provide reasoned analysis of how that authority should apply in the particular case, including citations to the record where appropriate.” *Bank of Am. v. Adamson*, 2017 UT 2, ¶13, 391 P.3d 196. That said, the Utah Supreme Court has stated that its “analysis will be focused on the ultimate question of whether the appellant has established a [sufficient argument for ruling in its favor]—and not on whether there is a technical deficiency in [briefing] meriting a default.” *State v. Nielsen*, 2014 UT 10, ¶41, 326 P.3d 645.

Here, Murray adequately briefed his argument that the trial court’s sentencing decision was prejudicial. *See* Aplt.Br.8-10. Murray’s argument met the requirements of rule 24 because he supported his prejudice analysis with citation to Utah caselaw and the record. Utah R. App. P. 24(a)(8); *Broderick*, 2012 UT 17, ¶9; Aplt.Br.8-10. Specifically, Murray relied on this Court’s caselaw holding that an error is prejudicial where, absent the error, there was “a reasonable likelihood of a more favorable outcome.” *State v. Cox*, 2012 UT App 234, ¶2, 286 P.3d 15 (quoting *State v. Lee*, 2006 UT 5, ¶26, 128 P.3d 1179); Aplt.Br.10. Murray also argued that the record shows that trial counsel asked to complete probation without revocation, jail sentence, or reinstatement. *See* Aplt.Br.9-10; R.105-107.

Moreover, Murray argued that absent the error, it is likely that his probation term would have been shorter. Aplt.Br.9-10.

Indeed, as argued in the opening brief, the trial court abused its discretion by revoking and reinstating Murray's probation and imposing 180 days in jail. Aplt.Br.7-10. Without the trial court's error, Murray would have continued on probation and likely completed probation sooner. Aplt.Br.9-10. Here, the record clearly shows that the trial court's decision to reinstate probation extended its expiration date for 12 months to December 11, 2017. R.87-88; Aplt Br.6. The fact that Murray violated probation again does not undermine the prejudice analysis because the later violation and extension occurred after the original 36 months of probation would have expired. *See* R.40-42 (sentencing Murray to 36 months probation (Sentence, Judgment, Commitment, dated March 17, 2014)). Thus, Murray has established prejudice because his probation would have ended sooner if the trial court had not revoked and reinstated probation for an additional 12 months. *See* Aplt.Br.10; Aple.Br.13-14.

In any event, Utah caselaw shows that Murray need not establish prejudice in order for this Court to reverse for abuse of discretion at sentencing. Aple.Br.13-14. Rather, Utah's appellate courts have long vacated a defendant's sentence "and remand[ed] for further sentencing proceedings" when "the district court abuse[s] its discretion when sentencing [a defendant]." *LeBeau v. State*, 2014 UT 39, ¶167, 337 P.3d 254; *see, e.g., State v. Galli*, 967 P.2d 930, 938-39 (Utah 1998); *State v. Smith*, 909 P.2d 236, 244-45 (Utah 1995); *State v. Strunk*, 846 P.2d 1297, 1301-

02 (Utah 1993); *State v. Garfield*, 552 P.2d 129, 130-31 (Utah 1976); *State v. Jaramillo*, 2016 UT App 70, ¶¶42-44, 372 P.3d 34. Thus, this Court should reverse and remand for a new sentencing hearing because the trial court abused its discretion.

C. Murray's appellate argument is preserved, or may be reviewed for plain error.

Murray's appellate argument is preserved, or may be reviewed for plain error. *See* Aple.Br.9-11. The State argues that Murray did not preserve this issue because he never asked the trial court to continue on the original probation. Aple.Br.9-11. Similarly, the State argues that the trial court did not plainly abuse its discretion by not continuing probation because any error was not obvious. Aple.Br.12-13 & n.2.

First, as argued in the opening brief, Murray preserved this argument when trial counsel argued to continue probation: Murray "would very much like the opportunity to do treatment again, to do treatment and probation." R.107; Aplt.Br.8-10; *see* Utah Code §77-18-1(12)(e)(ii). "[P]reservation of [a] claim does not 'turn on the use of magic words or phrases.'" *State v. Robinson*, 2014 UT App 114, ¶14, 327 P.3d 589 (quoting *In re Baby Girl T.*, 2012 UT 78, ¶38, 298 P.3d 1251). Rather, "so long as [the appellant] presented the issue 'in such a way that the trial court ha[d] an opportunity to rule on that issue,' he preserved the issue for appellate review." *State v. Robinson*, 2014 UT App 114, ¶14 (quoting 438 *Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶51, 99 P.3d 801).

Here, Murray's sentencing issue is preserved because the record shows that trial counsel argued for Murray to continue on probation. Specifically, trial counsel argued to continue on by probation by stating that Murray "would very much like to complete probation." R.106. Moreover, trial counsel reiterated this argument by asking the trial to allow Murray "the opportunity to do treatment again, to do treatment and probation." R.107.

Further, the record shows that Murray and trial counsel presented this issue "in such a way that the trial court ha[d] an opportunity to rule." *Robinson*, 2014 UT App 114, ¶14 (quoting *438 Main St.*, 2004 UT 72, ¶51). Here, the trial court's ruling shows that it rejected Murray's request to continue on probation without a jail sentence: "all of this is important information, Mr. Murray, but what you and your defense attorney are asking me to do is just kind of treat this something different than it is." R.109-110. Thus, Murray's appellate issue is preserved.

But, as argued in the opening brief, if this Court concludes the argument is unpreserved, then this Court should reverse for plain error. Aplt.Br.9-10; Aple.Br.11-13. "[T]o demonstrate plain error, [Murray] must show that the trial court committed an obvious and harmful error." *State v. Jenkins*, 2016 UT App 41, ¶13, 368 P.3d 873 (citing *State v. Holgate*, 2000 UT 74, ¶13, 10 P.3d 346).

As argued in the opening brief, the trial court abused its discretion by revoking and reinstating probation with a jail sentence without adequate consideration of Murray's commitment to sobriety and history of treatment

compliance while on probation. Aplt.Br.7-10. The trial court's error was obvious in light of clear caselaw that a sentencing decision may not be "so inherently unfair as to constitute an abuse of discretion." *State v. Rhodes*, 818 P.2d 1048, 1051 (Utah Ct. App. 1991); see *Jenkins*, 2016 UT App 41, ¶2; Aplt.Br.8,9-10. Further, the error was obvious in light of clear caselaw that a probation decision will be reversed "when it is 'clear that the actions of the judge were so inherently unfair as to constitute an abuse of discretion.'" *State v. Vazquez*, 2014 UT App 159, ¶7, 330 P.3d 760 (quoting *Rhodes*, 818 P.2d at 1051 (citations and internal quotation marks omitted)). Moreover, where both trial counsel and Murray emphasized Murray's commitment to sobriety and history of treatment compliance in connection with a request to continue probation, the trial court's error should have been obvious. Aplt.Br.9-10; Aple.Br.12-13; R.106-107,108-109; *Jenkins*, 2016 UT App 41, ¶3.

Further, as argued above and in the opening brief, the trial court's decision prejudiced Murray because his probation term would have ended sooner if the court had not revoked and reinstated the term for 12 months. Aplt.Br.9-10; discussion *supra*. The initial 36 month term was imposed on March 17, 2014. R.40-42; Aplt.Br.10. But, on December 12, 2016, the trial court revoked and reinstated Murray's probation for 12 months. R.87-88; Aplt.Br.10. Thus, the trial court's sentencing decision extended Murray's probation expiration date for approximately nine months. R.40-42,87-88; Aplt.Br.10. Accordingly, the trial court's decision prejudiced Murray because he served more time on probation

than if the court had allowed probation to continue and expire, rather than deciding to revoke and reinstate. And, as discussed above, the error was prejudicial in light of the November 2017 probation violation because the later violation and extension occurred after the original 36 months of probation would have expired. *See discussion supra.*

CONCLUSION

For the reasons stated here and in the opening brief, Murray respectfully requests that this Court reverse and remand for a new sentencing hearing.

SUBMITTED this 19th day of January, 2018.



DIANA PIERSON

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 2,307 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.



DIANA PIERSON

CERTIFICATE OF DELIVERY

I, DIANA PIERSON, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtsofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 19th day of January 2018.


DIANA PIERSON

DELIVERED this _____ day of January 2018.
