

2019

**State of Utah, Plaintiff/Appellee, v. Robert Brian Walton,
Defendant/Appellant : Brief of Appellee**

Utah Court of Appeals

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MAR 29 2019

Case No. 20170977-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ROBERT BRIAN WALTON,
Defendant/Appellant.

Brief of Appellee

Consolidated appeal from convictions for retaliating against a witness and stalking, both third degree felonies, in the Third Judicial District, Salt Lake County, the Honorable Paul B. Parker and Mark S. Kouris presiding

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STATE OF UTAH,
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Brief of Appellee

INTRODUCTION

Facing charges of stalking, retaliation against a witness or victim, assault, unlawful detention, and threat of violence, Defendant entered a plea agreement that, with preapproval from the district court, closed the case and resulted in his release from jail. Under the plea deal, Defendant agreed to enter an *Alford* plea to retaliation and to stipulate to the issuance of a permanent stalking injunction covering Victim. In exchange, (1) the State dismissed the remaining charges, including stalking, and a criminal information in another case, (2) the State agreed to forego prosecution of any other criminal charges that may have arisen in relation to Victim before the date of the plea; and (3) on the State's recommendation, the district court

sentenced Defendant to 330 days in jail with credit for time served and closed the case, resulting in Defendant's release from jail.

When Defendant thrice contacted Victim a year and a half later, the State charged him in a new case with three counts of stalking for violating the injunction. Defendant then filed a rule 22(e) motion in the Retaliation case, asking the district court to remove the injunction on the ground that it was not a statutorily-authorized sentence for retaliation. The court correctly ruled that rule 22(e) was not an appropriate vehicle to challenge the plea under his court-approved plea agreement. Indeed, the issuance of the injunction was not part of the sentence in the Retaliation case, but consideration for the dismissal of his remaining charges, closure of the case, and release from jail.

Defendant also moved to dismiss the Stalking case on the ground that the stalking injunction—entered as an agreed-to term of his plea in the Retaliation case—was invalid. But after the trial court denied that motion, Defendant entered an unconditional plea to one count of violating the stalking injunction. Defendant now challenges his stalking conviction, even though his plea was unconditional and he waived his right to appeal.

Moreover, because Defendant's retaliation and stalking convictions were both based on unconditional *Alford* pleas, and he did not timely move to withdraw either, this Court lacks jurisdiction to consider either conviction.

STATEMENT OF THE ISSUES

1. Defendant agreed to entry of a permanent stalking injunction against him as a condition of a plea agreement. Was the district court's issuance of the permanent stalking injunction an illegal sentence?

Standard of Review. This Court reviews for correctness a trial court's ruling on a motion to correct a sentence under rule 22(e), Utah R. Crim. P. *State v. Wynn*, 2017 UT App 211, ¶11, 407 P.3d 1113.

2. If the stalking injunction – to which Defendant agreed when he pled to retaliation against a witness or victim – constituted an illegal sentence for retaliation, is Defendant entitled to vacation of his subsequent stalking conviction based on a violation of that injunction where that conviction is based on his 3 plea to stalking and he did not challenge that plea by filing a timely motion to withdraw it?

Standard of Review. Whether the court has jurisdiction is a question of law reviewed for correctness. *State v. Allgier*, 2017 UT 84, ¶13, 416 P.3d 546.

STATEMENT OF THE CASE

This appeal involves two criminal cases in the Third District Court that have been consolidated on appeal. The first charged Defendant with stalking, retaliation against a witness or victim, assault, unlawful detention, and threat of violence (Case No. 121903179). Pursuant to a 2014 plea agreement, that case

resulted in a conviction and sentence for retaliation and the entry of a permanent stalking injunction (“Retaliation case”). The second case charged Defendant with three counts of stalking, Case No. 161907013, and pursuant to a 2016 plea agreement, resulted in a conviction and sentence for Stalking based on a violation of the 2014 stalking injunction (“Stalking case”).¹

1. Victim’s 2012 report that Defendant retaliated against her because of her civil stalking injunction against him.²

Defendant began dating Victim in June of 2010. R1835-36. It was an “off and on” relationship that peaked in the final months of that year. R1835-36. But the relationship progressively worsened the following year, ending acrimoniously to say the least. R1836; S720. Victim filed a police report in May 2011, alleging that Defendant was harassing her at work. R1836-37. Victim reported that Defendant repeatedly tried to get her to retract her statements, complaining that they would ruin him. R1837. In July 2011, she again called the police after he reportedly refused to leave her house and demanded that she sleep with him. R1838.

¹ Citations to the record in the Retaliation case are designated with an “R.” Citations to the record in the Stalking case are designated with an “S.”

² The background facts are taken largely from Victim’ testimony at the preliminary hearing in the Retaliation case.

Victim reported that when she tried to cut the relationship completely off in September of 2011, Defendant began threatening her with physical harm. R1839-40. Victim reported that Defendant ignored her repeated requests to leave her alone. R1840-42. She ultimately moved in an effort to evade his harassment. R1841-42.

In February 2012, Victim obtained a civil stalking injunction against Defendant. R1843-44. Victim reported that on March 1, 2012, Defendant assaulted her in her car – grabbing her by the hair, hitting her head against the steering wheel, and threatening to snap her neck if she did not sign papers that would dismiss the civil injunction. R1842-49. Fearing for her safety, Victim signed the papers in the hopes he would quit and leave. R1846-48.

2. Retaliation case – retaliation and stalking charges, plea deal closing the case, and stipulation to entry of permanent stalking injunction.

The State charged Defendant with (1) retaliation against a witness, victim, or informant, a third degree felony; (2) stalking, a class A misdemeanor; (3) assault, a class B misdemeanor; (4) unlawful detention, a class B misdemeanor; and (5) threat of violence, a class B misdemeanor. R1-4. After a competency evaluation, the withdrawal of counsel, and numerous *pro se* motions, Defendant – with the assistance of standby counsel – reached

a plea agreement with the State that the district court preapproved under rule 11 of the Utah Rules of Criminal Procedure. R2401.

Consistent with the plea deal, the district court accepted Defendant's *Alford* plea to retaliation and dismissed with prejudice the remaining four counts, as well as charges in a separate criminal case. R2405.³ Also consistent with the plea deal, the court sentenced Defendant to 330 days in jail with credit for time served and closed the case:

I will impose a 330-day jail sentence. That time would run between November 15th of 2012 and October the 1st, 2013, meaning that the 330 days has been served. So credit for time served and the case closed And that's the sentence of the court.

R2401,2408. Immediately after the court announced its sentence and closed the case, the prosecutor provided the court with a Permanent Criminal Stalking Injunction (PCSI), which Defendant had expressly "stipulate[d] to ... pursuant to the [plea] agreement." R2407-08. Again consistent with the plea deal, the court signed, sealed, and served it on Defendant that same day. R2409-10 (Addendum B).

³ Under the plea deal, the prosecutor also agreed to forego prosecution against Defendant for any criminal charges arising from his relationship with Victim before the date of the plea. R2401-02; R989.

3. Victim's 2016 report that Defendant contacted her in violation of permanent stalking injunction.

About a year and a half after the Retaliation case was closed and the PCSI was issued, Victim reported that Defendant contacted her in violation of the injunction. She reported that as she sat on her front porch on Saturday, July 2, 2016, Defendant approached her on foot and initiated an hour-long, heated discussion, accusing her of doing him wrong and demanding that she clear his name. S713-14,739-40. Surprised that he had discovered where she lived, Victim asked how he found out and he replied that he had known for some time. S727. Throughout the conversation, he expressed concern that Victim would call the police. S715,740,769. Alarmed by his unexpected appearance, Victim did call the police, who came and took a statement. S716,743,775.

Victim reported that Defendant contacted her twice more the following day. On that Sunday afternoon, Victim had to drive into work to assist a client, and after she parked, Defendant also drove into the parking lot and tried to chase her down on foot and engage her in a conversation. S716,728. Victim quickly walked into the vacant building, repeatedly protesting on the way there that she could not talk with him. S716. Scared and flustered by Defendant's contact, Victim summoned the presence of a co-worker who was at a nearby ballpark with clients. S716,718.

The co-worker stayed with Victim for about 20 minutes while she finished her work, after which she drove him back to the ballpark. S716-18. Victim then took a circuitous route toward her home in case Defendant might try to follow her. S716,730. She reported that he apparently did. While Victim waited for a stop light just a few blocks from work, Defendant pulled up alongside her and again tried to engage her in conversation. S717-18,730-31. She refused to roll down her window and drove off when Defendant turned. S717,730. She called the police and later emailed the prosecutor seeking his help in enforcing the injunction. S718-19,725.

4. Stalking case – stalking charges, plea deal, and sentence.

The State charged Defendant with three counts of stalking for violating the PCSI issued as part of the plea deal in the Retaliation case. S1-4. Defendant filed a *pro se* motion to dismiss, arguing that he could not be legally convicted of stalking because the PCSI upon which the new stalking charges were based was not a statutorily-authorized sentence for a retaliation conviction and the factual basis provided in the Retaliation case did not support a stalking conviction. S263-90.⁴ After hearing argument, Judge Mark Kouris denied the

⁴ This was the second motion to dismiss filed in the case. The first was filed by counsel in a limited appearance, arguing that the PCSI had not been filed or had been dismissed. S42-47. The court denied that motion in a signed minute entry. S165.

motion in an oral ruling (September 20, 2017). S430-31. Defendant filed a motion to reconsider, but it was denied. S437-44,471.

On October 16, 2017, and pursuant to another plea agreement, Defendant entered an unconditional *Alford* plea to one count of stalking, a third degree felony, and the remaining two counts were dismissed. R555-57. Consistent with the prosecutor's agreement, Judge Kouris sentenced Defendant to a suspended, indeterminate prison term of zero to five years, ordered Defendant's release from jail, and placed him on supervised probation for 36 months. S555-59. And as required by the stalking statute, the judge issued a stalking injunction against Defendant, which covered Victim, her family, and employees of the district attorney's office. R556,852-53.

5. Post-plea proceedings in Retaliation and Stalking cases.

About a week and a half before his plea in the Stalking case, Defendant filed a *pro se* motion in the Retaliation case to correct his sentence under rule 22(e), Utah Rules of Criminal Procedure. R1002-10. He argued that the district court should declare the PCSI null and void and resentence him in the Retaliation case accordingly. *Id.* At a hearing on November 2, 2017, Judge Paul Parker orally denied the motion, R1099-1100, and thereafter entered a written order denying the motion with factual findings and legal conclusions, R1184-88 (Addendum C).

One week later, Defendant filed a single motion in both cases, asking (1) that Judge Parker reconsider the denial of Defendant's Rule 22(e) motion in the Retaliation case, and (2) that Judge Kouris terminate the just-recently-imposed probation and close the Stalking case based on his contention that he had been punished enough and upon a reconsideration of its denial of the motion to dismiss. S561-69. On November 21, 2017, Judge Kouris denied Defendant's motion to terminate probation in the Stalking case. S593 (signed minute entry). And on November 29, 2017, Judge Parker denied Defendant's motion to reconsider the denial of his rule 22(e) motion in the Retaliation case. R1102-03 (signed minute entry).

6. Appeal.

On December 8, 2017, Defendant filed a *pro se* notice of appeal, identifying both cases by number. R1107; S596. The notice was filed after the court orally denied his rule 22(e) motion in the Retaliation case, but before the written order, which was entered on January 23, 2018. R1184-88. By rule, the notice of appeal as it pertained to the Retaliation case is "treated as filed after such entry and on the day thereof." Utah R. App. P. 4(c). But the notice of appeal was filed 53 days after the October 16, 2017 judgment and sentence in the Stalking case. This Court consolidated the Stalking case appeal with the appeal in the Retaliation case in an order entered on June 29, 2018.

SUMMARY OF ARGUMENT

Denial of rule 22(e) motion in Retaliation case. Defendant contends that the district court's entry of a stalking injunction—to which Defendant stipulated under a plea agreement in the Retaliation case—was an illegal sentence because it is not authorized under the retaliation statute and exceeded the maximums for retaliation offenses. Defendant's argument is based on a false premise—that the injunction was part of his retaliation sentence. It was not. The injunction was consideration for (1) dismissal of the stalking, assault, unlawful detention, and threat of violence charges; (2) dismissal of another criminal case; (3) the State's agreement to forego prosecution of any other case arising before the plea date related to Victim; and (4) Defendant's sentence to 330 days with credit for time served and closure of the Retaliation case, resulting in his release from jail. Thus, Defendant's challenge to the injunction is really a challenge to his underlying conviction. Because he did not move to withdraw his plea, neither the trial court nor this Court had jurisdiction to consider the challenge.

Even assuming *arguendo* that the injunction was part of his retaliation sentence, he cannot challenge the injunction under rule 22(e) because such an injunction is not prohibited by statute nor does the injunction in a term of incarceration that exceeds the maximum term.

Appeal in Stalking case. This Court lacks jurisdiction over Defendant's appeal in the Stalking case for several reasons—Defendant did not file a motion to withdraw his plea, and, in any event, Defendant waived the right to appeal when he entered his plea under the plea deal and the notice of appeal was untimely.

ARGUMENT

I.

Defendant cannot challenge issuance of the stalking injunction under rule 22(e) because it was not part of his sentence for retaliation, but an agreed-to term of his plea under a court-approved plea agreement.

Consistent with the parties' pre-approved plea agreement, the district court in 2014 accepted Defendant's *Alford* plea to Retaliation, a third degree felony, sentenced him to 330 days with credit for time served, and closed the case. R994-95,2408. And consistent with the pre-approved plea agreement, R989, the court then issued a permanent stalking injunction enjoining Defendant from contacting Victim or her family (PCSI). 1000-01,2408-10.

A year and a half later, and facing new stalking charges arising from alleged violations of the PCSI, Defendant moved to correct the sentence under rule 22(e), arguing that the Utah Code permits the issuance of a permanent stalking injunction only upon a conviction for stalking. R1002-08. The district court denied Defendant's motion, explaining that rule 22(e) "is

not a vehicle by which the Defendant can attack the issuance” of the PCSI. R1187,2462-63. Contrary to Defendant’s claim on appeal, the district court is correct.

A trial court may correct a sentence only in limited circumstances. Under rule 22(e), Utah R. Crim. P., a trial court may “at any time” correct a sentence if it:

- (A) exceeds the statutorily authorized maximums;
- (B) is less than statutorily required minimums;
- ...; or
- (F) omits a condition required by statute or includes a condition prohibited by statute.

Utah R. Crim. P. 22(e)(1); (e)(2).⁵ The PCSI issued in the Retaliation case does not fall within any of these provisions.

In the first place, the PCSI was *not* part of the “sentence” for retaliation at all. While plea agreements “are not contracts,” they “are *like* contracts.” *State v. Francis*, 2017 UT 49, ¶ 11, 424 P.3d 156 (cleaned up). Thus, within limits, contract principles “provide a useful framework within which to consider plea agreements.” *Id.* The terms of plea agreements are not limited

⁵ Additionally, a trial may, within one year after the necessary facts could be discovered, correct a sentence that “violates Double Jeopardy; ... is ambiguous as to the time and manner in which it is to be served; ... [or] is internally contradictory.” Utah R. Crim. P. 22(e)(C),(D),(E). None of these bases for correcting a sentence is at issue in this appeal.

to the withdrawal of charges, or a sentencing recommendation. Parties may agree to—and seek enforcement of—terms that fall outside these areas, subject, of course, to court approval.

In this case, Defendant’s stipulation to the entry of the PCSI was not part of his sentence for retaliation. Rather, the sentence was 330 days in jail with credit for time served. The PCSI was consideration for the State’s court-approved agreement to (1) dismiss the remaining charges in the information (which included a stalking charge); (2) dismiss other outstanding charges against Defendant relating to Victim; (3) forego prosecution of any other crimes connected to Victim before the plea date; and (4) have Defendant sentenced to 330 days in jail with credit for time served and then have the case closed. R989,2401-02.

Nor was the injunction treated as a sentence by the district court. After accepting Defendant’s *Alford* plea, the court imposed the “330-day jail sentence” with credit for time served and closed the case: “So credit for time served and the case closed, case 3179 is closed. And that’s the sentence of the court.” R2408. Only then did the court turn to the consideration given by Defendant in the plea agreement—the injunction. After the court sentenced Defendant and closed the case, the prosecutor produced the unsigned injunction—which Defendant had expressly “stipulate[d] to” during the

hearing—and the judge then signed, sealed, and served it on Defendant that same day. R2409-10. As the district court explained, Defendant “got the benefit of his [plea] bargain and cannot attack the injunction that he agreed to have issued.” R1187.

In sum, Defendant’s challenge to the injunction is really a challenge to the terms of the underlying plea, not the sentence. The Utah Supreme Court has made clear that rule 22(e) “cannot be used as a veiled attempt to challenge the underlying conviction.” *State v. Candedo*, 2010 UT 32, ¶9, 232 P.3d 1008.⁶ Nor can it be used to challenge the terms of a plea entered under a court-approved plea agreement. To challenge that plea, Defendant was statutorily required to file a motion to withdraw his plea before sentence was announced. *See* Utah Code Ann. § 77-13-6(2)(b). And the district court expressly informed Defendant at the plea hearing that by agreeing to be sentenced that same day, he would “lose the right to come back at a later date and ask to withdraw the [*Alford*] plea,” to which Defendant replied, “I don’t have a problem with that.” R2406.

⁶ Defendant’s argument that the injunction was illegal because there was no factual basis for a stalking conviction, Aplt.Br. 12-13, is also a challenge to his underlying conviction—or lack of such a conviction. As *Candedo* makes clear, rule 22(e) cannot be used in this manner. Regardless, as explained, Defendant’s express agreement to entry of the injunction as a term of his plea agreement provided more than adequate basis for the injunction.

Because Defendant did not file a motion to withdraw his plea, his challenge to the plea terms can only be “pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.” Utah Code Ann. § 77-13-6(c); accord *State v. Allgier*, 2017 UT 84, ¶¶17-21, 416 P.3d 546.⁷

In any event, Defendant’s claim fails even assuming arguendo that the injunction was part of the retaliation sentence. As the district court correctly concluded, rule 22(e) permits relief only in limited circumstances. Defendant argues that the injunction was a “condition prohibited by statute,” Utah R. Crim. P. 22(e)(1)(F), and exceeded “the statutorily authorized maximums,” Utah R. Crim. P. 22(e)(1)(A). *See* Aplt.Br. 7-13. Neither argument has merit.

Nowhere in the stalking statute, nor in the retaliation statute, does it “prohibit” the issuance of a permanent stalking injunction as part of a plea agreement. *See* Utah Code Ann. § 76-5-106.5 (Westlaw, 2019); Utah Code Ann. § 76-8-508.3 (Westlaw, 2019). Indeed, Defendant has pointed to no statute that

⁷ As a challenge to his plea, Defendant’s only remedy would thus be withdrawal of that plea, not resentencing removing the injunction as he argues. Aplt.Br. 14-16.

prohibits a court from issuing a permanent stalking injunction pursuant to a defendant's agreement under a plea agreement. There is none.⁸

Moreover, rule 22(e)'s references to "minimums" and "maximums" relate to periods of incarceration, just as those terms are used throughout the criminal code. *See, e.g.,* Utah Code Ann. § 77-18-4(2) (Westlaw, 2019) (providing that a prison "sentence ... shall be for an indeterminate term of *not less than the minimum and not to exceed the maximum term* provided by law") (emphasis added); Utah Code Ann. § 77-18-4(3) (Westlaw, 2019) (providing that "every sentence, regardless of its form or terms, ... *shall be construed to be a sentence for the term between the minimum and maximum periods of time* provided by law") (emphasis added).

In sum, Defendant's stipulation to the issuance of the injunction was not part of any sentence, but consideration for benefits he received under the pre-approved plea agreement. Rule 22(e) is not a vehicle by which a defendant can challenge the terms of his plea under the court-approved plea agreement. And having failed to file a motion to withdraw his plea,

⁸ To the contrary, though styled a "criminal stalking injunction," such injunctions do not operate as a criminal punishment, but rather as a civil remedy designed to protect the victim. The issuance of such injunctions are thus within a trial court's sentencing authority. *See* Utah Code Ann. § 76-3-201(3)(b) (Westlaw, 2019) (providing that a "civil penalty may be included in a sentence").

Defendant can challenge the plea only in post-conviction. Even if the injunction were treated as part of the sentence for retaliation, Defendant still cannot challenge the injunction under rule 22(e). The issuance of an injunction is not prohibited by statute, nor does it increase the maximum term of incarceration for retaliation.

II.

This Court lacks jurisdiction over Defendant's challenge to his Stalking conviction.

Defendant argues that if this Court determines that the issuance of the injunction in the Retaliation case was a sentence that can be corrected under rule 22(e), the Court should vacate his conviction in the Stalking case. Aplt.Br. 17-18. But as Defendant himself recognizes, *see* Aplt.Br. 17, the rules do not allow him to do so where he did not file a motion to withdraw. He instead argues that the Court should do so "in the interests of judicial economy." Aplt.Br. 17. There is no interests-of-judicial-economy exception and Defendant has cited no case in support of one. As discussed, a plea may only be challenged by filing a timely motion to withdraw the plea. Utah Code Ann. § 77-13-6(2)(b). Defendant did not file such a motion to withdraw. Accordingly, his only remedy, if he is entitled to one, would be through post-conviction proceedings. Utah Code Ann. § 77-13-6(2)(c). This Court thus lacks jurisdiction to address Defendant's appellate challenge.

Moreover, Defendant's appeal in the Stalking case is untimely in any event. His sentence in the Stalking case was entered on October 16, 2017. S555-57. And it was based on an *Alford* plea that did not reserve the right to challenge any adverse rulings, *see id.*, which included Judge Kouris's denial of his motion to dismiss on the ground that the stalking injunction in the Retaliation case was invalid, S430-31,471. As he acknowledged at the plea hearing, *see* S550, he thus waived any right to appeal his stalking conviction. *See Manning v. State*, 2005 UT 61, ¶36, 122 P.3d 628 ("[I]t is well established that [the right to appeal] will be considered waived where the defendant enters a knowing and voluntary guilty plea pursuant to a plea agreement that expressly waives the right to appeal and is entered in accordance with the procedural safeguards of rule 11.").

And even had he reserved his right to appeal the district court's ruling, the notice of appeal was not filed until December 8, 2017—53 days after judgment. Because he had only 30 days within which to appeal the judgment, Utah R. App. P. 4(a), the notice of appeal is out of time and this Court would lack jurisdiction in any event. *See State v. Housekeeper*, 2002 UT 118, ¶23, 62

P.3d 444 (holding that “failure to timely file [notice of appeal] deprives an appellate court of jurisdiction over the appeal”).⁹

CONCLUSION

For the foregoing reasons, the State asks the Court to dismiss Defendant’s appeal.

Respectfully submitted on March 29, 2019.

SEAN D. REYES
Utah Attorney General

/s/ Jeffrey S. Gray

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Assistant Solicitor General
Counsel for Appellee

⁹ About two weeks before his notice of appeal, Judge Kouris did deny a motion to terminate his probation and close the Stalking case, S593, but that motion was no more than a request to reconsider his sentence, 561-69. But again, even assuming that was a final order from which Defendant could appeal, this Court would not have jurisdiction to consider his appeal. As explained, that can only be accomplished by filing a timely motion to withdraw the plea or through post-conviction action. *See, supra*, at 15-16.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 21 pages, excluding the table of contents, table of authorities, addenda, and certificate of service. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Jeffrey S. Gray
JEFFREY S. GRAY
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on March 29, 2019, the Brief of Appellee was served upon appellant's counsel of record by mail email hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

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/s/ Jeffrey S. Gray

ADDENDA

ADDENDUM

- Utah R. Crim. P. 22(e) A1
- Utah Code Ann. § 76-5-106.5 (Westlaw, 2019)..... A2
- Utah Code Ann. § 76-8-508.3 (Westlaw, 2019)..... A7

Utah R. Crim. P. 22(e)

(e) Correcting the sentence. The court may correct a sentence when the sentence imposed:

(e)(1)(A) exceeds the statutorily authorized maximums;

(e)(1)(B) is less than statutorily required minimums;

(e)(1)(C) violates Double Jeopardy;

(e)(1)(D) is ambiguous as to the time and manner in which it is to be served;

(e)(1)(E) is internally contradictory; or

(e)(6) omits a condition required by statute or includes a condition prohibited by statute.

(e)(2) *Time for filing.* A motion under (e) (1)(C), (e)(1)(D), or (e)(1)(E) shall be filed no later than one year from the date the facts supporting the claim could have been discovered through the exercise of due diligence. A motion under the other provisions may be filed at any time.

Utah Code Ann. § 76-5-106.5 (Westlaw, 2019) [Stalking]

(1) As used in this section:

(a) “Conviction” means:

- (i) a verdict or conviction;
- (ii) a plea of guilty or guilty and mentally ill;
- (iii) a plea of no contest; or
- (iv) the acceptance by the court of a plea in abeyance.

(b) “Course of conduct” means two or more acts directed at or toward a specific person, including:

(i) acts in which the actor follows, monitors, observes, photographs, surveils, threatens, or communicates to or about a person, or interferes with a person's property:

- (A) directly, indirectly, or through any third party; and
- (B) by any action, method, device, or means; or

(ii) when the actor engages in any of the following acts or causes someone else to engage in any of these acts:

- (A) approaches or confronts a person;
- (B) appears at the person's workplace or contacts the person's employer or coworkers;
- (C) appears at a person's residence or contacts a person's neighbors, or enters property owned, leased, or occupied by a person;
- (D) sends material by any means to the person or for the purpose of obtaining or disseminating information about or communicating with the person to a member of the person's family or household, employer, coworker, friend, or associate of the person;
- (E) places an object on or delivers an object to property owned, leased, or occupied by a person, or to the person's place of employment with the intent that the object be delivered to the person; or
- (F) uses a computer, the Internet, text messaging, or any other electronic means to commit an act that is a part of the course of conduct.

(c) “Emotional distress” means significant mental or psychological suffering, whether or not medical or other professional treatment or counseling is required.

(d) “Immediate family” means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.

(e) “Reasonable person” means a reasonable person in the victim's circumstances.

(f) “Stalking” means an offense as described in Subsection (2) or (3).

(g) “Text messaging” means a communication in the form of electronic text or one or more electronic images sent by the actor from a telephone or computer to another person's telephone or computer by addressing the communication to the recipient's telephone number.

(2) A person is guilty of stalking who intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person:

- (a) to fear for the person’s own safety or the safety of a third person; or
- (b) to suffer other emotional distress.

(3) A person is guilty of stalking who intentionally or knowingly violates:

- (a) a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions; or
- (b) a permanent criminal stalking injunction issued pursuant to this section.

(4) In any prosecution under this section, it is not a defense that the actor:

- (a) was not given actual notice that the course of conduct was unwanted; or
- (b) did not intend to cause the victim fear or other emotional distress.

(5) An offense of stalking may be prosecuted under this section in any jurisdiction where one or more of the acts that is part of the course of conduct was initiated or caused an effect on the victim.

(6) Stalking is a class A misdemeanor:

- (a) upon the offender’s first violation of Subsection (2); or
- (b) if the offender violated a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions.

(7) Stalking is a third degree felony if the offender:

- (a) has been previously convicted of an offense of stalking;
- (b) has been previously convicted in another jurisdiction of an offense that is substantially similar to the offense of stalking;
- (c) has been previously convicted of any felony offense in Utah or of any crime in another jurisdiction which if committed in Utah would be a felony, in which the victim of the stalking offense or a member of the victim’s immediate family was also a victim of the previous felony offense;
- (d) violated a permanent criminal stalking injunction issued pursuant to Subsection (9); or

(e) has been or is at the time of the offense a cohabitant, as defined in Section 78B-7-102, of the victim.

(8) Stalking is a second degree felony if the offender:

(a) used a dangerous weapon as defined in Section 76-1-601 or used other means or force likely to produce death or serious bodily injury, in the commission of the crime of stalking;

(b) has been previously convicted two or more times of the offense of stalking;

(c) has been convicted two or more times in another jurisdiction or jurisdictions of offenses that are substantially similar to the offense of stalking;

(d) has been convicted two or more times, in any combination, of offenses under Subsection (7)(a), (b), or (c);

(e) has been previously convicted two or more times of felony offenses in Utah or of crimes in another jurisdiction or jurisdictions which, if committed in Utah, would be felonies, in which the victim of the stalking was also a victim of the previous felony offenses; or

(f) has been previously convicted of an offense under Subsection (7)(d) or (e).

(9) (a) The following serve as an application for a permanent criminal stalking injunction limiting the contact between the defendant and the victim:

(i) a conviction for:

(A) stalking; or

(B) attempt to commit stalking; or

(ii) a plea to any of the offenses described in Subsection (9)(a)(i) accepted by the court and held in abeyance for a period of time.

(b) A permanent criminal stalking injunction shall be issued by the court at the time of the conviction. The court shall give the defendant notice of the right to request a hearing.

(c) If the defendant requests a hearing under Subsection (9)(b), it shall be held at the time of the conviction unless the victim requests otherwise, or for good cause.

(d) If the conviction was entered in a justice court, a certified copy of the judgment and conviction or a certified copy of the court's order holding the plea in abeyance shall be filed by the victim in the district court as an application and request for a hearing for a permanent criminal stalking injunction.

(10) A permanent criminal stalking injunction shall be issued by the district court granting the following relief where appropriate:

(a) an order:

(i) restraining the defendant from entering the residence, property, school, or place of employment of the victim; and

(ii) requiring the defendant to stay away from the victim, except as provided in Subsection (11), and to stay away from any specified place that is named in the order and is frequented regularly by the victim;

(b) an order restraining the defendant from making contact with or regarding the victim, including an order forbidding the defendant from personally or through an agent initiating any communication, except as provided in Subsection (11), likely to cause annoyance or alarm to the victim, including personal, written, or telephone contact with or regarding the victim, with the victim's employers, employees, coworkers, friends, associates, or others with whom communication would be likely to cause annoyance or alarm to the victim; and

(c) any other orders the court considers necessary to protect the victim and members of the victim's immediate family or household.

(11) If the victim and defendant have minor children together, the court may consider provisions regarding the defendant's exercise of custody and parent-time rights while ensuring the safety of the victim and any minor children. If the court issues a permanent criminal stalking injunction, but declines to address custody and parent-time issues, a copy of the stalking injunction shall be filed in any action in which custody and parent-time issues are being considered and that court may modify the injunction to balance the parties' custody and parent-time rights.

(12) Except as provided in Subsection (11), a permanent criminal stalking injunction may be modified, dissolved, or dismissed only upon application of the victim to the court which granted the injunction.

(13) Notice of permanent criminal stalking injunctions issued pursuant to this section shall be sent by the court to the statewide warrants network or similar system.

(14) A permanent criminal stalking injunction issued pursuant to this section has effect statewide.

(15) (a) Violation of an injunction issued pursuant to this section constitutes a third degree felony offense of stalking under Subsection (7).

(b) Violations may be enforced in a civil action initiated by the stalking victim, a criminal action initiated by a prosecuting attorney, or both.

(16) This section does not preclude the filing of a criminal information for stalking based on the same act which is the basis for the violation of the stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions, or a permanent criminal stalking injunction.

(17) (a) A law enforcement officer who responds to an allegation of stalking shall use all reasonable means to protect the victim and prevent further violence, including:

(i) taking action that, in the officer's discretion, is reasonably necessary to provide for the safety of the victim and any family or household member;

(ii) confiscating the weapon or weapons involved in the alleged stalking;

(iii) making arrangements for the victim and any child to obtain emergency housing or shelter;

(iv) providing protection while the victim removes essential personal effects;

(v) arranging, facilitating, or providing for the victim and any child to obtain medical treatment; and

(vi) arranging, facilitating, or providing the victim with immediate and adequate notice of the rights of victims and of the remedies and services available to victims of stalking, in accordance with Subsection (17)(b).

(b) (i) A law enforcement officer shall give written notice to the victim in simple language, describing the rights and remedies available under this section and Title 77, Chapter 3a, Stalking Injunctions.

(ii) The written notice shall also include:

(A) a statement that the forms needed in order to obtain a stalking injunction are available from the court clerk's office in the judicial district where the victim resides or is temporarily domiciled; and

(B) a list of shelters, services, and resources available in the appropriate community, together with telephone numbers, to assist the victim in accessing any needed assistance.

(c) If a weapon is confiscated under this Subsection (17), the law enforcement agency shall return the weapon to the individual from whom the weapon is confiscated if a stalking injunction is not issued or once the stalking injunction is terminated.

Utah Code Ann. § 76-8-508.3 (Westlaw, 2019) [Retaliation]

(1) As used in this section:

(a) A person is “closely associated” with a witness, victim, or informant if the person is a member of the witness’, victim’s, or informant’s family, has a close personal or business relationship with the witness or victim, or resides in the same household with the witness, victim, or informant.

(b) “Harm” means physical, emotional, or economic injury or damage to a person or to his property, reputation, or business interests.

(2) A person is guilty of the third degree felony of retaliation against a witness, victim, or informant if, believing that an official proceeding or investigation is pending, is about to be instituted, or has been concluded, he:

(a) (i) makes a threat of harm; or

(ii) causes harm; and

(b) directs the threat or action:

(i) against a witness or an informant regarding any official proceeding, a victim of any crime, or any person closely associated with a witness, victim, or informant; and

(ii) as retaliation or retribution against the witness, victim, or informant.

(3) This section does not prohibit any person from seeking any legal redress to which the person is otherwise entitled.

(4) The offense of retaliation against a witness, victim, or informant under this section does not merge with any other substantive offense committed in the course of committing any offense under this section.

ADDENDUM B
2014 Permanent Criminal Stalking Injunction
R1000-01



SIM GILL
 District Attorney for Salt Lake County
 JOSEPH S. HILL, 10178
 Deputy District Attorney
 111 East Broadway, Suite 400
 Salt Lake City, Utah 84111
 Telephone: (385) 468-7600

Third District Court

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
 IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

<p>THE STATE OF UTAH, Plaintiff, -vs- ROBERT BRIAN WALTON, Defendant.</p>	<p>PERMANENT CRIMINAL STALKING INJUNCTION Case No. 121903179 Hon. ROBIN W. REESE</p>
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As of now, you, Robert Brian Walton (Defendant) are under the following Court Orders with regards to Kori E. Boes, specifically:

- **LEAVE and STAY AWAY** from any place where **KORI E. BOES** lives, works, or goes to school.

This means that:

- you are restrained from entering the present or future residence, property, school, or place of employment of **KORI E. BOES**;

- **STAY AWAY** from **KORI E. BOES** and from certain people, and **DON'T COMMUNICATE** with any of them. **DON'T ASK** anyone else to communicate with any of them.

This means that:

- you are required to stay away from **KORI E. BOES** and members of **KORI E. BOES'** immediate family or household, including her parents and siblings;
- you are restrained from making contact in any form with **KORI E. BOES**.
- you are forbidden from personally or through an agent initiating any communication likely to cause annoyance or alarm, including personal, written or telephone contact with **KORI E. BOES** or her family members, employers, employees, fellow workers, friends,

associates, or others with whom communication would be likely to cause annoyance or alarm to KORI E. BOES.

**IT IS A CRIME to disobey this order.
NO ONE EXCEPT THE JUDGE CAN CHANGE COURT ORDERS.**

The Court makes the following findings:

- 12* The defendant has stipulated to and waives any defect with the issuance of a permanent stalking injunction naming Kori E. Boes as the protected party.
- 12* The defendant was notified of the right to a hearing on the issuance of a permanent criminal stalking injunction and the Defendant has waived the same and stipulated to the issuance of the injunction.

This order is permanent. VIOLATIONS SHALL CONSTITUTE A FELONY OFFENSE OF STALKING pursuant to Section 76-5-106.5. Violations may be enforced either in a civil action by the victim and/or in a criminal action by a prosecuting attorney.

Defendant was afforded both notice and opportunity to be heard in the hearing that gave rise to this order. The court had jurisdiction over the parties and over the matter under the laws of the state of Utah. Pursuant to the Violence Against Women Act 18 U.S.C. §§2265-2266 (2000), this order is valid in all the United States, in the District of Columbia, in tribal lands, and in United States Territories.

SIGNED ON this 5 day of Dec 2014

[Signature]
 DISTRICT COURT JUDGE



I served a copy on the defendant on:

12/08/12
[Signature]
 Signature
officer
 Title

ADDENDUM C

**Findings of Fact and Conclusions of Law Regarding Defendant's
Motion to Correct Sentence [in Retaliation case]**

R1184-88

FINDINGS OF FACT

1. Defendant was originally charged in an Information with Robbery, a second degree felony, Retaliation Against a Witness, a third degree felony, Stalking, a class A misdemeanor, Assault, a class B misdemeanor, Unlawful Detention, a class B misdemeanor and Threat of Violence, a class B misdemeanor. Defendant entered a no-contest *Alford* plea to one count of Retaliation Against a Witness on December 8, 2014. As part of the plea agreement the Defendant made with the State, the State moved to dismiss the remaining counts in the information and recommended the Defendant receive credit for the time he had served (330 days) and the case be closed.
2. As part of the plea agreement, Defendant knowingly, and intending to receive the benefit of the plea bargain allowing his release from jail, stipulated to the issuance of a Permanent Criminal Stalking Injunction (PCSI) naming victim Kori Boes as the protected party. The plea form, which the Defendant signed, stated, “Robert Walton agrees to the permanent stalking injunction being imposed in this case.” The issuance of the stalking injunction was an important part of negotiation for the State and the reason they allowed the type of plea and Defendant’s release from jail. The injunction was also one of the important reasons for the victim’s agreement with the

- resolution. The State would not have agreed with the plea except for Defendant's agreement to the stalking injunction.
3. Defendant received the benefit of his bargain, the stalking injunction was issued and he was allowed to plea was sentenced on December 8, 2014, and the Court gave him credit for 330 days served, issued the PCSI, and closed the case.
 4. On July 7, 2016, Defendant was charged in District Court case number, assigned to Judge Mark Kouris, with three counts of violating the Permanen Criminal Stalking Injunction.
 5. In his *Urgent Motion for Correction of Sentence According to Statue for the "Alford" Plea to "Retaliation,"* filed October 5, 2017, Defendant, as a method of attacking the prosecution against him for violating the stalking injunction, moved this Court to correct his sentence by invalidating the PCSI. Defendant argued that the issuance of the PCSI was an illegal sentence that should be corrected pursuant to Utah Rule of Criminal Procedure 22(e)(6).
 6. At the November 2, 2017, hearing on Defendant's motion, Defendant presented no evidence or law to show that the PCSI the Court issued at sentencing on December 8, 2014, was a condition that was prohibited by statute.

CONCLUSIONS OF LAW

1. Utah Rule of Criminal Procedure 22(e)(6) is not a vehicle by which the Defendant can attack the issuance of the PCSI.
2. Utah Code Annotated Section 76-5-106.5(9) states that a conviction of Stalking or Attempted Stalking or a plea to either held in abeyance is an application for a permanent stalking injunction, requires the court to issue the permanent stalking injunction at the time of conviction and provides for notice and an opportunity for a hearing. Section 76-5-106.5(10) states, "A permanent criminal stalking injunction shall be issued by the district court granting the following relief where appropriate." Following that statement is a list of various orders possible including prohibiting a defendant from entering property and requiring a defendant to stay away from a victim, etc. The statute does not address whether a defendant can agree to a stalking injunction being issued when the defendant is charged with a count of stalking but bargains to plead to another of the counts in exchange for entry of the stalking injunction and dismissal of the stalking charge. In this case, Defendant agreed to have the injunction issued. He did so because he got the benefit of pleading no contest to only one count of the several charged and his release from jail. As such he got the benefit of his bargain and cannot attack the injunction that he agreed to have issued.
3. The issuance by the Court of a PCSI to which the parties stipulated was not an illegal sentence prohibited by statute.
4. Defendant has not presented a valid legal basis for this Court to invalidate the PCSI.

Having made the foregoing findings and conclusions, the Court hereby DENIES the Defendant's *Motion for Correction of Sentence According to Statue for the "Alford" Plea to "Retaliation."*

ADDENDUM D

Sentence, Judgment, Commitment [in Stalking case]

S555-57

The Order of the Court is stated below:

Dated: October 16, 2017
01:20:38 PM

At the direction of:
/s/ MARK KOURIS
District Court Judge
by
/s/ REENA PARTOLA
District Court Clerk



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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 161907013 FS
ROBERT BRIAN WALTON,	:	Judge: MARK KOURIS
Defendant.	:	Date: October 16, 2017
Custody: Salt Lake County Jail		

PRESENT

Clerk: reenap

Prosecutor: HILL, JOSEPH S

Defendant Present

The defendant is in the custody of the Salt Lake County Jail

Defendant's Attorney(s): FINLAYSON, DAVID V

DEFENDANT INFORMATION

Date of birth: May 27, 1969

Sheriff Office#: 361501

Audio

Tape Number: W48 Tape Count: 10:08, 12:13

CHARGES

1. STALKING - 3rd Degree Felony
 Plea: Guilty - Disposition: 10/16/2017 Guilty
2. STALKING - 3rd Degree Felony
 - Disposition: 10/16/2017 Dismissed w/ Prejudi
3. STALKING - 3rd Degree Felony
 - Disposition: 10/16/2017 Dismissed w/ Prejudi

Court advises defendant of rights and penalties.
Defendant waives the reading of the Information.
Defendant waives time for sentence.

Change of Plea Note

Count 1 as an Alford Plea.

00555

HEARING

10:08 am. Defendant addresses the Court on issues from the last Preliminary Hearing.

Defendant provides arguments for release

10:13 am: Mr. Hill responds.

10:14 am: Discussions take place regarding scheduling.

This matter is to continue to later this morning.

12:13 am: Parties are present and inform the Court that they have reached resolution.

SENTENCE PRISON

Based on the defendant's conviction of STALKING 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 RELEASE TIME NOTE

To be released.

ORDER OF PROBATION

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

Probation is to be supervised by Adult Probation and Parole.

Usual and ordinary conditions required by Adult Probation and Parole.

Obtain a mental health evaluation and successfully complete any recommended treatment.

The issuance of a Permanent Criminal Stalking Injunction.

No contact with Victim.

No Contact with District Attorney employees. District Attorney employees may contact Defendant for official matters.

To report to AP&P Services within 24 hours of release.

Case No: 161907013 Date: Oct 16, 2017

End Of Order - Signature at the Top of the First Page

00557

ADDENDUM E
Notice of Appeal
R1107 (also at S596)

Robert Walton

Defendant

rob@westernciviccapital.com

FILED DISTRICT COURT
Third Judicial District
DEC -8 2017
SALT LAKE COUNTY

In the Third Judicial District Court, Salt Lake County, State of Utah, Salt Lake Department

**Notice of Appeal from the Order of 11/29/17 By Judge Parker denying
Reconsideration of the denial of Resentencing, and the denial of the Motion for
Resentencing under U.R.Cr.P. 22(e)(6)**

Request for Appointment of Counsel

State of Utah

v.

Robert Walton

December 6, 2017

Case nos. 121903179. 161907013

01107