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Utah Court of Appeals

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UTAH DOCUMENT
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DOCKET NO. 890086 CA

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
EARLY GILBERT HODGES, JR.,	:	Case No. 890086-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a probation revocation order and imposition of a previously suspended prison sentence for Attempted Sexual Abuse of a Child, a third degree felony, in violation of Utah Code Ann. § 76-5-404.1 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, Judge, presiding.

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FILED
MAY 30 1990
COURT OF APPEALS

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SUPPLEMENT TO

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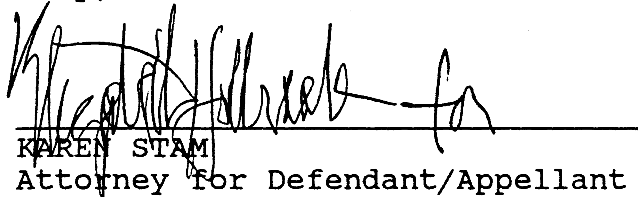
SUMMARY OF THE ARGUMENT

The right to due process requires that in order to find a person in violation of his probation, the trial court must make specific findings so as to clarify the evidence on which it relied. Even if it had attmpted to make such findings, there was insufficient evidence before the court for it to find that Mr. Hodges had failed to comply with the specific term of his probation that he participate in the Bonneville Sex Offenders Program.

SUBMITTED this 30 day of May, 1990.



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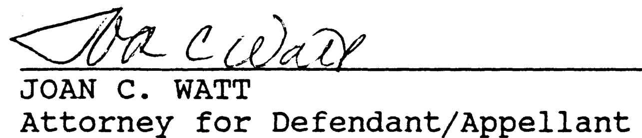

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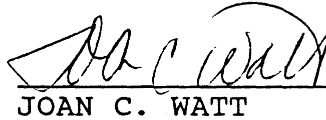
CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 30 day of May, 1990.



JOAN C. WATT

DELIVERED by ______________________________ this _____ day of May, 1990.

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INTRODUCTION

The statements of jurisdiction, issues, case, and facts are set forth in Appellant's opening brief. Appellant replies to Appellee's brief as follows:

ARGUMENT

POINT. MR. HODGES' RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE TRIAL JUDGE TERMINATED HIS PROBATION UNDER THE CIRCUMSTANCES OF THIS CASE.

A. THE TRANSCRIPT DOES NOT ESTABLISH THE TRIAL JUDGE'S SPECIFIC FINDINGS; NOR DOES IT CLARIFY THE EVIDENCE HE RELIED ON.

The State is correct in asserting that in Morishita v. Morris, 621 P.2d 691, 693 n.1 (Utah 1980) (Morishita I), the Utah Supreme Court stated:

> We are aware of the due process requirements set forth in Gagnon v. Scarpelli [citation omitted], for probation revocation proceedings, yet find the requirement for written findings inapplicable in the instant case. First, the standards set forth in Gagnon were addressed to administrative revocation proceedings which required no transcript, no

> judicial moderator, and no counsel, as opposed to the instant circumstance of a judicial proceeding with probationer being represented by counsel and a transcript being maintained.[1]

Implicit in Morishita I, as clarified in Morishita v. Morris, 702 F.2d 207, 210 (10th Cir. 1983), is the idea that written findings are not required only if the transcript and record clarify the basis for the revocation.

In State v. Parsons, 717 P.2d 99 (N.M. App. 1986) (cited by the State on p. 12 of its brief), the Court held that the trial court was required to adopt specific findings of fact or "indicate in the record its determination of whether defendant had the ability to pay the sums ordered and whether defendant's failure to pay was willful." The Court noted:

> Black [v. Romano], however, finds that in a revocation hearing, procedural due process is satisfied where probationer has an opportunity to present mitigating evidence and to argue alternatives to imprisonment and, additionally, the factfinder states the reason for its decision and the evidence relied on.

Id. at 103 (emphasis added). In the absence of such specific findings, the court remanded the case for additional findings.

In the present case, the trial judge apparently violated Mr. Hodges' probation because Appellant failed to participate in the

---

[1] Such statement was made in a footnote and is not the holding of the case. In Morishita I, the defendant raised his claim that the trial court had not entered written findings for the first time in a habeas corpus proceeding. The Court held that the petitioner's claim did not affect the fundamental fairness of the proceedings, especially in view of the fact that a transcript of the proceedings had been made and therefore could not be raised for the first time in a habeas proceeding.

Bonneville Program. A review of the transcript fails to elucidate what specific acts Mr. Hodges did or did not do which led to the trial judge's conclusion. Mr. Hodges was informed only that he failed to "fully participate" (T 37-8) as the trial judge defined that term, and that although he did some things, he did not "effectively participate" in the program (T 38-9). The transcript in this case is not an adequate substitute for written findings.

B. THE EVIDENCE DOES NOT SUPPORT A FINDING THAT MR. HODGES VIOLATED THE TERMS OF HIS PROBATION.

The State argues that application of the rationale in Bearden v. Georgia, 461 U.S. 660 (1983), to the instant case is improper because in Black v. Romano, 471 U.S. 606 (1985), the United States Supreme Court "specifically declined to extend Bearden beyond indigency cases . . . ." State's brief at 10-11. Such argument breathes too much life into the quoted statement in Romano.

In Romano, the issue was whether the due process clause required "a sentencing court to indicate that it has considered alternatives to incarceration before revoking probation." 471 U.S. at 607. While the Court was unwilling to extend Bearden to require such a consideration of alternatives, it does not follow that the substantive due process limitation of Bearden is not applicable to other contexts. Concededly, Bearden is not directly on point in the instant case; nevertheless, the concerns espoused in Bearden regarding an individual's interest in remaining on probation and the existence of substantive due process limits on revocation of such

probation are applicable. See State v. Parsons, 717 P.2d 99, 120 (N.M. App. 1986) (cited by the State at p. 12 of its brief) ("In Black [v. Romano], the court observed that due process imposes procedural and substantive limits on the revocation of a defendant's conditional liberty interest created by probation").

The statute discussed by the Court in Williams v. Harris, 149 P.2d 640 (Utah 1944), (cited by the State at p. 12 of its brief), is significantly different from the statute in effect when the trial court sentenced Mr. Hodges. Nevertheless, Williams points out that "the right of personal liberty and suspended sentence 'may not be alternatively granted and denied without just cause'" [citation omitted] and that the legislature "never intended that trial courts should implant hope and faith into one with the right to destroy this as a whim, without just cause." 149 P.2d at 642.

In State v. Cowdell, 626 P.2d 487, 488 (Utah 1981), the Court acknowledged that although "[t]he decision of a trial court to modify or revoke a probation is basically a discretionary one, . . . in revoking a probation, a court may not ignore fundamental precepts of fairness protected by the due process clause." The Court determined that although a "pleading in a criminal case may not be defective for failure to allege the time a particular offense occurred," notice for a probation revocation requires that an allegation as to the time of the alleged occurrence be included in order to comport with due process. The rationale for the more stringent protection in a probation revocation proceeding than in a trial is that the probationer has not had a prior hearing or

discovery, and requires the notice to adequately present controverting evidence. Hence, in some instances, due process actually requires greater protection in a probation revocation hearing than in a criminal trial.

Various cases dealing with probation revocation suggest that a probationer must "abuse[] this opportunity" in order to revoke probation. State v. Dubish, 696 P.2d 969, 974 (Kan. 1985); see State v. Bonza, 150 P.2d 970, 972 (Utah 1944) ("As long as the defendant to whom leniency has been extended keeps faith with the court and the agency which supervises his probation, he is entitled to the benefit of the probation or suspension"); see also State v. Eichler, 483 P.2d 887, 889 (Utah 1971) ("[F]airness and effective use of probation demand that a defendant who is placed on probation should have the assurance that if he keeps the conditions of his probation it will continue . . ."). In the present case, although the therapists concluded that Mr. Hodges would need four years to complete the program, all of the underlying acts testified to by either the therapists or Mr. Hodges demonstrate that he was participating to the best of his ability and not "abusing" his opportunity to be on probation.

The State relies on the "flexible nature of a probation revocation hearing" to argue that the therapists were not required to articulate a basis for their conclusions. However, it is entirely consistent with the "flexible nature of a probation revocation proceeding" (State's brief at 11) to require that testimony have adequate foundation and reliability, that witnesses

explain the bases for their conclusions, and that sufficient evidence that the probationer violated a term of probation be required. See State v. Tulipaine, 596 P.2d 695, 696 (Ariz. 1979) (no error where trial court refused to admit polygraph results at probation revocation hearing due to lack of reliability of polygraph examinations); People v. Maki, 704 P.2d 743 (Cal. 1985) (hearsay must be reliable in order to introduce at probation revocation hearing).

The concerns espoused in State v. Rimmasch, 775 P.2d 388 (Utah 1989), that the factfinder might "abandon its responsibility" and simply adopt the conclusions of experts without analyzing the underlying facts are just as applicable to a probation revocation hearing as they are to a trial.

In its brief, the State points out that "Dr. Cespedes believed that defendant had been manipulative, using his medication to justify his behavior and inability to progress in therapy." Appellee's brief at 15. The transcript establishes that this testimony by Dr. Cespedes actually related to the three-or-four-month period before Mr. Hodges went to the Veterans Administration Hospital and had his medication changed[2] and not the four-to-five-month period following the trip to the Veterans Administration Hospital. Rather than suggesting that Mr. Hodges was manipulative following the trip to the hospital and change in medication,

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[2] As outlined in Appellant's opening brief at 4, Appellant went to the VA Hospital three or four months after entering Bonneville and four or five months before the State filed the Order to Show Cause in this case.

Dr. Cespedes' testimony demonstrates that Mr. Hodges behavior improved during the last several months in the program.

Dr. Cespedes testified:

> So, Mr. Hodges' behavior did change after the evaluation and changing in medication at the VA, but that was more the result of a confrontation to get him to lower or stop manipulating more than a change in medication itself.

(T 9). This testimony demonstrates that the therapy at Bonneville was working and Mr. Hodges' behavior was improving significantly during his last several months in the program.

The State also points out that "Dr. Kramer found that defendant lost motivation and that it was difficult to get him to work hard and consistently." Appellee's brief at 15. While the State's depiction of the testimony suggests Mr. Hodges simply stopped working, Dr. Kramer actually testified that Mr. Hodges would try, then lose motivation, then try again for awhile, then lose motivation again (T 21). Again, Dr. Kramer offered no specific examples nor any testimony as to how he assessed the level of Mr. Hodges' motivation. Specific examples, including the fact that Dr. Kramer complimented Mr. Hodges several times on his progress after returning from the evaluation at the Veterans Administration Hospital, suggest that Mr. Hodges was motivated following the VA evaluation. As outlined further in Appellant's opening brief at 5, 18-19, Dr. Kramer also testified that he was unable to tell whether assignments were completed correctly or the therapy was having an impact on sexual arousal without use of the plethysmograph. Therefore, Dr. Kramer's testimony demonstrates an inability to

ascertain whether Mr. Hodges was benefiting from the therapy.

In the present case, where the therapists offered only conclusions and no underlying examples of behavior which would establish that Mr. Hodges was not participating and where Mr. Hodges continued to participate to the best of his ability, society's interest in reformation and Appellant's interest in remaining on probation absent an "abuse of [that] opportunity" are both best served by reinstating Appellant's probation.

CONCLUSION

Appellant respectfully requests that this Court reverse the trial court's order violating his probation and remand the case with an order that probation be reinstated.

SUBMITTED this 22 day of May, 1990.

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CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 22 day of May, 1990.

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DELIVERED by ______________________________ this _____ day of May, 1990.

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