2017

BOUNTIFUL CITY, Plaintiff/Appellee, v. NATHAN DAVID BAIZE, Defendant/Appellant. : Reply Brief

Utah Court of Appeals

280

JUDGE Rule 31

CALENDARED Aug 28 2018 11am

IN THE UTAH COURT OF APPEALS

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

REPLY BRIEF OF APPELLANT

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

SCOTT L WIGGINS (5820)
ARNOLD & WIGGINS, P.C.
American Plaza II, Suite 105
57 West 200 South
Salt Lake City, UT 84101
Counsel for Appellant

JACOB L. FORDHAM (15134)
BOUNTIFUL CITY ATTORNEY'S OFFICE
805 South Main St.
Bountiful, UT 84010
Counsel for Appellee

ORAL ARGUMENT GRANTED

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BOUNTIFUL CITY ATTORNEY'S OFFICE
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Bountiful, UT 84010
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None.

ARGUMENTS

I. MR. BAIZE WAS HARMED BECAUSE THE COURT VIOLATED HIS RIGHT TO DUE PROCESS BY FAILING TO PROVIDE HIM WITH TIMELY AND ADEQUATE NOTICE AND THE OPPORTUNITY TO BE HEARD ON THE PROBATION VIOLATION ALLEGATIONS.

Bountiful City claims that Mr. Baize was not harmed by the alleged error. *See* Brief of Appellee, p. 5. This argument – when viewed in conjunction with the circumstances of this case – is without merit.

According to Utah law, harmfulness requires "more than the mere possibility that the outcome might have been different without the error." *State v. Powell*, 2007 UT 9, ¶ 21, 154 P.3d 788; *see also State v. Parker*, 2000 UT 51, ¶ 7, 4 P.3d 778. However, an appellant need only show that "absent the error, there is a *reasonable likelihood* of a more favorable outcome" – or, in other words, the reviewing court's confidence in the sentence "is undermined." *See id.* (emphasis added).

A court must hold a hearing in order to extend, modify, or revoke probation and to find that the probationer violated the conditions of probation. *See* Utah Code Ann. § 77-18-1(12)(a)(ii) (2012) (stating "[p]robation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated").[1] At the probation revocation proceeding, "[t]he defendant may call witnesses, appear and speak in the

[1]A true and correct copy of Utah Code Ann. § 77-18-1 (2012) is attached to the Brief of Appellant as Addendum E.

defendant's own behalf, and present evidence," including questioning witnesses called by the City "who have given adverse information on which the allegations are based . . . ." *See id.* at § 77-18-1(12)(a)(iii)-(iv). "After the hearing the court shall make findings of fact." *Id.* at § 77-18-1(12)(e)(i).

If a probation violation is found, the trial court "'must determine by a preponderance of the evidence that the violation was willful.'" *State v. Maestas*, 2000 UT App 22, ¶ 24, 997 P.2d 314 (quoting *State v. Peterson*, 869 P.2d 989, 991 (Utah Ct. App. 1994) and citing *State v. Hodges*, 798 P.2d 270, 279 (Utah Ct. App. 1990)). But if the court determines that a probationer's violation was not willful, it is then required to "consider 'whether adequate alternative methods of punishing the defendant are available.'" *See State v. Orr*, 2005 UT 92, ¶ 34, 127 P.3d 1213 (quoting *Bearden v. Georgia*, 461 U.S. 660, 668-69, 103 S.Ct. 2064 (1983)); *see also* Utah Code Ann. § 77-18-1(12)(e)(ii).

Assuming, *arguendo*, the alleged probation violation was based upon Mr. Baize's other case entitled *Bountiful City v. Baize*, Case No. 161800370,[2] there is a reasonable likelihood that had the court abided by the requirements of the probation statute and the

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[2]This related case is currently pending before the Court in *Bountiful City v. Baize*, Case No. 20170155-CA. The lack of willfulness of the probation violation is also demonstrated by the offense for which Mr. Baize was charged and ultimately convicted in that case – Child Abuse, a class C misdemeanor, with the mens rea of criminal negligence, which – as the trial court noted – is the lowest of the four mens rea standards under Utah law. Moreover, the court – in that case – failed to consider that Mr. Baize's conduct constituted reasonable discipline of a child as provided by the plain language of the statute.

minimum requirements of due process, it would have realized that Mr. Baize's violation of probation was not willful. As a result, the court would have then been required to "consider 'whether adequate alternative methods of punishing the defendant are available.'" *See Orr*, 2005 UT 92 at ¶ 34 (quoting *Bearden*, 461 U.S. at 668-69); *see also* Utah Code Ann. § 77-18-1(12)(e)(ii). The court – in other words – would have been required to consider alternative sentences such as revoking and restarting probation or even an extension of probation. The reasonable likelihood of this result is underscored by the court's lenient sentence of 10 days in jail imposed in this case, which the court ran concurrent with the term in the other case. Consequently, there is a reasonable likelihood of a more favorable outcome for Mr. Baize.

The harm inflicted is a result of the court's violation of Mr. Baize's right to due process. A probationer is entitled to the minimum requirements of due process in a probation modification proceeding, which include

> (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body . . .; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation].

See Orr, 2005 UT 92 at ¶ 20 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756 (1973) (with alterations and internal quotation marks omitted)). "These requirements

in themselves serve as substantial protection against ill-considered revocation." *Scarpelli*, 411 U.S. at 786.

The probation statute states, "Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified." Utah Code Ann. § 77-18-1(12)(b)(i). Once the court determines there is probable cause, "it shall cause to be served on the defendant a warrant for the defendant's arrest or a copy of the affidavit and an order to show cause why the defendant's probation should not be revoked, modified, or extended." *Id.* at § 77-18-1(12)(b)(ii). "The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing" and "shall also inform the defendant of a right to present evidence." *Id.* at § 77-18-1(12)(c)(i) & (iv).

"In our judicial system, except in extraordinary circumstances that are not present here, all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision." *Plumb v. State*, 809 P.2d 734, 743 (Utah 1990) (citing *Nelson v. Jacobsen*, 669 P.2d 1207, 1211-12 (Utah 1983) and *Highbarger v. Thornock*, 94 Idaho 829, 831-32, 498 P.2d 1302, 1304 (1972)). "The failure to give adequate notice and opportunity to participate can constitute a denial of due process under article I, section 7 of the Utah Constitution. Utah

Const. art. I, § 7."[3] *See Plumb*, 809 P.2d at 743. "'Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceedings against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process.'" *Cornish Town v. Koller*, 798 P.2d 753, 756 (Utah 1990) (quoting *Nelson*, 669 P.2d at 1212). "'Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.'" *Id.* (quoting *Nelson*, 669 P.2d at 1211).

Contrary to the plain language of the probation statute, the court erred by failing to provide Mr. Baize with timely and adequate notice of the probation violation allegation and a meaningful opportunity to be heard on the matter. The City essentially concedes that there is nothing in the record demonstrating that the court caused any type of filing or written notice alleging with particularity facts asserted to constitute violation of the conditions of probation to be served on Mr. Baize. *See & cf.* Utah Code Ann. § 77-18-1(12)(b)(ii). The court further failed to inform Mr. Baize of his right to present evidence at the order to show cause hearing, which notice – according to the statute – must be served at least five days prior to the hearing. *See id.* at § 77-18-1(12)(c)(i) & (iv).

Utah case law mandates that a probationer – consistent with the minimum requirements of due process – be provided with at least the following: (1) notice of the

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[3]Article I, section 7, of the Utah Constitution provides, "No person shall be deprived of life, liberty or property, without due process of law. Utah Const. art. I, § 7.

claimed violations of probation; (2) disclosure to the probationer of the evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; and (5) a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. *See Orr*, 2005 UT 92 at ¶ 20 (citation omitted). Each of these requirements was substantially, if not wholly, lacking in this case.

II. BY FAILING TO OBJECT TO THE LACK OF NOTICE AND OPPORTUNITY TO RESPOND, TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL THAT PREJUDICED MR. BAIZE.

Bountiful City argues that "Mr. Baize's trial counsel's performance did not fall below an objective standard because there was no likelihood of a different outcome." *See* Brief of Appellee, p. 6. This argument miscomprehends the *Strickland*[4] two-prong test for reviewing claims of ineffective assistance of counsel.

The *Strickland* two-prong test – adopted by Utah courts – requires a defendant to 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." *State v. Martinez*, 2001 UT 12, ¶ 16, 26 P.3d 203; *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Stidham*, 2014 UT App 32, ¶ 18, 320 P.3d 696; *State v. Perry*, 899 P.2d 1232, 1239

[4]*Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct 2052, 2064 (1984).

(Utah Ct. App. 1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," or, in this case, a fair and just sentencing. *See Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

A defendant – to satisfy the first prong – must "'identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). To show prejudice under the second prong, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187.

There is no conceivable legitimate tactic or strategy that can be surmised from trial counsel's failure to object to the lack of notice and opportunity to respond to the probation violation allegations in the instant case. By failing to object, trial counsel precluded Mr. Baize from receiving the following minimum requirements of due process in this case: (1) notice of the claimed violations of probation; (2) disclosure to the probationer of the evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; and

(5) a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. *See State v. Orr*, 2005 UT 92, ¶ 20, 127 P.3d 1213; *see also Cornish Town v. Koller*, 798 P.2d 753, 756 (Utah 1990) ("'Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.'" (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1211 (Utah 1983)).

The prejudice suffered by Mr. Baize is a result of the court's violation of his right to due process. There is a reasonable probability that had the court abided by the requirements of the probation statute and the minimum requirements of due process, it would have realized that Mr. Baize's violation of probation was not willful. The court would have then been required to "consider 'whether adequate alternative methods of punishing the defendant are available.'" *See Orr*, 2005 UT 92 at ¶ 34 (quoting *Bearden*, 461 U.S. at 668-69); *see also* Utah Code Ann. § 77-18-1(12)(e)(ii). Thus, the court would have been required to consider alternative sentences such as revoking and restarting probation or even an extension of probation. The reasonable probability of this different outcome is underscored by the court's lenient sentence of 10 days in jail imposed in this case, which the court ran concurrent with the term in the other case. As a result, there is a reasonable probability of a more favorable outcome for Mr. Baize.

The prejudice resulting from trial counsel's failure is further demonstrated by the fact that the revocation of probation and termination as unsuccessful may be utilized in future settings involving probation. Trial counsel's failure allowed the sentencing court to

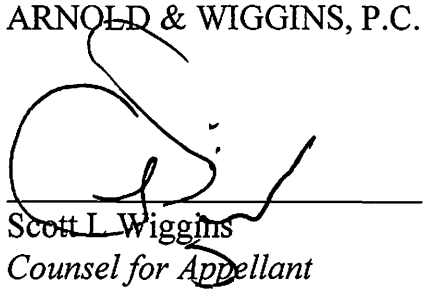
utilize incomplete, inaccurate, and misleading information in the course of revoking and terminating Mr. Baize's probation as unsuccessful.

CONCLUSION

In light of the foregoing, Mr. Baize respectfully requests that this Court set aside the trial court's order revoking and terminating his probation as unsuccessful and remand the case for further proceedings consistent with this Court's instructions as set forth in its opinion. Mr. Baize also requests that the Court provide him with any other remedy that the Court deems just and appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 2nd day of July, 2018.

ARNOLD & WIGGINS, P.C.

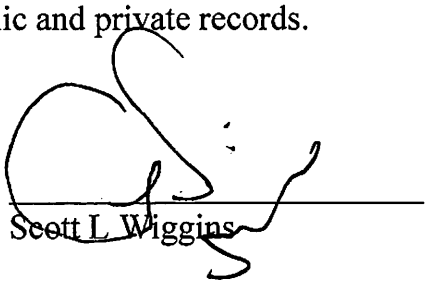


Scott L. Wiggins
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned, Scott L Wiggins, hereby certifies, pursuant to Utah Rule of Appellate Procedure 24(a)(11)(g), that the Reply Brief of Appellant complies with the applicable rule by containing 2,474 words.

The undersigned also certifies that the Reply Brief of Appellant complies with Utah Rule of Appellate Procedure 21, governing public and private records.



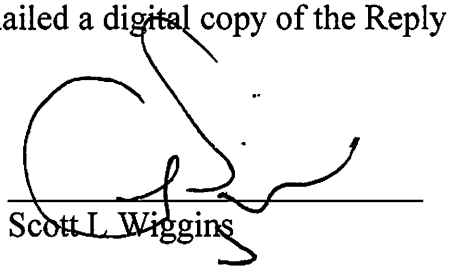
Scott L Wiggins

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on the 3rd day of July, 2018:

Jacob L. Fordham
Bountiful City Attorney's Office
805 South Main St.
Bountiful, UT 84010
Counsel for Bountiful City

The undersigned also certifies that he emailed a digital copy of the Reply Brief of Appellant.



Scott L Wiggins

ADDENDA

No Addendum is necessary. *See* Utah Rule of Appellate Procedure 24(a)(11).