

2003

Utah v. David J. Orr : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH. Plaintiff/Appellee. vs. DAVID J. ORR. Defendant/Appellant.	 Trial Court No. 001902772 Appellate Court No. 20030574-CA
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BRIEF OF APPELLANT

Appeal from an Order entered by the Honorable Timothy R. Hanson in the Third District Court, Salt Lake County, State of Utah, denying Defendant's Motion to Dismiss and extending Defendant's probation for ten years.

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Utah Court of Appeals

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JURISDICTION AND NATURE OF THE PROCEEDING

This is an appeal from an Order of the Honorable Timothy R Hanson, Third Judicial District Court of Salt Lake County, State of Utah, denying Defendant's Motion to Dismiss an Order to Show Cause and extending Defendant's formal AP&P probation for a term of ten years minus the three years previously served. The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e).

STATEMENT OF THE ISSUE ON APPEAL, STANDARD OF APPELLATE REVIEW AND PRESERVATION BELOW

The Third Judicial District Court of Salt Lake County in and for the State of Utah wrongfully denied Defendant's Motion to Dismiss Order to Show Cause and erroneously ruled the Court had jurisdiction to extend the Defendant's probation for a period of ten years (minus three years previously served on probation). "Whether the trial court had the authority to extend Defendant's probation is a question of law. We accord a trial court's conclusions of law no particular deference, reviewing them for correctness." *State v. Wilcox*, 808 P.2d 1028, 1031 (Utah 1991); *State v. Rawlings*, 893 P.3d 1063, 1066-67 (Utah App. 1995). Also, "(b)ecause the interpretation of a statute presents a question of law, we review for correctness." *State v. Amador*, 804 P.2d 1233, 1234 (Utah App. 1990); *State v. Grate*, 947 P.2d 1161, 1164 (Utah App. 1997).

This issue was preserved in the lower court upon the Defendant's filing of a Motion to Dismiss Order to Show Cause for Lack of Jurisdiction and Memorandum in Support

thereof, and oral argument relating to said Motion, as well as the Judge's ruling denying Defendant's Motion (R. 234-378, 481, Add. 4, 386-394).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statute is relevant to the issues presented on appeal and is attached as Addendum 1:

Utah Code Ann. § 77-18-1

STATEMENT OF THE CASE

Defendant David J. Orr was initially charged with twenty-eight felonies including Securities Fraud, Communications Fraud, Unregistered Securities Agent and Pattern of Unlawful Activity (R. 2-8). On March 23, 2000, Defendant entered a Change of Plea to the amended charge of Attempted Securities Fraud, a third degree felony (Count 8) and Unlicensed Broker-Dealer or Agent, a third degree felony (Count 20) (R. 20-21). On May 12, 2000, Defendant was sentenced by the Honorable Timothy R. Hanson to two indeterminate terms not to exceed five years in the Utah State Prison to run consecutively. At the same time, the Court suspended the prison terms and placed Defendant on probation for three years to be supervised by the Utah Adult Probation & Parole Department ("AP&P") with numerous conditions, including that Defendant serve six months in the Salt Lake County Jail with no credit for time served, and pay restitution as determined by his probation officer. Defendant was required to pay no less than \$1,000.00 per month toward restitution or 25% of his income under the direction of AP&P (R. 22-27).

Defendant performed satisfactorily during his three years (36 months) of probation, but on May 13, 2003, Court records show that an AP&P Progress/Violation Report was filed with the Court (R. 228-229). On May 19, 2003, an Order to Show Cause was entered by the Third District Court (signed on May 13, 2003 by Judge Hanson) alleging that the Defendant had violated the terms and conditions of his probation “by having failed to pay restitution in full, as ordered, in violation of a special condition of the Probation Agreement.” (Add. 2 & 3) (R. 230-231, 232-233). On or about May 23, 2003, Defendant filed a Motion to Dismiss Order to Show Cause for Lack of Jurisdiction and a Memorandum in Support thereof (R. 234-378).

The Court held a hearing on June 23, 2003 and denied Defendant’s Motion to Dismiss from the Bench and indicated a formal Memorandum Decision and Order would be forthcoming (R. 383-384).¹ The Court filed its Memorandum Decision and Order on July 2, 2003 formally denying Defendant’s Motion to Dismiss for Lack of Jurisdiction and ruling that the Court had jurisdiction and authority to extend Defendant’s probation for a maximum of ten years because the Court had sentenced the Defendant to two 0-5 year terms in the Utah State Prison, and had suspended those terms (Add. 4, R. 386-394). The Court also concluded that it was not required to place the Defendant on a bench probation as argued by

¹ The Court apparently combined the hearing on the Defendant’s Motion to Dismiss with the Probation Revocation hearing, although Defendant was not asked to admit or deny the allegations in the Order to Show Cause and no evidence was presented as to the Defendant’s willful failure to pay restitution. Further the Judge made no findings on this issue. *See* Point III *infra*.

the Defendant under the provisions of U.C.A. § 77-18-10(a)(ii)(A) (sic) “because the Defendant’s probation did not expire or terminate under § 77-18-10(a)(i) (sic), but was instead tolled under § 77-18-1(11)(b)” (Add. 4, p. 6, R. 391).

Defendant filed a Notice of Appeal from the Court’s Decision on July 9, 2003 bringing us to the present proceedings (R. 395-396).

STATEMENT OF THE FACTS

1. Defendant David J. Orr was originally charged with twenty-eight felonies under the securities laws of the State of Utah (R. 2-8).

2. On or about March 23, 2000, Defendant waived preliminary hearing and entered a plea of guilty to Attempted Securities Fraud, a third degree felony (Count 8 amended) and Unlicensed Broker-Dealer or Agent (Count 20) also a third degree felony (R. 20-21).

3. On May 12, 2000, the Defendant appeared before the Honorable Timothy R. Hanson and was sentenced to two terms not to exceed five years in the Utah State Prison with the sentences to run consecutively. The Court suspended the prison terms and placed the Defendant on probation under certain specific conditions, including that the Defendant was required to pay restitution as determined by the Adult Probation & Parole Department. Defendant was required to pay no less than \$1,000.00 per month toward his restitution, or 25% of his income, under the direction of the Adult Probation & Parole Department. The

Court indicated a restitution hearing could be set upon appropriate application (R. 22-24, 25-29).

4. Court records indicate that on May 13, 2003, a Progress/Violation Report was filed by Probation Officer Robert Egelund requesting that the Court issue an Order to Show Cause requiring Defendant Orr to appear and show cause, if any he has, why his probation should not be revoked and he be committed to the Utah State Prison for the indeterminate term as provided by law, the execution of which had been previously stayed by the Court, “(B)y virtue of his having failed to pay restitution in full, as ordered, in violation of a special condition of the probation agreement.” (R. 228-229, Add. 2, 230-231).

5. The Defendant was served with the Affidavit and Order to Show Cause on May 19, 2003 requiring him to appear before the Court on May 30, 2003 at 9:00 a.m. by Agent Egelund (Add. 3, R. 232-233).

6. Defendant filed a Motion to Dismiss the Order to Show Cause and Memorandum in Support thereof for lack of jurisdiction on or about May 22, 2003 (R. 234-235, 236-378).

7. On or about June 23, 2003, the Court held a hearing regarding Defendant’s Motion to Dismiss at which the Defendant was present and represented by his attorney Larry R. Keller and the State was present through its attorney Assistant Salt Lake County District Attorney Howard R. Lemcke, Jr. (R. 383-384) (*See* footnote 1, p. 4 *infra*).

8. While the Court ruled from the bench regarding several of the issues on June 23, 2003, the Court issued its Memorandum Decision and Order on or about July 2, 2003 and mailed it to the parties (Add. 4, R. 386-394).

9. Defendant Orr filed his Notice of Appeal on July 9, 2003 (R. 395-396), and his Motion for Certificate of Probable Cause and Motion for Stay of Execution of the July 2, 2003 Order on or about August 29, 2003 (R. 425-427, 430-473).

10. Although not indexed in the record on appeal, the Court denied Defendant's Motion for Certificate of Probable Cause on October 1, 2003, and Defendant appealed the denial of the Motion for Certificate of Probable Cause by filing a Motion and Memorandum in Support thereof as well as an Affidavit of Counsel in Support of said Motion with the Utah Court of Appeals on November 24, 2003. Said Motion remains pending before this Court at the time of the writing of this Brief.

SUMMARY OF ARGUMENT

Defendant Orr maintains that the Court's jurisdiction to extend or modify his probation ended by operation of law on either May 11, 2003 or May 12, 2003 and that additional proceedings undertaken by the Court, and the Court's Order extending his probation for a period of ten years minus the three years he had already served on probation, is in violation of Utah law. Defendant further argues that if the Court did have jurisdiction over him, the Court can only extend his probation as a Court probation only and not a formal

probation with the Adult Probation & Parole Department for purposes of enforcing the Court's restitution order.

ARGUMENT

POINT I. DEFENDANT'S PROBATION ENDED BY OPERATION OF LAW ON MAY 12, 2003, AND THE COURT LOST JURISDICTION OVER HIM AT THAT TIME.

The record in the instant case shows that Defendant was sentenced by the Honorable Timothy R. Hanson on May 12, 2000 (R. 22-29). The records further show that on May 13, 2003 an AP&P Progress/Violation Report and an Affidavit in Support of Order to Show Cause were formally filed with the Court (Add. 2, R. 228-231). The record also shows that the Court issued an Order to Show Cause on May 13, 2003 requiring the Defendant's appearance in Court to answer to the allegation in the Affidavit (Add. 3) (R. 232-233). The record shows that the Order to Show Cause itself was signed by the Court on May 13, 2003.

Id.

Utah Code Ann. § 77-18-1(10)(a)(i) reads as follows: "Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions." Calculating a date which is thirty-six months from the date of May 12, 2000, the date upon which Defendant was sentenced, his probation technically terminated by law on May 11, 2003 at midnight; or, at the very least, May 12, 2003 at midnight. It is Defendant's contention that May 12, 2003 was one day beyond thirty-six

months, but his argument remains the same whether it was May 11, 2003 at midnight or May 12, 2003 at midnight. since documents were not formally filed with the Court, and the Order to Show Cause process was not begun according to the official Court record until May 13, 2003 (R. 228-233).

In its decision, the trial court engaged in the reasoning that, although Defendant was placed on probation on May 12, 2000, “. . . the first day of probation would have concluded twenty-four hours after the sentence was imposed on or at the close of business on the following day, May 13, 2000.” *See*, Order attached as Addendum 4, R. 386-394 at 390-391. The Court cites no authority for this position; and, in fact, on May 12, 2000, the Court specifically ordered Defendant taken into custody and committed to the Salt Lake County Jail for a period of six months as a condition of his probation. The Court had Defendant handcuffed and removed from the courtroom on May 12, 2000 (R. 23-24).

If the Court’s reasoning is correct, it did not have authority to send Defendant to jail as a condition of probation until May 13, 2000, (twenty-four hours following the end of business on May 12, 2000), yet the Court clearly believed that the Defendant was on probation on May 12, 2000 by having him placed in handcuffs and having him taken forthwith from the courtroom as a condition of that probation.

The Court further indicated that, although the records of the Third District Court clearly show that the Progress/Violation Report was not formally filed with the Court until May 13, 2003, the fact that probation officer Robert Egelund testified that he brought the

Progress/Violation Report into the Court and date stamped it himself on May 9, 2003 was dispositive of the matter. The Court ruled that although the filing date on the Progress/Violation Report was changed to May 13, 2003, apparently by Court personnel, the Court intended to ignore such change. (Add. 4, p. 4, 5, R. 389, 390).

Although the Court opined from the bench that the change was probably made by his clerk on the date that she filed the document, no testimony or evidence under oath was taken to establish that fact in the Order to Show Cause hearing (R. 481, p. 26, l. 24, 25, p. 27, l. 1-11, p. 28, l. 6-20, p. 29, l. 1-5). Furthermore, the clerk of the court was not sworn and provided no specific evidence to support the trial Judge's conclusion (R. 481 in its entirety).

The trial Judge stated from the bench that he recalled that Officer Egelund had come to his office on Friday, May 9, 2003 and at that time he had authorized a filing of an Order to Show Cause for the purpose of extending probation (R. 481, p. 9, l. 3-7, p. 28, l. 8-25, p. 29, l. 1-5, p. 30, l. 3-9, p. 33, l. 6-25). The trial Judge was not placed under oath and was not examined or cross-examined by the parties, despite the fact that he purported to give evidence in this case. Because the issue in question was the very jurisdiction of the Court to proceed with the Order to Show Cause the trial Judge signed according to the Court's own record on May 13, 2003, after Defendant's probation ended according to Defendant's calculation, the trial Judge's unsworn testimony and statements from the bench became material to the case. It is the position of Defendant that once the Judge determined during

the course of the hearing that he had become a material witness, the Judge had an obligation to recuse himself from further proceedings associated therewith.²

The Judge ruled in his Order of July 2, 2003 as follows:

“An alternative date for tolling the probationary period is the issuance of an Order to Show Cause. The documents in this case reflect that the Court approved and authorized issuance of the Order to Show Cause on May 12, 2003. . . .” (Add. 4, p. 5, R. 390, 481).

However, the Order to Show Cause actually issued by the Court was not signed until May 13, 2003 and was actually filed by the clerk on the date of May 13, 2003. (Add. 3, last page, R. 232-233). Although the trial judge’s unsworn statement from the bench was that he actually approved and authorized the issuance of the Order to Show Cause on May 12, 2003 and thus that date is the date upon which the probationary period was tolled as a result of his signing the Order to Show Cause, the fact that it was not signed nor issued, nor filed with the Court until May 13, 2003 is a matter of record (Add. 3, R. 232, 233). The Judge’s unsworn testimony with regard to the date of May 12, 2003 should not have been admitted as a basis for establishing the “alternative date for tolling the probationary period” as indicated in the Judge’s Order of July 2, 2003.

The Court found that the provisions of U.C.A. § 77-18-1(11)(b) were in full force and effect in the instant case beginning on May 9, 2003, the date upon which Mr. Egelund

² See Utah Code of Judicial Conduct, Canon 3 E.(1)(d)(iv) which reads as follows, “(1) a judge shall enter a disqualification in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where: E.(1)(d)(iv) is to the judge’s knowledge likely to be a material witness in the proceeding.”

testified that he date stamped his original Progress/Violation Report, despite the fact that the date stamp was changed by someone in the Court system to May 13, 2003 and not formally filed with the Court until May 13, 2003. (Add. 4, p. 4, R. 389). The concept of “filing” a Court document is determined almost exclusively by the date upon which Court records show the document was filed, and not by extrinsic testimony. In considering the question of whether or not a notice of appeal was timely filed, the Utah Court of Appeals stated:

In determining whether a notice of appeal is timely filed and establishes jurisdiction in an appellate court, this court must be bound by the filing date indicated on the notice of appeal transmitted to it by the trial court. This requirement is implicit in provisions of our rules governing timeliness of an appeal. We are therefore bound by the date stamped on appellant’s notice of appeal, and must dismiss the appeal for lack of jurisdiction. *In re K.G.*, 2002 UT App 3, 2002 WL 23812, at *1 (Jan. 4, 2002).

In *State v. Parker*, 936 P.2d 1118 (Utah Ct. App. 1997), the court dismissed a prisoner’s appeal as untimely by one day even though it took nine days for the court clerk to stamp the appeal. Judgment had been entered on October 25, 1994; the prisoner had mailed his notice of appeal on November 19, 1994 but it was not date-stamped until November 28, 1994—one day after the expiration of the time limit for filing notice of appeal (since it was a Monday). *Parker*, 936 P.2d at 1118-19. In dismissing the appeal, the *Parker* court declined to adopt the widely-accepted “prison delivery rule” because “it is not consistent with the plain language of Utah Rule of Appellate Procedure 4 [which requires that notice of appeal ‘shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment ...].” *Parker*, 936 P.2d at 1122.

If the date-stamp is so determinative and enforced so strictly **against** criminal defendants, the State should be held to a similar standard given that its agents can hand-deliver the documents and wait in person for them to be stamped, or stamp them themselves. It would be easy for abuse to occur in the Court system if a probation agent who may have failed to file a certain report with the Court by a specific deadline realized that he could simply go in and stamp a first page of such a report on the due date without actually filing it with the Court until some days later. Certainly, this Court ought not to go by extrinsic testimony as to when the date stamp might have been placed on the document by Agent Egelund, but should go by the date that Court records show it was actually filed with the Court. If the date it was actually filed by the Court is not important and has no meaning, why then would the Court not give it the official date upon which it was date stamped by the individual who filed it? The date of filing is extremely important as indicated above, and May 13, 2003, the date that the Progress/Violation Report was considered by Court records to be filed, and the date upon which the Court signed the Order to Show Cause, should be the dispositive dates in this matter.

POINT II. DEFENDANT'S PROBATION ENDED BY OPERATION OF LAW ON MAY 12, 2003, AND THE COURT LOST JURISDICTION OVER HIM AT THAT TIME, BECAUSE HE WAS NOT PROVIDED NOTICE OF THE COURT'S ACTION UNTIL MAY 19, 2003.

The Utah Supreme Court and the Utah Court of Appeals have ruled in numerous cases that a trial court's power to grant, modify, or revoke probation is purely statutory, and

although the trial court has discretion in these matters, the trial court's discretion must be exercised within limits imposed by the legislature.³ Since U.C.A. § 77-18-1(10)(a)(i) (as amended 2003) requires a termination of probation "upon completion without violation of 36 months probation," it is the position of Defendant that the Court did not have jurisdiction to proceed with the Order to Show Cause against him. The filing of the Progress/Violation Report and Order to Show Cause on May 13, 2003 was not sufficient to create jurisdiction in the Court when such jurisdiction automatically terminated on May 11, 2003 at midnight by operation of law (or May 12, 2003 at midnight as the Court may determine). Therefore, the Court should have granted Defendant's Motion to Dismiss the Order to Show Cause for Lack of Jurisdiction in the Court. In addition to the foregoing however, Defendant's right to due process of law under both the U.S. and Utah Constitutions was violated because he was not provided with notice of the Court's action until May 19, 2003.

Although there was controversy in the lower court regarding the precise date that documents prepared by AP&P were "filed", there was **no** conflicting evidence regarding the date upon which the Defendant was served with notice of the Order to Show Cause. The Defendant was served on May 19, 2003, at least seven days after his probation should have terminated by operation of law according to the Court's records (Add. 3, R. 233). Furthermore, Agent Egelund testified at the hearing in the above-entitled matter that he did

³ See, *State v. Green*, 757 P.2d 462 (Utah 1988); *State v. Cowdell*, 626 P.2d 487 (Utah 1981); *Smith v. Cook*, 803 P.2d 788 (Utah 1990); *State v. Dickey*, 841 P.2d 1203 (Utah App. 1992).

not serve the Defendant until May 19, 2003 because “(T)hat was the soonest I was going to see him.” Mr. Egelund admitted that he didn’t make any extra effort to notify him of the Order to Show Cause hearing and the possibility that the Court would revoke, extend or modify his probation until May 19th. (R. 481, p. 22, l. 8-20). Furthermore, Agent Egelund admitted that he informed the Defendant prior to May 12, 2003 that his intention was to recommend to Judge Hanson that his probation be terminated and the matter of restitution be handled through the civil process as a judgment (R. 481, p. 22, l. 21-25, p. 23, l. 1-14).

In addition to the foregoing, the Court itself, in making its comments at the Order to Show Cause hearing on June 23, 2003, made the following statement:

THE COURT: Mr. Keller, when Mr. Egelund came down he says, “Mr. Orr’s probation is going to terminate. We don’t want to deal with him any more,” and I said, “Wrong. I want you to deal with him. I want probation to continue, because he won’t pay unless I am holding the prison term over his head,” which is evidenced by the fact that he apparently hasn’t made the May payment or the June payment. (R. 481, p. 30, l. 3-9).

Therefore, the evidence is clear that Defendant was led by his probation officer to believe that the probation officer was going to recommend termination and that his probation would be terminated and he would be required to continue to pay restitution as part of the civil process. It was a shock to Defendant when he was served with the Order to Show Cause on May 19, 2003.

It is the contention of Defendant that his probation ended by operation of law on either May 11, 2003 or May 12, 2003, and the Court lost jurisdiction over him at that time, because he was not provided notice of the Court’s action until May 19, 2003. In *State v. Rawlings*,

893 P.2d 1063 (Utah App. 1995), the Utah Court of Appeals held that a trial court lost jurisdiction to initiate probation extension proceedings against the probationer upon expiration of probation. In that case, Defendant had been sentenced on October 11, 1985 after pleading guilty to a single count of attempted sodomy on a child, a first degree felony. Defendant's probation was to expire by operation of law on May 6, 1987 by virtue of his having completed eighteen months on probation. Although the Adult Probation & Parole department generated a memorandum directed to the trial court which suggested extending the Defendant's probation because he needed to continue in treatment, no motion was filed or made by the court or prosecutor to extend Defendant's probation. The Court of Appeals there noted that, although the trial court was apparently made aware of the recommendation and a hearing was scheduled, the Defendant received nothing in writing and only learned of the hearing when advised thereof casually by a hospital aid two days before the hearing date. The court then extended Defendant's probation for an additional eighteen months. *Id.* at 1065.

The Utah Court of Appeals held that "(I)t is well settled that a probationer shall be accorded due process at revocation proceedings because revoking probation seriously deprives a person of his or her liberty." (citations omitted)... *Id.* at 1067. Although the Court went on to note that the matter was less clear with regard to probation extension proceedings, "...because of the high risk of prejudice to the probationer when he or she is not given notice of the extension hearing and the hearing is conducted ex-parte, these courts have invoked

their supervisory powers requiring the necessary parties to (1) give the probationer notice of the extension hearing; (2) advise the probationer that he or she has a right to a hearing and/or (3) advise the probationer that he or she has the right to the assistance of counsel.” (citations omitted) Id. at 1067.

The Court then specifically ruled: “We hold that a probationer in the State of Utah is accorded a measure of due process at a probation extension proceeding and is thus entitled to the available protections.” Id.

In the instant case, Defendant Orr was not notified of any type of action being taken against him until May 19, 2003, seven (or eight) days after his probation terminated by operation of law. The instant Order to Show Cause was styled as a probation revocation hearing at which the Court was being asked by Adult Probation & Parole to consider revoking the Defendant’s probation and send him to prison. Therefore, all of the due process requirements of a probation revocation hearing, including proper notice of the proceedings prior to the time probation terminates by operation of law, must be provided to the Defendant, or it becomes a violation of his right to due process of law as held by the Court in *Rawlings*.

The Utah Supreme Court weighed in on the issue in *State v. Call*, 980 P.2d 201 (Utah 1999). The Court reiterated the proposition that:

(Prior) cases instruct that if it is the intent of the state to extend the probationary period beyond its original term, the state must take definitive action to extend the term **before the expiration date, and the probationer must be given notice of that intent** otherwise the probationer is left in a state

of uncertainty, not knowing whether to continue to observe the terms of his probation.
(Emphasis added). 980 P.2d ¶11 at 203.

The court cited its previous cases in *State v. Green*, 757 P.2d 462 (Utah 1988) and *Smith v. Cook*, 803 P.2d 788 (Utah 1990) for this proposition, and clearly indicated in *Call* that this principle was still good law in this State. However, due to the fact that the defendant in *Call* had signed a waiver of personal appearance, and a waiver of his right to a hearing and an agreement to extend his probation for an additional year prior to the date that the probation terminated by operation of law, the court ruled against the defendant in that particular case. Nevertheless, as indicated previously, the court clearly stated that due process requires that the state must take definitive action to extend the term before the expiration date of the probation **and the probationer must be given notice of that intent**. In Defendant Orr's case, definitive action was not taken until May 13, 2003 and Defendant wasn't notified until May 19, 2003 of the Court's action.

This issue was elucidated even more clearly by the Utah Court of Appeals in the case of *State v. Grate*, 947 P.2d 1161 (Utah App. 1997). In that case, defendant was sentenced on January 16, 1987 to 1-15 years in prison and was placed on 18 months probation. The Adult Probation & Parole Department filed an Incident Report with the trial court on June 12, 1987 alleging Grate had violated his probation by being arrested for auto burglary. Grate had been arrested on July 8, 1987 on the court's bench warrant based upon the Incident Report and the court noted that Grate's 18-month probation period was due to terminate on

July 15, 1988. However, because AP&P did not file its Affidavit in Support of an Order to Show Cause until July 21, 1988 **and Grate was not served with the Order to Show Cause until August 9, 1988** the court ultimately ruled that the trial court had no jurisdiction to proceed with the Order to Show Cause as defendant's probation had terminated by operation of law on July 15, 1988.

In the *Grate* case, the Court stated:

Under Utah law, it is the notice to a person of the commencement of a judicial enforcement action that distinguishes the filing of an information in a criminal proceeding or the issuance of an OSC in a probation setting, from the filing of an incident report. In each of the former instances, there is no ambiguity as to the State's intention to enforce its rights within a judicial proceeding or the defendant's need to prepare a defense. Furthermore, all the procedural structures which attach to a court proceeding are activated.

In contrast, **the filing of an incident report does not commence a probation revocation proceeding.** *See*, Utah Code Ann. § 64-13-29(1) (1987). Such report need not be served on the probationer, nor does the filing necessarily activate any court proceeding or require the probationer to respond. *See Id.* Indeed, a probationer may never learn about the filing of such a report. . . . rather, **it is only when a probationer is served with an OSC that the probationer receives actual notice of the state's decision to proceed against the probationer for any violations.** . . .
(Emphasis supplied) 947 P.2d at 1165.

The court found that the critical element involved in the process was notice to the probationer that action was to be taken against him. The court went on to state:

Most obviously, the notice must inform the probationer of the specific violations the state believes he or she has committed. Equally important, however, is that such notice inform the probationer that he or she *is being* – rather than may at some future date be – called into court to respond to the state's allegations . . .

However, Grate received no notice within his initial probation term of an imminent need to appear in court to respond to those allegations. . . .

We conclude that a probationer is not charged with a probation violation within § 77-18-1(8)(a) until he or she has received written notice both of the nature of the allegations against him or her and of the pendency of an enforcement action in the trial court requiring a response. We further conclude that because Grate was not charged with a probation violation within the original term of his probation, his probation terminated as a matter of law on July 15, 1988, such that the trial court lacked jurisdiction to revoke Grate's probation on August 12, 1988. We therefore reverse the trial court's denial of Grate's 1999 Motion to Correct an Illegal Sentence. (Emphasis supplied). 947 P.2d at 1168.

In the *Grate* case, the Court analyzed the previous cases of the Utah Supreme Court which it believed supported its decision in that case. The Court looked at *Smith v. Cook*, 803 P.2d 788 (Utah 1990) and noted that the Court had reviewed a proceeding in which an affidavit supporting an Order to Show Cause was filed within the probationer's term but the Order to Show Cause was not served on the probationer until after that term had expired. The *Grate* court observed “. . . In rejecting the state's argument that filing of the affidavit tolled the running of the probationer's term, the court focused on both ‘the nature and degree of notice to which an individual is entitled (under § 77-18-1) prior to a revocation hearing.’ *Id.* at 795”. 947 P.2d at 1166.

As the *Grate* court noted, the Utah Supreme Court in *Smith v. Cook* concluded

. . . (T)hat the “emphasis on notice . . . is consistent with the assertion that a court retains authority to revoke probation if the probationer is served with notice of the *revocation proceedings* within the probation period” and that the “assertion that a probationer is entitled to notice within the period of probation in order for the court to retain the authority to revoke probation is consistent with the rationale underlying our decision in *Green*.” *Cook*, 803 P.2d at 795

(emphasis added). This court later reiterated that proper notice must be “reasonably calculated under all the circumstances, to apprise interested parties *of the pendency of the action* and afford them an opportunity to present their objections.” *Rawlings*, 893 P.2d at 1069 (emphasis added) (quoting *Nelson v. Jacobsen*, 669 P.2d 1207, 1212 (Utah 1983) (citation omitted)). (Emphasis in original) *Id.* at 1166.

This decision in *State v. Grate* by the Utah Court of Appeals was handed down on October 30, 1997. It should be noted that the tolling statute relied upon by the Court in the instant case, Utah Code Ann. § 77-18-1(11)(b) (1996) (as amended in 1989) was in full force and effect. The Utah Court of Appeals in that case reversed a trial court that had denied Grate’s motion (essentially a motion to dismiss the probation revocation proceedings) on the basis that the filing of the Incident Report on June 12, 1987 had tolled the running of Grate’s probation under § 77-18-1(11)(b) until the OSC was signed on July 19, 1988. The trial court had rejected Grate’s claim that the tolling of the probation period without notice to him had violated his due process rights. As indicated, the Court of Appeals reversed.

The trial court in the instant case relied on this same tolling provision of the Utah Code to deny Defendant Orr’s Motion to Dismiss (Add. 4, p. 7, R. 392). It is clear that Defendant Orr was not served with notice of AP&P’s Incident Report and the OSC until seven days after his probation ended. This and the fact that he was lulled into believing that the Adult Probation & Parole Department and the Court would terminate his probation on May 12, 2003 should be a dispositive factor in this Court’s analysis. Defendant’s due process rights under both Article I § 12 of the Utah Constitution and the Fifth Amendment to the U.S. Constitution were violated in this circumstance, much the same as defendant

Grate's rights were held to have been violated by the Utah Court of Appeals in his situation. The Court declined to consider any violation of the Defendant Orr's right of due process of law by virtue of the fact that he was not served until May 19, 2003, seven days after his probation was scheduled to terminate by operation of law. (Add. 4, p. 6-7, R. 391-392).

The *Grate* court considered this tolling provision of Utah law and determined that it had no force and effect because of the failure of the State of Utah to have served the defendant with the Order to Show Cause until several days after his probation was due to terminate. Because the defendant was denied legal notice, it was a violation of his right to fundamental fairness embodied in the due process clause of the United States Constitution.

See, Grate at 1163, 1167.⁴

⁴ Although the Utah Court of Appeals ruled in the case of *State v. Reedy*, 937 P.2d 152 (Utah App. 1997) that § 77-18-1(11)(b) (1995) prevented the court from being required to dismiss that particular case for lack of jurisdiction because a violation report was filed with a trial court and a warrant for the defendant's arrest was issued, the court found that the defendant had "made service impracticable since he left Utah without permission and was in California when he claims he should have been served." *Id.* at 153. Because this case was decided several months prior to the *Grate* case, and because it is clear that the defendant had left the jurisdiction and could not be served with the court's proposed action violating his probation, Defendant Orr maintains that this case is inapposite and does not affect the dismissal requested by him. Reedy's due process rights were essentially waived by his evasion of supervision and leaving the state so he could not be located to be served. No such facts exist in the instant case. If it were otherwise, the *Grate* court surely would have relied on *Reedy* as precedent. *Reedy* was decided April 17, 1997 and *Grate* was decided October 30, 1997. Davis, P.J. sat on both panels.

POINT III. THE TRIAL COURT HAD NO AUTHORITY TO EXTEND PROBATION BECAUSE IT DID NOT ENTER ANY FINDING THAT DEFENDANT VIOLATED A CONDITION OF HIS PROBATION, LET ALONE ANY FINDING THAT SUCH A VIOLATION WAS WILLFUL.

Under Utah law, “[p]robation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.” Utah Code Ann. § 77-18-1(12)(a)(i) (2003). Furthermore, “[p]robation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.” Utah Code Ann. § 77-18-1(12)(a)(ii) (2003). In other words, the sentencing court must reveal both “the evidence relied on and the reasons for revoking probation” in order “to enable a reviewing court to accurately determine the basis for the trial court’s decision.” *State v. Hodges*, 798 P.2d 270, 274 (Utah Ct. App. 1990); *see also Rucker v. Dalton*, 598 P.2d 1336, 1338-39 (Utah 1979) (noting that the reviewing function of an appellate court is seriously undermined where findings are insufficiently detailed to disclose the steps by which ultimate conclusions are reached—in the context of a civil case, where no liberty interest was at stake). In the instant case, the district court ordered Defendant Orr’s probation extended, but entered no “finding that the conditions of probation ha[d] been violated[,]” as required under section 77-18-1(12)(a)(i) or (ii). Therefore, the trial court had no basis for ordering an extension of Defendant Orr’s formal probation.

In the context of an allegation that probation has been violated by a failure to pay restitution, the standards are even stricter. Where the alleged violation is a failure to pay a fine and/or restitution, the sentencing court “must either find that probationer was at fault or that alternatives other than imprisonment are inadequate to meet the state’s interests in punishment and deterrence.” *See Hodges*, 798 P.2d at 276 (citing *Bearden v. Georgia*, 461 U.S. 660, 662 (1983)). As the *Hodges* court stated, “[w]e believe that ... in order to revoke probation, a violation of a probation condition must, as a general rule, be willful.” *Hodges*, 798 P.2d at 276. In the context of an alleged failure to pay restitution (i.e. as grounds for revocation/modification of probation), “a finding of willfulness merely requires a finding that the probationer did not make *bona fide* efforts to meet the conditions of his probation.” *State v. Petersen*, 869 P.2d 989, 991 (Utah Ct. App. 1994) (internal quotations, citation omitted; emphasis in original). In the instant case, the district court made no finding that Defendant Orr had violated any term of his probation, let alone that such an alleged violation was willful. Without finding **both** a violation and willfulness (i.e. the absence of bona fide efforts to pay restitution), the district court had no basis for ordering an extension of his probation, even if this Court rules it still had jurisdiction.⁵

⁵ If the Court chooses to reverse and remand on this issue, it is respectfully requested the Court decide the other issues as well, because once the Court issues findings upon remand, the same issues will need to be appealed again. Judicial economy should dictate this result.

POINT IV. THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN ORDERING PROBATION BEYOND THE STATUTORILY MANDATED TIME FRAME AND STRUCTURE.

As indicated previously in this brief, a court's power to grant, modify, or revoke probation is purely statutory, and although a trial court has discretion in these matters, the trial court's discretion must be exercised within limits imposed by the legislature, *Smith v. Cook*, 803 P.2d 788 (Utah 1990); *State v. Green*, 757 p.2d 462 (Utah 1988); *See also State v. Cowdell*, 626 P.2d 487 (Utah 1981). Therefore, it stands to reason that a court cannot sentence a defendant to any particular term of probation without specific legislative authority to do so.

In the instant case, the trial judge concluded he had authority and discretion to "extend the defendant's probation up to the remaining term of the court's original sentence (equating to 10 years)."⁶ Although the trial court concluded that whatever flexibility it had in sentencing must be exercised within legislatively established limits and quoted *State v. Green*, the Court went on to conclude "Further, the Court can find no express limitation on the permissible length of probation; only that the probation, together with any extensions, not exceed the legislatively established sentencing guidelines." (R. 392-393). The Court cited no authority for this proposition, and concluded from this principle that it had discretion, apparently from its inherent powers, to extend the Defendant's probation up to the remaining

⁶ The Court had sentenced the Defendant to two consecutive terms of 0-5 years in the Utah State Prison and suspended that sentence (R. 22, 23).

term of the Court's original sentence (equating to ten years). Since we know that the trial court's power to extend probation must be exercised within limits imposed by the legislature, we must look to the legislature to determine what powers it has granted the Court in this regard. The inherent powers of the Court play no part in this analysis under the controlling case law cited earlier in this point.

Utah Code Ann. § 77-18-1(10)(a) is the statute which places a limitation on the power of the Court with regard to the time a Court may keep an individual on probation. This statute has been amended from time to time, and was previously eighteen months. The statute presently reads “(10)(a)(i) Probation may be terminated at any time at the discretion of the Court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.” There is no jurisdiction of the Court to place Defendant on formal probation in excess of thirty-six months, except as provided in subsection (12)(a)(i) and (ii) which allows probation to be modified, extended or revoked upon a finding that probationer had violated the conditions of probation. Defendant could find no Utah case which addresses the length of time probation may be extended upon a determination that there has been a probation violation, but it is presumed it could not be extended in excess of the thirty-six months allowed under subsection (10)(a)(i).⁷

⁷ It should be noted that if probation expires or terminates under (10)(a)(i) and an unpaid balance remains regarding restitution, the Court may retain jurisdiction of the case and continue the Defendant on bench probation. There appears to be no time limit on this

In addition to the foregoing, the Court made clear that the only purpose for the extension of probation for the ten year term was that the Judge believed that “(B)ecause the defendant’s only incentive to continue making restitution payments is to avoid his probation being revoked, the court invokes the full scope of its discretion to extend the defendant’s probation for the maximum length permissible, the remaining full term of his sentence of 10 years.” (Add. 4, p. 8, R. 393).

It is noteworthy that the Defendant was never asked to admit or deny the allegation of failure to pay restitution against him, and the Court never entered any finding with regard to the Defendant’s failure to pay restitution as being a violation of probation. *See* Point III *supra*. Although defense counsel pointed out to the Court that if the Court intended to keep Defendant on probation for purposes of payment of restitution, it would be necessary to make that a bench probation rather than a formal probation with AP&P, the Court concluded “The tolling of the defendant’s probation period prior to its legislative termination sounds a death knell to two of the defendant’s principle arguments. First, the defendant argues that under § 77-18-1(10)(a)(ii)(A) this Court can retain jurisdiction over him only under the form of a bench probation. However, this provision never comes into play because the Defendant’s probation did not expire or terminate under § 77-18-10(a)(i), but was instead tolled under § 77-18-1(11)(b). . . .” (R. 391).

authority, but it is to be noted that this section does not address formal probation with the Utah State Department of Adult Probation & Parole. Utah Code Ann. § 77-18-1(10)(a)(ii)(A) (2003).

The Court mistakenly determined that the mere fact that it found that Defendant's probation was tolled under § 77-18-1(11)(b) and therefore the filing of the Progress/Violation Report and Order to Show Cause were within the time period of Defendant's probation, he could automatically ignore § 77-18-1(10)(a)(ii)(A). It is again noteworthy that at no time did the Court make a finding that Defendant had violated his probation. The Court simply assumed that because it was clear the Defendant had not paid the full amount of restitution ordered of \$110,000.00 (R. 121, 122), as well as the additional \$255,504.39 added to the restitution by Order of January 31, 2002 (R. 170, 171), the Defendant had failed to pay full restitution. In fact, the Defendant had been paying \$1,000.00 a month for thirty-six months as ordered by the Court in its original Sentencing, but it was clear the Defendant had thus far paid only \$36,000.00 at most (R. 26-27).

Utah Code Ann. § 77-18-1(10)(a)(i)(A) reads as follows:

If, upon expiration or termination of the probation period under subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in § 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.

As stated previously, the Court simply determined that there was no expiration or termination of the probation period under subsection (10)(a)(i) based upon the tolling statute, and therefore he was entitled to extend the Defendant's probation an additional seven years (ten years minus the three years previously served on probation). Defendant argues that the Court has misinterpreted the law.

The Utah Court of Appeals interpreted the forerunner of § 77-18-1(10)(a)(ii) in the case of *State v. Dickey*, 841 P.2d 1203 (Utah App. 1992) in which a defendant had plead guilty to criminal mischief and was ordered to pay a certain amount in restitution and placed on probation. In that case, the Court of Appeals held that, although the court's jurisdiction regarding defendant's compliance with probation conditions had lapsed after a certain period of time, the court retained jurisdiction to enforce the payment of restitution to the victim. In that case, the Utah Court of Appeals ruled:

"... this court concludes, however, that the subsection is actually intended to insure that mandatory termination of probation not affect the trial court's jurisdiction for the purpose of collecting restitution. The legislature anticipated both situations where the court might order restitution but no probation and situations where the court might decide upon a payment schedule for restitution which would extend beyond the probation period. The legislature, therefore, provided a separate, limited source of jurisdiction by which the court could recall a defendant and hold him or her accountable for full payment of restitution or fines according to the sentencing order to which defendant had previously agreed."
841 P.2d at 1208.

Therefore, it would seem that the legislature granted jurisdiction to the Court to enforce restitution **independent of the probationary status of the defendant.**

In the case of *State v. Allen*, 2000 UT App. 340, 15 P.3d 110, the Utah Court of Appeals illuminated its decision in *Dickey* by first noting that the general rule is that a trial court may not extend probationary jurisdiction to enforce conditions of probation unless extension proceedings are timely initiated (citing *Smith v. Cook* and *State v. Green, supra.*) The Court went on to state as follows:

However, Utah law provides an independent legal basis for restitution, allowing a court to require a defendant to pay restitution after his probation has been terminated . . .

Recently, this court reemphasized that trial court's may retain jurisdiction over criminal defendants for purposes of restitution, independent of a defendant's probationary status. In *State v. Nones*, the defendant argued that under changes in the restitution statute made since *Dickey*, the trial court could not enforce its restitution order against her after probation expired. See *Nones*, 11 P.3d 709, 2000 UT App 211, ¶ 4, 299 Utah Adv. Rep. 14. Applying the reasoning of *Dickey* we held that the trial court retained jurisdiction despite the legislatures clarification of the statute. 2000 UT App. 340 ¶ 9, 11, 15 P.3d 110.

Thus, the conclusion is inescapable that it was absolutely not necessary for the Court to continue Defendant Orr on formal AP&P probation for the remainder of the ten years merely for the purpose of collecting restitution. Since the power of the Court to enforce restitution orders exists independent of probation status, the Court clearly could have placed Defendant on **bench probation** for the limited purpose of enforcing the payment of restitution amounts as allowed **and required** under § 77-18-1(10)(a)(ii). Whether this is true or not however, the Court simply had no authority to extend Defendant's probation for a period of ten years and to maintain him on formal AP&P probation for that entire period for the limited purpose of enforcing restitution, which was the Court's expressly stated goal. (Add. 4, p. 8. R. 393, 481, p. 30, l. 3-9, 17-20).

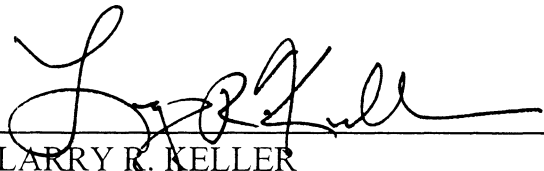
CONCLUSION

Defendant respectfully requests that this Court rule that his probation terminated by operation of law on either May 11, 2003 or May 12, 2003, and that the Court lost jurisdiction

over him on one of those two dates. In the alternative, Defendant requests this Court find that since the only basis for the Court's determination to extend Defendant's probation was to pay restitution, any probation must be bench probation pursuant to the requirements of Utah Code Ann. § 77-18-1(10)(a)(ii)(A).

Dated this 11th day of December, 2003.

COHNE, RAPPAPORT & SEGAL, P.C.

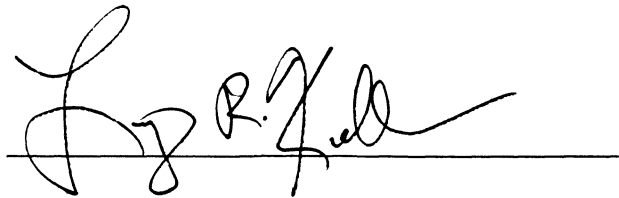


LARRY R. KELLER
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed, by first class U.S. postage prepaid, this 12 day of December, 2003, to:

J. Frederic Voros, Jr. (3340)
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

A handwritten signature in black ink, appearing to read "J. Frederic Voros, Jr.", is written over a horizontal line.

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Tab 1

CHAPTER 18

THE JUDGMENT

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77-18-1. Suspension of sentence — Pleas held in abeyance — Probation — Supervision — Presentence investigation — Standards — Confidentiality — Terms and conditions — Termination, revocation, modification, or extension — Hearings — Electronic monitoring.

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2) (a) On a plea of guilty, guilty and mentally ill, no contest, or conviction of any crime or offense, the court may, after imposing sentence, suspend the execution of the sentence and place the defendant on probation. The court may place the defendant:

- (i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;
- (ii) on probation with an agency of local government or with a private organization; or
- (iii) on bench probation under the jurisdiction of the sentencing court.

- (b) (i) The legal custody of all probationers under the supervision of the department is with the department.
- (ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.
- (iii) The court has continuing jurisdiction over all probationers.
- (3) (a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:
 - (i) the type of offense;
 - (ii) the demand for services;
 - (iii) the availability of agency resources;
 - (iv) the public safety; and
 - (v) other criteria established by the department to determine what level of services shall be provided.
- (b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.
- (c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.
- (d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.
- (e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.
- (4) Notwithstanding other provisions of law, the department is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.
- (5) (a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.
- (b) The presentence investigation report shall include a victim impact statement according to guidelines set in Section 77-38a-203 describing the effect of the crime on the victim and the victim's family.
- (c) The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act.
- (d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.
- (6) (a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to

sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

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

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that the defendant:

(a) perform any or all of the following:

(i) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;

(iii) provide for the support of others for whose support he is legally liable;

(iv) participate in available treatment programs;

(v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;

(vi) serve a term of home confinement, which may include the use of electronic monitoring;

(vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 78-11-20.7;

(viii) pay for the costs of investigation, probation, and treatment services;

(ix) make restitution or reparation to the victim or victims with interest in accordance with Title 77, Chapter 38a, Crime Victims Restitution Act; and

(x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997:

(i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or

(ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:

(A) a diagnosed learning disability; or

(B) other justified cause.

(9) The department shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest and any other costs assessed under Section 64-13-21 during:

- (a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and
 - (b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection (10).
- (10) (a) (i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.
- (ii) (A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.
- (B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.
- (iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court.
- (b) (i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law.
- (ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.
- (11) (a) (i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.
- (ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.
- (b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.
- (12) (a) (i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.
- (ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.
- (b) (i) 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.

- (ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.
- (c) (i) 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.
 - (ii) The defendant shall show good cause for a continuance.
 - (iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.
 - (iv) The order shall also inform the defendant of a right to present evidence.
- (d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.
 - (ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.
 - (iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.
 - (iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.
- (e) (i) After the hearing the court shall make findings of fact.
 - (ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.
 - (iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.
- (13) The court may order the defendant to commit himself to the custody of the Division of Substance Abuse and Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:
 - (a) the defendant is appropriate for and can benefit from treatment at the state hospital;
 - (b) treatment space at the hospital is available for the defendant; and
 - (c) persons described in Subsection 62A-15-610(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).
- (14) Presentence investigation reports, including presentence diagnostic evaluations, are classified protected in accordance with Title 63, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63-2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:
 - (a) ordered by the court pursuant to Subsection 63-2-202(7);
 - (b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;
 - (c) requested by the Board of Pardons and Parole;

- (d) requested by the subject of the presentence investigation report or the subject's authorized representative; or
 - (e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.
- (15) (a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.
- (b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).
- (16) (a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.
- (b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.
- (c) The electronic monitoring device shall be used under conditions which require:
- (i) the defendant to wear an electronic monitoring device at all times; and
 - (ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.
- (d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:
- (i) place the defendant on probation under the supervision of the Department of Corrections;
 - (ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and
 - (iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.
- (e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.
- (f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.

History: C. 1953, 77-18-1, enacted by L. 1980, ch. 15, § 2; 1981, ch. 59, § 2; 1982, ch. 9, § 1; 1983, ch. 47, § 1; 1983, ch. 68, § 1; 1983, ch. 85, § 2; 1984, ch. 20, § 1; 1985, ch. 212, § 17; 1985, ch. 229, § 1; 1987, ch. 114, § 1; 1989, ch. 226, § 1; 1990, ch. 134, § 2; 1991, ch. 66, § 5; 1991, ch. 206, § 6; 1992, ch. 14, § 3; 1993, ch. 82, § 7; 1993, ch. 220, § 3; 1994, ch. 13, § 24; 1994, ch. 198, § 1; 1994, ch. 230, § 1; 1995, ch. 20, § 146; 1995, ch. 117, § 2; 1995, ch. 184, § 1; 1995, ch. 301, § 3; 1995, ch. 337, § 11; 1995, ch. 352, § 6; 1996,

ch. 79, § 103; 1997, ch. 392, § 2; 1998, ch. 94, § 10; 1999, ch. 279, § 8; 1999, ch. 287, § 7; 2001, ch. 137, § 1; 2002, ch. 35, § 7; 2002 (5th S.S.), ch. 8, § 137; 2003, ch. 290, § 3.

Amendment Notes. — The 1999 amendment by ch. 279, effective May 3, 1999, substituted references to accounts receivable under § 76-3-201.1 for references to fines, restitution, and other assessed costs under Subsection 76-3-201(4) in Subsections (9) and (10); deleted "upon order of the court" before "shall collect" near the beginning of Subsection (9); added

Tab 2

IN THE 3RD DISTRICT - SALT LAKE CITY COURT OF SALT LAKE COUNTY
IN AND FOR THE STATE OF UTAH

FILED
REPLY TO
03 MAY 13 PM 3:41
REGION III
DEPUTY CLERK

THE STATE OF UTAH

:

Plaintiff, :AFFIDAVIT IN SUPPORT OF

VS :ORDER TO SHOW CAUSE

ORR, David Jay :COURT CASE NO: 001902772

Defendant, :JUDGE: Timothy R. Hanson

:DEF ATTY: Larry R. Keller

STATE OF UTAH)
) :ss
COUNTY OF SALT LAKE):

ROBERT EGELLND, being duly sworn upon an oath deposes and says that: He is a Probation Officer for the Utah State Department of Corrections; that on the 23rd day of March, 2000, the above-named defendant was adjudged guilty of the crime of Real Estate Broker/Agent With Out License, 3rd Degree Felony; Securities Fraud, 3rd Degree Felony, in the above-entitled Court and on the 12th day of May, 2000, was sentenced to serve a term of 0-5 years in the Utah State Prison; that the execution of the imposed sentence was stayed and the defendant was placed on probation under the supervision of the Department of Corrections; that the above-entitled defendant did violate the terms and conditions of the defendant's probation as follows, to-wit:

MAY 11

RE: ORR, David Jay

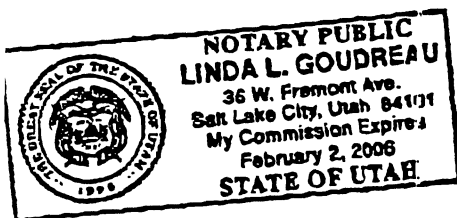
-2-


1. By having failed to pay restitution in full, as ordered, in violation of a special condition of the Probation Agreement.

WHEREFORE, your affiant prays that an Order from the Court issue directing and requiring the above-named defendant to be and appear before said Court to show cause, if any he/she has, why the aforesaid period of probation should not be revoked, and why said defendant should not be forthwith committed to the Utah State Prison.


ROBERT EGELUND, PROBATION OFFICER

Subscribed and sworn to before me this 9 day of May, 2003.





NOTARY PUBLIC

Residing: SLC, Utah

Commission expires: 2-2-06

Tab 3

IN THE 3RD DISTRICT - SALT LAKE CITY COURT OF SALT LAKE COUNTY
IN AND FOR THE STATE OF UTAH

THE STATE OF UTAH :
Plaintiff, :
VS :ORDER TO SHOW CAUSE
ORR, David Jay :COURT CASE NO: 001902772
Defendant, :JUDGE: Timothy R. Hanson
:DEF ATTY: Larry R. Keller

UPON A READING of the Affidavit in Support of Order to Show Cause, the Court finds probable cause to believe that the defendant in this matter has violated the terms and conditions of his/her probation as set forth in the Affidavit, and that revocation or modification of defendant's probation is justified.

IT IS ORDERED that the defendant appear before the Honorable Timothy R. Hanson, Judge of the above-entitled Court, at the Judge's courtroom in SALT LAKE, Utah, on the 30 day of May, 2003, at the hour of 9:00 AM, then and there to show cause why probation of said defendant should not be revoked or modified by the Court based upon the allegations contained in the Affidavit on file with the Court.

RE: ORR, David Jay

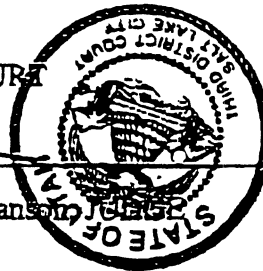
-2-

The defendant has a right to be represented by counsel at the above-described hearing and to have appointed to represent the defendant if the defendant is indigent. The defendant also has a right to present evidence as provided in the Utah Rules of Civil Procedure.

DATED THIS 13 day of May, 2003

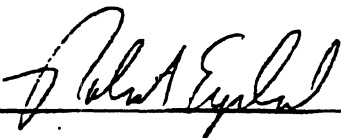
BY THE COURT

Timothy R. Hanson, Judge



CERTIFICATE OF SERVICE

I hereby certify that this Order to Show Cause and Affidavit in support thereof, was personally served upon the defendant at B APP 36 W. FRIETUNG^{SALE}, by showing the original and informing the defendant of its contents, and delivering a copy on the 19 day of MAY, 2003; additional copies were delivered to CUNY ATTORNEYS counsel for the defendant, on the 19 day of MAY, 2003



ROBERT EGELUND, PROBATION OFFICER

Tab 4

FILED DISTRICT COURT
Third Judicial District

JUL - 2 2003

SALT LAKE COUNTY

By _____ Deputy Clerk

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

THE STATE OF UTAH,	:	MEMORANDUM DECISION AND ORDER
Plaintiff,	:	CASE NO. 001902772
vs.	:	
DAVID JAY ORR,	:	
Defendant.	:	

This matter came before the Court for hearing on June 23, 2003, in connection with the defendant's Motion to Dismiss Order to Show Cause for Lack of Jurisdiction. The State elicited testimony from Robert Egelund, the defendant's AP&P officer. The Court received into evidence two exhibits, consisting of Mr. Egelund's copies of the Progress/Violation Report and the Affidavit in Support of the Order to Show Cause (both of which were originally filed with the Court).

Following Mr. Egelund's testimony and oral argument from the prosecution and counsel for the defendant, the Court ruled from the bench that the defendant's Motion to Dismiss was denied and that he was to make up the May and June restitution payments. The Court took under advisement the issue of whether the defendant's probation may be extended to the limit or term of the original sentence. The Court also indicated to counsel that a more thorough

discussion of the Court's legal basis for denying the Motion to Dismiss would be included in the Memorandum Decision that the Court would issue. Having now again reviewed the defendant's Motion to Dismiss (the State did not file a response) and having considered counsel's arguments and Mr. Egelund's testimony, the Court rules as stated herein.

LEGAL ANALYSIS

In his Motion to Dismiss, the defendant contends that this Court lacks the jurisdiction to initiate probation extension proceedings against him because these proceedings were not initiated until after probation had already terminated by operation of law. The defendant's argument is based on an erroneous presumption that his probation terminated on May 12, 2003, and that the proceedings were not formally commenced until May 13, 2003, when he considers the Progress/Violation Report to have been filed.

The legal analysis of whether this Court has the jurisdiction to extend the defendant's probation begins with an analysis of when the extension proceedings were initiated in this case and when the defendant's probation would have terminated. As an aside, the Court notes that the defendant takes issue with whether this Court is even permitted to consider an extension of his probation given that the filing of a Progress/Violation Report implies a potential revocation proceeding and possible incarceration. According to the

defendant, such a Report is an inappropriate vehicle for seeking an extension of his probation, even if it had been timely filed.

The Court concludes that the styling of the report is unimportant given that the Court has a wide latitude and flexibility in determining whether probation should be revoked or modified (including the possibility of extending the probationary term). Because it is the Court and not AP&P that fashions these remedies, how AP&P chooses to style the reports that it files with the Court has no import in the Court's ultimate determination of the appropriate remedy. In this case, the Court opts for extending the defendant's probation, as opposed to revoking it altogether. Therefore, the Court will refer to these proceedings as a probation extension proceeding. Having addressed the defendant's argument on this point, the Court proceeds to analyze the timing of the filings that initiated this probation extension proceeding.

Under Utah Code Annotated §77-18-1(11)(b), "[t]he running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court." The first issue therefore becomes when the Progress/Violation Report was filed and whether it tolled the running of the defendant's probation period under §77-18-1(11)(b).

The filing date for the Progress/Violation Report was established by the credible testimony of Mr. Egelund. Mr. Egelund testified that he met with the undersigned on May 9, 2003, and pursuant to that meeting, he returned to the Court on the same date for the purpose of filing the Progress/Violation Report and the Affidavit in Support of Order to Show Cause. Mr. Egelund specifically testified that on May 9, 2003, he brought copies of these documents to the Court, date-stamped them and left them in the intake basket for the Court's clerk. In support of this testimony, Mr. Egelund offered his copies of the Progress/Violation Report and the Affidavit in Support of Order to Show Cause (marked Exhibits 1 and 2). A review of these documents indicates hand-written changes to the May 9, 2003, date-stamp to reflect a date of May 13, 2003. However, the copy of Order to Show Cause attached to the Progress/Violation Report (Exhibit 1) has no such hand-written change. This copy of the Order to Show Cause clearly shows a date-stamp of May 9, 2003. Taking together the documentary evidence before the Court in light of Mr. Egelund's credible testimony, the Court finds that the Progress/Violation Report and the Affidavit were filed on May 9, 2003, but that for reasons that the Court need not delve into, hand-written changes were made to the date-stamp to reflect an apparent date that the documents were docketed. However, the pivotal date under §77-18-1(11)(b) is not the date of

docketing, but rather the date of filing. In this case, this date is easily determined by Mr. Egelund's testimony that he delivered these documents to the Court for filing on May 9, 2003, and that he date-stamped the documents himself with the date of May 9, 2003.

An alternative date for tolling the probationary period is the issuance of an order to show cause. The documents in this case reflect that the Court approved and authorized issuance of the Order to Show Cause on May 12, 2003. Having established the dates of May 9, 2003, or May 12, 2003, as potential dates for tolling the defendant's probationary period, the Court now proceeds to evaluate whether these dates occurred prior to the legislative termination of the defendant's probation.¹

The defendant was placed on probation by this Court on May 12, 2000. The Court reasons that the first day of probation would have concluded 24 hours after the sentence was imposed or at the close of business on the following day, May 13, 2000. Therefore,

¹ During oral argument, the State alluded to a statement made by the Court at a February 16, 2001, hearing, as providing the basis for concluding that the Court extended the defendant's probation at that time. Although the Court indicated at that hearing that the defendant's probation would not terminate pending restitution being satisfied, this statement was not intended as a suggestion that probation was extended or that a violation in probation had occurred. For these reasons, the Court does not rely on the February 16, 2001, date in its analysis.

the defendant's probation was set to expire by operation of law on May 13, 2003, the termination date of the defendant's 36-month probationary period. Accordingly, Mr. Egelund's filing of the Progress/Violation Report on May 9, 2003, and this Court's authorization to issue the Order to Show Cause on May 12, 2003, both occurred prior to the legislative termination of the defendant's probation. The defendant's probation period was therefore tolled either on May 9, 2003, or at the latest, May 12, 2003.

The tolling of the defendant's probation period prior to its legislative termination sounds a death knell to two of the defendant's principal arguments. First, the defendant argues that under §77-18-10(a)(ii)(A), this Court can retain jurisdiction over him only under the form of a bench probation. However, this provision never comes into play because the defendant's probation did not expire or terminate under §77-18-10(a)(i), but was instead tolled under §77-18-1(11)(b).

Second, the defendant argues that the due process concerns of State v. Call, 980 P.2d 201 (Utah 1999), have been violated in this case because he was not notified of the State's intent to extend his probation before the expiration of his probation period. Once again, the holding in Call is not applicable to these facts because the defendant's probation did not expire, it was tolled.

Therefore, the service upon the defendant of the Order to Show Cause on May 19, 2003, was within the probationary period and was therefore appropriate under due process considerations.

Based on the foregoing, this Court concludes that it has jurisdiction to extend the defendant's probation because the probation extension proceedings were initiated prior to the legislative termination of the probation period and served to toll the probation period under §77-18-1(11)(b). The defendant's Motion to Dismiss is therefore denied.

Having concluded that the Court has jurisdiction to extend the defendant's probation period, the Court next considers the issue of whether the Court can extend the defendant's probation in 36-month intervals or for the full duration of his remaining 10-year sentence (two terms not to exceed 5 years, to run consecutively). The Court's own legal research has not yielded a case or statute addressing this precise issue. However, distilling the general law on the trial court's discretion in matters of sentencing and probation to its essence provides that while the Court has a large measure of flexibility, it must be exercised "within legislatively established limits." State v. Green, 757 P.2d 462, 464 (Utah 1988). Further, the Court can find no express limitation on the permissible length of probation; only that the probation, together

with any extensions, not exceed the legislatively established sentencing guidelines.

Applying these concepts to this case, the Court concludes that it has the discretion to extend the defendant's probation up to the remaining term of the Court's original sentence (equating to 10 years). The defendant's failure to pay the May and June installments of his restitution underscores the fact that the defendant is induced to repay his victims only when he is in the shadow of probation and the threat of incarceration is held over him. Because the defendant's only incentive to continue making restitution payments is to avoid his probation being revoked, the Court invokes the full scope of its discretion to extend the defendant's probation for the maximum length permissible, the remaining full term of his sentence of 10 years.

This Memorandum Decision will stand as the Order of the Court, denying the defendant's Motion to Dismiss and extending his probation in the manner indicated above.

Dated this 2 day of July 2003.

14
TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, to the following, this 2 day of July 2003:

Howard R. Lemcke, Jr.
Deputy District Attorney
Attorney for Plaintiff
231 East 400 South, Suite 300
Salt Lake City, Utah 84111

Larry R. Keller
Attorney for Defendant
525 East 100 South, 5th Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008

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