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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BOUNTIFUL CITY, Plaintiff/Appellee, vs. NATHAN DAVID BAIZE, Defendant/Appellant.	Case No. 20170154-CA

BRIEF OF APPELLEE

Appeal from Post sentencing Judgment / Commitment entered on February 10, 2017, in the Second District Court, Davis Count, the Honorable Glen R. Dawson, presiding

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INTRODUCTION

This appeal is based on two claims of plain error. First, that the trial court committed plain error when revoking probation and ordering a new sentence for a probation violation following a new conviction. Second, Mr. Baize has claimed that his trial counsel's performance fell below an objective standard of reasonable professional judgment.

This Court should deny Mr. Baize's request to set aside the trial court's order because there was no harm. Mr. Baize's trial counsel's performance during the Order to Show Cause hearing did not violate Mr. Baize's right to counsel because Counsel's performance was adequate where there was no prejudice to Mr. Baize.

STATEMENT OF ISSUES

1. Whether Mr. Baize's right of due process was violated.

Standard of review: "The correct interpretation of a statute is a question of law and is reviewed for correctness." *State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993). Mr. Baize first claimed the trial court violated his due process rights on appeal. This issue was not preserved at trial and so this Court must apply the plain error standard. The plain error standard from *Dunn* is as follows:

> "(i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined. **If any one of these requirements is not met, plain error is not established."**

State v. Dunn, 850 P.2d 1201, 1208-09 (Utah Sup. Ct. 1993) (emphasis added).

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Preservation or Statement of Grounds for Review: Mr. Baize must show plain error because the alleged error was not properly objected to during trial. *Id.*

2. Whether Trial Counsel Provided Adequate Counsel To Mr. Baize Under The Sixth Amendment.

Standard of review: The United States Supreme Court held the analysis of an ineffective assistance of counsel claim "has two components." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). An appellant must show both, "his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant, to succeed on this claim. *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988).

Preservation or Statement of Grounds for review: "Ineffective assistance of counsel is sometimes characterized as an exception to preservation." *State v. Johnson*, 2017 UT 76, (Citing *See State v. Griffin*, 384 P.3d 186 (2016 UT)). "This exception differs from the other preservation exceptions." *Id.* "While such a claim necessarily requires the court to look at the substantive issue the defendant argues his counsel should have raised, and whether the substantive issue had any merit, the substantive issue is only viewed through the lens of counsel's performance." *Id.*

STATEMENT OF THE CASE

Mr. Baize was charged with Assault-Domestic Violence, a class B Misdemeanor, Criminal Trespass-Domestic Violence, a class B misdemeanor, Unlawful Detention-

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Domestic Violence, a class B misdemeanor, and Commission of Domestic Violence in the Presence of a Child, a class B misdemeanor (R. 1-3).

On December 7, 2015 Mr. Baize appeared before the court and entered guilty pleas pursuant to a plea negotiation (R. 86). Mr. Baize pleaded guilty to the amended charges of Criminal Trespass, a class B misdemeanor and Disorderly Conduct-Domestic Violence, a class C misdemeanor and all remaining charges were dismissed (R. 86-87).

At sentencing on January 20, 2016, Mr. Baize was sentenced on the charge of Disorderly Conduct-Domestic Violence to a term of ninety (90) days with ninety (90) days suspended (R. 107). He was also sentenced to pay a fine of $1425.00 with $1075.00 suspended (R. 108). On the charge of Criminal Trespass Mr. Baize was sentenced to a term of one hundred and eighty (180) days, with one hundred and eighty (180) days suspended and a fine of 1900.00 with 1220.00 suspended. Mr. Baize was also sentenced to a term of twelve (12) months of court supervised probation for both counts (R. 108).

As part of that probation, Mr. Baize was to pay $100.00 monthly, starting payments on June 30, 2016, keep the court appraised of any address change, and to have no further violations of the law. (R. 108 -109). On August 31, 2016, the Second District Court informed Mr. Baize, by letter, that he had failed to pay his fine in accordance with the Court's orders (R. 114).

Mr. Baize requested a review in case 151800071 (R. 116). At that review, Mr. Baize informed the court that he had been charged with new criminal violations since he was placed on probation for case 151800071(R. 275:5-8). The court set the matter for an Order to Show Cause hearing on December 12, 2016 (R 276:18-19). Mr. Baize signed a promise

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to appear for the December 12 hearing (R. 123). At the December 12 court appearance, Mr. Baize was represented by counsel (R. 124-125). Mr. Baize's counsel spoke with the City and a trial date was set for the new allegations of child abuse and it was decided that the Order to Show Cause hearing would trail the trial (R. 283-10-17). Mr. Baize signed a promise to appear at the trial and Order to Show Cause hearing (R. 126).

After Mr. Baize was convicted, the court stated that it found "in light of [the conviction], a violation of the terms of probation" and asked counsel if that was alright (R. 245). Counsel did not object to the court finding the new conviction, which the Court had just entered, a violation of probation (R. 245). The court then stated, "It's a court order to show cause. I think the only allegation was this new crime. But, in light of that, it does create a violation of the term of probation in the earlier case. And I will sentence on both of those matters." (R. 245:8-12).

During sentencing, Counsel submitted without a statement, but Mr. Baize spoke (R. 251- 253). After Mr. Baize spoke the City recommended treatment and stated, "And we think that's the most important thing here" (R. 253:12-13). The Judge then asked the Mr. Baize what type of treatment had been ordered in the past and he responded, "Yes, your Honor. All treatments have conceded that my ex-wife is the problem. And the court should recognize that." (R. 254:6-8) Defense Counsel then tries to clarify for Mr. Baize by asking, "What treatment have you had through Judge Hamilton?" (R. 254:9-10). The City then responds that, "If the defendant doesn't want to do counseling, maybe some imposed jail time would be appropriate." (R. 254:16-21). Mr. Baize then addressed the Court again (R. 254:24-255:14). The court then imposed sentence (R. 255:15-256:15).

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SUMMARY OF ARGUMENTS

1. There was no plain error because Mr. Baize fails to show how the error was harmful to him.
2. Counsel's performance was adequate where there was no prejudice to Mr. Baize.

ARGUMENTS

I. MR. BAIZE WAS NOT HARMED BY THE ALLEGED ERROR

To succeed on a claim of plain error an appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined. **If any one of these requirements is not met, plain error is not established.** *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah Sup.Ct. 1993) (emphasis added).

For this Court to find plain error, it must find Mr. Baize has shown "the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." *State v. Dunn*, 850 P.2d at 1208. Mr. Baize has not met this burden. Based on the record presented, there is no likelihood of a more favorable outcome and there was no harm to Mr. Baize.

When determining harm to a Mr. Baize, this Court should look at "the importance of the relevant testimony, whether the testimony was cumulative, and the overall strength of the prosecution's case." *State v. Fahina*, 400 P.3d 1177, 1182, *cert. denied*, 406 P.3d

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251 (Utah 2017). Furthermore, "the more evidence supporting the verdict, the less likely there was harmful error." *Id.*

Mr. Baize was not harmed by the lack of a written affidavit because there is not a reasonable likelihood of a more favorable outcome, nor was the Court's decision to revoke probation undermined by the procedural error of the trial court. The trial court took notice of the Mr. Baize's probation violation when he informed the court of the violations during a review requested by himself (R. 275: 5-8). The trial court set the Order to Show Cause hearing initially in open court (R. 276: 18-19). Then the trial court continued the hearing to the same date as the bench trial on one of the new violations of probation (R. 283: 10-17). The trial court convicted Mr. Baize of a new violation of law and sentenced at the same time for the new violation, which was a probation violation, and the probation violation (R. 245:8-12). There is not a reasonable likelihood of a more favorable outcome if Mr. Baize had been served with a written notice of his probation violation. There was no harm to Mr. Baize based on the facts as found in the record and this Court should deny this appeal.

II. MR. BAIZE'S TRIAL COUNSEL'S PERFORMANCE DID NOT FALL BELOW AN OBJECTIVE STANDARD BECAUSE THERE WAS NO LIKELIHOOD OF A DIFFERENT OUTCOME

Under the Sixth Amendment "the accused shall enjoy the right…to have the assistance of counsel for his defense." (U.S. Const. amend. VI) The United States Supreme Court has held the analysis of a "claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." *Strickland v.*

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Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The Utah Supreme Court clarified that, "a defendant must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant." *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988). "Unless a defendant makes both showings, it cannot be said that the conviction… resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland* 466 U.S. at 687.

Under this analysis, Mr. Baize must overcome the strong presumption that counsel's performance was "within the wide range of reasonable professional assistance." *Id*. at 689. "To that end, a reviewing court defers to counsel's choices regarding trial strategy, even if in hindsight his or her choices were incorrect." *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995) (Citing *Id*.). Moreover, "this court will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect." *State v. Tennyson*, 850 P.2d 461, 465 (Utah Ct. App. 1993). (citing *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065).

An ineffectiveness claim "succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions." *State v. Tennyson*, 850 P.2d 461, 466 (Utah Ct. App. 1993) (citing *State v. Moritzsky,* 771 P.2d 688, 692 (Utah Ct. App.1989)). "As a result, claims of ineffective assistance of counsel rarely succeed." *Tennyson*, 850 P.2d at 466.

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The second component required under *Strickland* necessitates Mr. Baize show "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 669. To show Mr. Baize was prejudiced he must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The Utah Supreme Court held "but for the errors, it is reasonably probable that the result would have been different." *Bundy v. Deland*, 763 P.2d 803, 806 (Utah 1988). In *Bundy*, the Supreme Court required "the Appellant to establish the likelihood that absent the errors, the jury would not have found him guilty." *Id.*

The Utah Supreme Court held, "an appellate court should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *State v. Templin*, 805 P.2d 182, 187 (Utah 1990) (*quoting Strickland,* 466 U.S. at 696. This is similar to determining harm under the plain error standard, where the Court has held, "The more evidence supporting the verdict, the less likely there was a harmful error." *State v. Fahina*, 2017 UT App 111, ¶ 29, 400 P.3d 1177, 1182, *cert. denied*, 406 P.3d 251 (Utah 2017).

Even if this Court finds trial counsel's representation did fall below an objective standard, there was no prejudice to Mr. Baize because of the totality of the evidence. The trial court entered the conviction, which was the alleged violation of probation, moments before finding that the conviction was a violation of Mr. Baize's probation in case 151800071. The trial court was going to take notice of this conviction and find a probation violation no matter what trial counsel said at that time. Based on these facts, this Court

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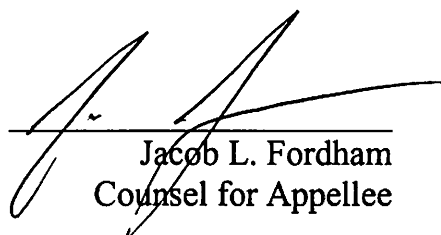
should find there was no prejudice to Mr. Baize and uphold the trial court's decision to terminate probation.

CONCLUSION

Based on the foregoing, Bountiful City respectfully requests that this Court deny Mr. Baize's appeal and uphold termination of probation entered against him.

RESPECTFULLY SUBMITTED this day 2 of May, 2018.

BOUNTIFUL CITY

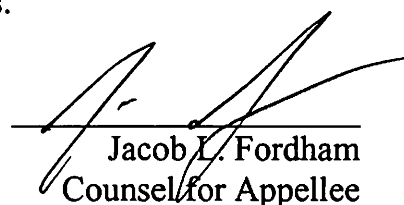


Jacob L. Fordham
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

The undersigned, Jacob L. Fordham, hereby certifies, pursuant to Utah Rules of Appellate Procedure 24(a)(11)(g), that the Brief of Appellee complies with the applicable word count by containing 2427 words.

The undersigned also certifies that the Brief of Appellee complies with the Rules of Appellate Procedure 21, governing public and private records.



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CERTIFICATE OF SERVICE

I, Jacob L. Fordham, herby certify that I personally caused to be HAND DELIVERED two (2) true and correct copies of the foregoing BRIEF OF APPELLEE to the following on this 2 day of May, 2018:

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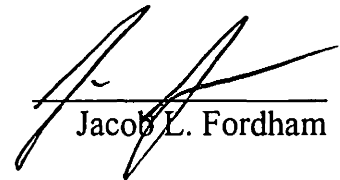
The Undersigned also certifies that he included a digital copy of the Brief of Appellant.



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