

COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 6703

STATE OF ARIZONA

v.

WILLIAM R. ROBINSON

MARICOPA COUNTY
SUPERIOR COURT
NO.CR 113712

TRANSMITTAL DATE

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STATEMENT OF THE CASE

On October 17, 1980, in Maricopa County Superior Court No. CR-113712 Appellant was placed on probation for a period of four (4) years on a charge of Negligent Homicide. One condition of probation was that Appellant be incarcerated in the County Jail for a period of six (6) months. It was also ordered that Appellant pay restitution in the total amount of Seven Thousand One Hundred Forty Five Dollars (\$7,145.00) in regular monthly payments of One Hundred Sixty Two 38/100 Dollars (\$162.38) per month. Additionally Appellant was ordered to pay a fine of Five Hundred Dollars (\$500.00) plus a ten percent (10%) surcharge. Payment on the fine and surcharge was to be made at a rate of Twenty Five Dollars (\$25.00) per month. Subsequently a petition to revoke probation was filed.

On November 15, 1982, Appellant admitted that he violated terms #14 and #15 of his probation by failing to pay his fine and restitution. At the time of his admissions Appellant indicated he wished an opportunity to explain the reasons for his failure to pay. (R.T. 11/15/82 at 6). He indicated that it was a matter of public record that his payments had not been fully made. (Id. at 8), but stated that he had made payments both on the fine and on the restitution. (Id. at 9).

A disposition hearing was conducted on November 23, 1982. At that time the probation officer for Appellant made an oral recommendation to the court that Appellant be sentenced to the presumptive term. (R.T. 11/23/82 at 14). The court imposed a sentence of five (5) years imprisonment dating from the date of the disposition hearing. Appellant was give credit for two hundred one (201) days of presentence incarceration. In explaining the reasons for a maximum sentence the following occurred:

THE COURT: The Court has considered the factors referred to by the probation department. I just now looked through the probation report and find that the Defendant —

considered the numerous factors there, and the Defendant's age — you are now twenty-five, right?

THE DEFENDANT: Twenty-six two weeks ago.

THE COURT: The fact that this offense did result in the death of a seventeen year old person; that the Defendant failed to stop at a traffic signal, allegedly, and had no license on him and was under the influence of alcohol according to the police reports. The Court is also considering the fact that the Defendant in 1974, at the age of seventeen, was remanded to the adult Court in Houston for involuntary manslaughter and given seven years in the Texas Department of Corrections by a jury trial. Also, a robbery aggravated by a deadly weapon in Texas in 1975, and that was ultimately dismissed. On June 1 a DWI in this jurisdiction.

The Court also notes that the Defendant has made a very poor record of living up to the terms of probation, failing to pay the restitution or meet with the probation officer as ordered and the Court finds that the aggravating circumstances and that the mitigating circumstances do not outweigh the aggravating circumstances and, therefore, that an aggravated sentence would be appropriate.
(Id. at 17-18).

A timely notice of appeal was filed on December 6, 1982. The appeal is brought from the revocation of probation and sentence imposed.

ARGUMENT

APPELLANT SUBMITS THE COURT ERRED IN IMPOSING A SENTENCE IN EXCESS OF THE PRESUMPTIVE.

In imposing a sentence in excess of the presumptive term the court relied on several factors. Appellant submits that the factors relied on by the court are insufficient to justify a term in excess of the presumptive. Further, Appellant submits that the court failed to sufficiently consider the mitigating factors in this case.

The aggravating factors relied on by the court were:

1. The present offense resulted in the death of a seventeen (17) year old person.
2. Appellant failed to stop at a traffic signal (allegedly).
3. Appellant had no driver's license in his possession.
4. Appellant was under the influence of alcohol.
5. In 1974 at the age of seventeen (17) Appellant was given seven (7) years in the Texas Department of Corrections by a jury trial.
6. Appellant was arrested for the charge of robbery aggravated by a deadly weapon in 1975. This charge was ultimately dismissed.
7. Appellant was arrested for a charge of DWI on June 1.
8. Appellant had a very poor record of living up to the terms of his probation. (R.T. 11/23/82 at 18).

Appellant submits that an examination of each of the factors referred to by the court discloses that they do not justify the term of imprisonment imposed here.

The first factor referred to by the court relates to the age of the victim. If the record supports a finding that the victim of the present offense was seventeen

(17) years old, Appellant submits that the age of a lawful driver of a motor vehicle is not significant. The second, third and fourth factors found to be aggravating by the trial court involve the offense itself. If these factors had not been present the charge would not have been filed. In regard to the fact that Appellant did not have a driver's license in his possession at the time of the traffic accident which was the basis of the charge of negligent homicide, the court was apparently not aware of whether Appellant had a valid driver's license. (R.T. 11/23/82 at 16). The original plea agreement provided that Appellant's driver's license would be revoked. (Instruments at 12). The State made a motion to transmit the defendant's driver's license to the motor vehicle department. (Instruments at 21). If the court considered that Appellant did not have a valid drivers license at the time of the offense, such consideration was improper.

The next aggravating factor found by the court was the conviction of Appellant following remand to adult court for a charge of involuntary manslaughter. This conviction apparently involved a hunting accident. (Presentence Report at 6). Appellant submits that this prior conviction for an unintentional act was of little consequence.

Appellant submits that the consideration of Appellant's arrest for robbery was completely improper. The presentence report discloses that this charge was dismissed. Appellant submits that a charge which was dismissed is an insufficient basis for imposing an aggravated term of imprisonment.

The seventh factor found by the trial court related to a charge of DWI on June 1. Again, this was only an arrest for an alleged offense occurring prior to the accident involved in the charge of Negligent Homicide. (Presentence Report at 4). Appellant submits that this arrest had no significance in regard to his disposition hearing.

All of the aforementioned aggravating factors found by the sentencing court

were present at the time Appellant was initially placed on probation. If probation were appropriate initially, Appellant fails to see how these pre-existing facts could turn into aggravating factors justifying a maximum prison sentence.

The final aggravating factor found by the court was Appellant's "poor record" on probation. Appellant did make payments on his ordered restitution. Appellant did make payments on his ordered fine. Appellant indicated that he was unable to pay all of the fine and restitution because of an inability to pay. The record supports a finding that Appellant's ability to pay was limited. Appellant submits that it is improper to incarcerate one solely for an inability to pay. Also, the fact that Appellant failed to make each and every meeting with his probation officer should be balanced with the fact that Appellant voluntarily surrendered himself. (R.T. 11/23/82 at 14). Appellant submits that the record of his performance on probation does not warrant its consideration as an aggravating factor.

It appears that the court failed to consider as mitigating factors in this case the fact that Appellant did voluntarily turn himself in, the fact that he was having personal problems with his girlfriend, the fact that restitution and fine payments were made in part and the fact that Appellant was convicted of no new criminal charges. Appellant submits that these mitigating factors were more than sufficient to offset any of the aggravating factors found by the court.

Appellant submits that the foregoing analysis demonstrates that the court erred in imposing a sentence in excess of the presumptive here. It is therefore respectfully requested that Appellant's sentence be modified to the presumptive term.

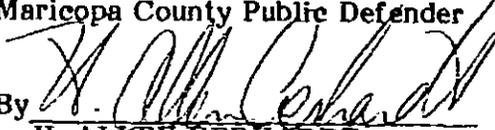
COMPLIANCE WITH ANDERS V. CALIFORNIA

Counsel for Appellant has searched the record on appeal pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). One arguable question of law has been found. It is respectfully requested that this Court search the record for fundamental error pursuant to A.R.S. §13-4035. State v. Powell, 5 Ariz.App. 51, 423 P.2d 127 (1967).

Respectfully submitted,

ROSS P. LEE
Maricopa County Public Defender

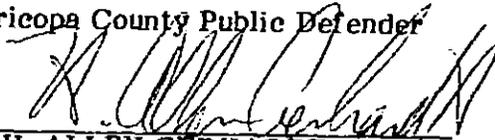
By


H. ALLEN GERHARDT
Deputy Public Defender
Attorney for Appellant

TWO COPIES of Appellant's Opening Brief mailed this 17 day
of March, 1983, to ROBERT K. CORBIN, Attorney General of Arizona, 1275 W.
Washington, Criminal Division - 2nd Floor, Phoenix, Arizona 85007.

ONE COPY of Appellant's Opening Brief mailed this 17 day
of March, 1983, to WILLIAM ROBERT ROBINSON, #46149, P.O. Box 4000-R,
Fort Grant, Arizona 85643.

ROSS P. LEE
Maricopa County Public Defender

By 
H. ALLEN GERHARDT
Deputy Public Defender
Attorney for Appellant
132 South Central, 2nd Floor
Phoenix, Arizona 85004

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,)	
)	
Appellee,)	NO. 1 CA-CR 6703
)	
-vs-)	MARICOPA COUNTY
)	SUPERIOR COURT
WILLIAM ROBERT ROBINSON,)	NO. CR-113712
)	
Appellant.)	

APPELLEE'S ANSWERING BRIEF

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

GEORGIA B. ELLEXSON
Assistant Attorney General
Department of Law
1275 W. Washington, 2nd Floor
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for APPELLEE

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED OCT 20 1983

GLEN D. CLARK, CLERK

By _____

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11-4-83

QUESTION PRESENTED FOR REVIEW

Is appellant's sentence excessive?

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STATEMENT OF THE CASE

On July 15, 1980, appellant was charged with negligent homicide, in violation of Ariz.Rev.Stat.Ann. §§ 13-1102, -1101, -701, -702, -801, and 28-444 and -445. (Indictment, filed July 15, 1980.) Pursuant to a plea agreement reached with the State of Arizona, appellant entered a plea of no contest to the charge of negligent homicide, a class 4 felony, in exchange for stipulated probation. (Plea Agreement, filed Sept. 17, 1980.) Judgment of guilt was entered, and appellant was placed on 4 years probation with the following special terms: restitution in the amount of \$7,145.00 in monthly payments of \$162.38 beginning March 15, 1981, with any balance to be paid no later than October 1, 1984; a fine of \$500.00, plus 10 percent surcharge in monthly payment of \$25.00 each month also beginning March 15, 1981; and confinement in the county jail for a period of 6 months, ending January 14, 1980. (Appellant was given credit for time served.) (Judgment and Order, dated Oct. 17, 1980.)

On October 15, 1982, the appellant's probation officer filed a petition to revoke probation for violation of conditions of probation, to wit:

Term #1: The defendant committed the crime of shoplifting, a misdemeanor, on or about August 1, 1982.

Term #2: The defendant failed to report to the probation officer on August 9 and 25, 1982, as directed by the probation officer. Last date reported was August 3, 1982.

Term #14: The defendant has failed to pay restitution through the Clerk of the Superior Court of Maricopa County in regular monthly payments of \$162.38 each month as ordered by the court.

Term #15: The defendant has failed to pay a fine to the Clerk of the Superior Court of Maricopa County in regular monthly payments of \$25.00 each month as ordered by the court.

A bench warrant was issued for appellant's arrest. (Petition to Revoke Probation; Order for Warrant, filed Oct. 18, 1982.) Appellant was arrested on the warrant on November 8, 1982. (Bench Warrant, Certificate of Execution, filed Nov. 15, 1982.) At the time of appellant's revocation arraignment, appellant admitted violations of Terms #14 and #15, and the state moved to dismiss the other terms. (R.T. of Nov. 15, 1982, at 10.)

At the disposition hearing, the probation officer testified regarding his contacts with appellant, and appellant's performance and compliance with the probationary terms. Further, the probation officer recommended to the court that probation be revoked, and appellant be sentenced to the presumptive term with credit for 201 days previously served. (R.T. of Nov. 23, 1982, at 13-14.) Among the factors noted by the probation officer was appellant's infrequent contact with him, and appellant's subsequent failure to appear when informed he would have to make some payments by August 25 to reduce the delinquency in his restitution/fine payments.

Approximately 3 months after the last contact, and 1 month after a petition to revoke and bench warrant were initiated, appellant contacted the probation officer and advised him that he wished to surrender himself. During conversations with him, appellant indicated to the probation officer that he *did not* want probation, that he felt he did not want probation; that he could not make it. (Id. at 13-14.)

The prosecutor noted that this was appellant's second negligent homicide and urged the court to impose a maximum 5-year sentence. (Id. at 15.) Appellant's counsel urged the court to impose less than the presumptive term, noting that appellant was never unwilling to pay restitution but rather was unable to do so, that he had made payments of close to \$1,500 although he was \$3,000.00 delinquent, that he lost his job in May because of some incident with his girl friend, and that he did voluntarily surrender himself. (Id. at 16.) Regarding appellant's previous record, defense counsel noted that those offenses had not occurred since this grant of probation. Defense counsel further relayed that, according to appellant, his chances for employment were good when released. (Id. at 17.)

The trial court noted that it was concerned by the fact that this was appellant's second homicide offense, referencing the previous involuntary manslaughter charge from Texas. The trial court enumerated the following

aggravating factors to justify a sentence greater than the presumptive.

THE COURT: The fact that this offense did result in the death of a seventeen year old person; that the Defendant failed to stop at a traffic signal, allegedly, and had no license on him and was under the influence of alcohol according to the police reports. The Court is also considering the fact that the Defendant in 1974, at the age of seventeen, was remanded to the adult Court in Houston for involuntary manslaughter and given seven years in the Texas Department of Corrections by a jury trial. Also, a robbery aggravated by a deadly weapon in Texas in 1975, and that was ultimately dismissed. On June 1 a DWI in this jurisdiction.

The Court also notes that the Defendant has made a very poor record of living up to the terms of probation, failing to pay the restitution or meet with the probation officer as ordered and the Court finds that the aggravating circumstances do out way the mitigating circumstances and that the mitigating circumstances do not outweigh the aggravating circumstances and, therefore, hat an aggravated sentence would be appropriate.

(R.T. of Nov. 23, 1982, at 18-19.) The trial court then revoked probation and sentenced appellant to 5 years imprisonment, with credit for 201 days presentence incarceration. (Id. at 19, 20.) Appellant now appeals. Counsel filed an opening brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and appellant has filed a supplemental opening brief in propria persona. By order of this Court filed

September 26, 1983, appellee submits its answering brief. This Court has jurisdiction pursuant to Ariz.Rev.Stat. Ann. §§ 12-120.21(A)(1), 13-4031, and -4033.

ARGUMENT

I

APPELLANT'S SENTENCE IS NOT EXCESSIVE.

(A) SINCE THE TRIAL COURT PROPERLY FOUND AGGRAVATING FACTORS CALLING FOR A GREATER THAN PRESUMPTIVE SENTENCE AND THE SENTENCE IMPOSED IS WITHIN THE STATUTORY LIMITS, THERE IS NO BASIS FOR REDUCING APPELLANT'S SENTENCE.

Appellant contends that the trial court erred in finding aggravating factors and in failing to find any mitigating circumstances. Appellant's supplemental opening brief voices the same complaints. Appellant requests that his sentence be reduced to the presumptive term.

On appeal, the reviewing court views the evidence in the light most favorable to sustaining the findings of the trier of fact. State v. Garcia, 121 Ariz. 417, 590 P.2d 1363 (1979). While it is true that Ariz.Rev.Stat. Ann. § 13-4037 gives this Court authority to modify a sentence, that authority is seldom exercised. State v. Gordon, 125 Ariz. 425, 610 P.2d 59 (1980). This Court exercises its power to reduce a sentence only when it clearly appears that the sentence is excessive. State v. Montano, 121 Ariz. 147, 589 P.2d 21 (Ct.App. 1978). The imposition of sentence is entirely within the discretion of the trial

court, and if the sentence is within statutory limits, it will not be modified unless there are unusual circumstances or the record clearly reflects an abuse of discretion.

State v. Ethington, 121 Ariz. 572, 592 P.2d 768 (1979). An abuse of discretion occurs when the trial court's decision is capricious or arbitrary, or is the result of a failure to adequately investigate all of the facts and circumstances necessary to intelligently exercise sound discretion. State v. Vasquez, 130 Ariz. 103, 634 P.2d 391 (1981). Appellee submits that appellant has failed to show any error in the imposition of sentence.

Appellant attacks each of the aggravating factors found by the trial court, substituting his own analysis of whether or not they constitute aggravating factors. Appellee submits that such an analysis is not particularly helpful to this Court. Moreover, contrary to appellant's assertion, the circumstances of the instant crime are legitimate considerations for the sentencing court. In determining an appropriate sentence, the trial court has broad discretion in considering available information about a defendant's past conduct, including evidence of crimes of which the defendant was acquitted; and the court is not necessarily restricted only to evidence admissible at trial. State v. Kelly, 122 Ariz. 495, 498, 595 P.2d 1040, 1043 (Ct.App. 1979).

In order to discharge its sentencing function properly, the trial court must consider not only the circumstances of

the offense, but also the moral character and past conduct of the defendant. State v. Smith, 107 Ariz. 218, 220, 484 P.2d 1049, 1051 (1971). In reviewing the propriety of the exercise of a trial court's discretion, the appellate court must look to the same considerations. These factors include, the defendant's age, physical health, cooperative attitude, moral character, and prior criminal record or lack thereof. They also include the violent or nonviolent nature of the crime, the depravity of the offense, and the degree of the defendant's participation in the offense. State v. Patton, 120 Ariz. 386, 586 P.2d 635 (1978).

Examined in light of these standards, the trial court's recitation of factors in aggravation was proper. The trial court expressed legitimate concern over the tragic loss of life of a young person at appellant's hands while appellant was under the influence of alcohol. Further, this was not the first instance of appellant's driving while under the influence of alcohol, as he had been arrested for this same activity approximately 1 1/2 months prior to this death. Additionally, although appellant considers the previous manslaughter committed by him as an insignificant "accident," appellee submits that the trial court properly considered appellant's history of negligent conduct in determining an appropriate sentence. Appellant's past conduct and criminal record reflect that he disregards the welfare and safety of others by engaging in a pattern of irresponsible behavior. The fact that appellant at the age

of 25 years is responsible through his negligence for the deaths of two persons is certainly an aggravating factor of some significance, regardless of the fact that appellant was initially placed on probation for this offense.

Appellant additionally, contends that the trial court erred in considering appellant's "poor record" on probation as an aggravating factor. On appeal he asserts that the trial court should consider that he did make some payments and that he voluntarily surrendered himself. These factors, of course, were known to the trial court. However, as noted by the probation officer, appellant's contacts with him were infrequent, and appellant specifically failed to make payments or remain in contact after being given a deadline to reduce the amount of his delinquent restitution/fine payments. Further, appellant's "voluntary surrender" must be viewed in context since it did not come about until 1 month after a bench warrant had been issued for his arrest. Moreover, appellant continually expressed the opinion to his probation officer that he did not want probation. (R.T. of Nov. 23, 1982, at 13-14.) The factors set forth by appellant, through counsel or by way of the supplemental opening brief, do not appear particularly mitigating, particularly when considered in light of the context of this case.

At any rate, all of the various factors appellant asks this Court to consider were before the trial court. His argument merely amounts to the contention that the trial

court erred in the relative weight given each factor. He has not given any reason why this Court would be in a better position to determine a proper sentence, nor has he established any error in the trial court's findings in aggravation.

(B) APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

As an additional claim, appellant also asserts that he was denied effective assistance of counsel at the probation revocation proceedings and sentencing. He claims that defense counsel failed to argue a number of mitigating factors to the trial court, including in particular his inability to pay restitution and the fine, and his attempts to comply with the terms of probation. In support of his contention, appellant attaches a number of documents to his supplemental opening brief. These documents, though, were not presented to the trial court, and so are not properly part of the record on appeal. (See Documents 11C - 17C.) Many of appellant's specific claims therefore are not properly before this Court. Those allegations of appellant's that are outside the record on appeal would have to be developed, if at all, in an independent proceeding for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. Of the matters asserted by appellant that are supported by the record, the record reflects the trial court's familiarity with appellant's circumstances. Appellant's argument on appeal

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is in reality an attempt to justify his violation of the probationary terms, and coming for the first time on appeal is an attempt made too late. Appellant admitted to violations of certain terms of his probation, and he failed to offer any exculpatory evidence prior to sentencing. (R.T. of Nov. 15, 1982, at 10; R.T. of Nov. 23, 1982, at 15, 17.)¹ Defense counsel did present argument in mitigation covering many of the mitigating circumstances that appellant now asserts on appeal, including an explanation for the violations of probation, and appellant's personal difficulties. (R.T. of Nov. 23, 1982, at 15-17.)

The standard for effective assistance of counsel in Arizona is whether counsel showed at least minimal competence in representing the defendant. State v. Watson, 134 Ariz. 1, 4, 653 P.2d 351, 354 (1982). The reviewing court focuses on the quality of counsel's performance, rather than the effect of that performance on the outcome of the proceedings. State v. Watson, supra. The burden of establishing ineffectiveness of trial counsel is on the defendant, and proof of counsel's ineffectiveness must be a demonstrable reality rather than speculation. State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981); State v. McDaniel, ___ Ariz. ___, 665 P.2d 70 (1983). Furthermore, disagreements on trial strategy or errors in trial tactics

¹Appellant's allegation that defense counsel advised him to remain quiet is likewise not supported by the record.

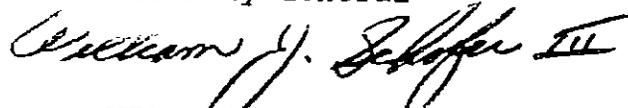
will not support a claim of ineffective assistance as long as the action taken could have had some reasoned basis. State v. Watson, supra; State v. Oppenheimer, 1 CA-CR 6239, slip op. at 5 (Ariz.Ct.App., Sept. 20, 1983). Here, much of appellant's so-called mitigation evidence was argued by counsel or already known to the trial court. The mere fact that counsel could have possibly offered different evidence of the same import does not render his assistance ineffective. At best, such decisions are clearly tactical or strategic in nature, and not subject to appellant's hindsight analysis. Appellant has failed to establish ineffective assistance of counsel.

CONCLUSION

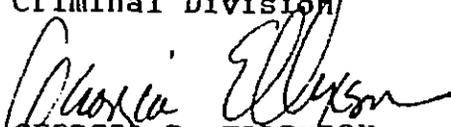
Since the trial court's findings of aggravating factors are supported by the record, appellant is not entitled to a reduction of his sentence. Furthermore, appellant has failed to establish ineffective assistance of counsel. Appellee respectfully requests this Court to affirm the judgment and sentence of the trial court below.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division



GEORGIA B. ELLEXSON
Assistant Attorney General

Attorneys for APPELLEE

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GEORGIA B. ELLEXSON, being first duly sworn upon oath,
deposes and says:

That she served the attorney for appellant and
appellant in the foregoing case by forwarding one (1) copy
each of APPELLEE'S ANSWERING BRIEF; in sealed envelopes,
first class postage prepaid, and deposited same in the
United States mail, addressed to:

ROSS P. LEE
Maricopa County Public
Defender
132 S. Central, 2nd Fl.
Phoenix, Arizona 85004

WILLIAM ROBERT ROBINSON
Box 46149
P.O. Box 4000R
Fort Grant, AZ 85643

this 20th day of October, 1983.



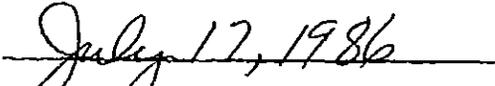
GEORGIA B. ELLEXSON

SUBSCRIBED AND SWORN to before me this 20th day of
October, 1983.



NOTARY PUBLIC

My Commission Expires:



CR38-050
2858D:bb

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ORIGINAL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WILLIAM ROBERT ROBINSON,
APPELLANT,
-vs-
STATE OF ARIZONA,
APPELLEE.

NO. 1 CA-CR 6703

MARICOPA COUNTY
SUPERIOR COURT
NO. CR- 113712

APPELLANT'S REPLY BRIEF

WILLIAM ROBERT ROBINSON
SAFFORD CONSERVATION CENTER
BOX 791
SAFFORD, ARIZONA 85546

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED NOV 7 1983

GLEN D. CLARK, CLERK

By W. S. [Signature]

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At Issue 11-4-83

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REPLY

AFTER REVIEW OF THE STATE'S ANSWERING BRIEF, APPELLANT HAS NOTED THAT AMONG OTHER THINGS, THE STATE CLEVERLY FAILED TO MAKE ANY MENTION OF MANY ISSUES RAISED BY APPELLANT ON APPEAL:

- A) FACTUAL INFORMATION AND MISINFORMATION IN DOCUMENTS 1A- 7A OF APPELLANT'S SUPPLEMENTAL OPENING BRIEF.
- B) THAT THE AGGRAVATING FACTORS USED BY TRIAL COURT AFTER REVOCATION OF PROBATION TO IMPOSE EXCESSIVE SENTENCE WERE THE SAME FACTORS USED BY THE TRIAL COURT TO IMPOSE PROBATION 2 YEARS PRIOR TO REVOCATION PROCEEDINGS.
- C) THAT DEFENDANT WAS FINANCIALLY UNABLE TO PAY THE AMOUNT OF RESTITUTION IMPOSED AS CAN BE SUPPORTED BY DOCUMENTS IN APPELLANT'S OPENING SUPPLEMENTAL BRIEF.
- D) THAT THE PROBATION OFFICER FAILED IN HIS DUTIES TO ASSIST APPELLANT IN HIS EFFORTS TO GAIN RELIEF FROM POSSIBLE REVOCATION BY WAY OF MODIFICATION OF PROBATION OR REDUCTION OF AMOUNT OF RESTITUTION PAYMENTS.

ON PAGE 3 OF THE STATE'S ANSWERING BRIEF THE STATE REFERS TO COURTS RECORDS THAT REFLECT THAT APPELLANT WAS NEVER UNWILLING TO PAY RESTITUTION BUT THAT APPELLANT WAS UNABLE TO DO SO, YET THE STATE DOES NOT ATTACK THAT FACT. THE STATE ALSO REFLECTS THAT NO CHARGES USED AS AGGRAVATING FACTORS AFTER REVOCATION OF PROBATION WERE COMMITTED SINCE IMPOSITION OF PROBATION. FURTHER, THE STATE REFERS TO STATE vs. ETHINGTON, 121 Ariz. 572, 592 P.2d, 768 (1979). CONCERNING THIS REFERENCE APPELLANT CON- TENDS THAT PROBATION OFFICER AS WELL AS LAWYERS FOR BOTH THE

STATE AS WELL AS APPELLANT ARE OFFICERS OF THE COURT AND ARE DUTIFULLY BOUND TO "adequately investigate all of the facts and circumstances necessary to exercise sound discretion." FURTHER, APPELLANT'S COUNSEL WAS AWARE OF SOME CIRCUMSTANCES NOT SUPPORTED BY THE RECORD, BECAUSE HE FAILED TO BRING THEM UP AT THE REVOCATION PROCEEDINGS.

APPELLANT SUBMITS THAT A COMPETENT LAWYER WOULD NEVER HINDER A MAN BY WAY OF ILL-ADVISE OR NEGLECT WHEN THE LAWYER IS AWARE THAT DEFENDANT CAN GIVE EVIDENCE TO THE COURT THAT WOULD SHOW THAT DEFENDANT IN NO WAY INTENTIONALLY VIOLATED ANY OF THE TERMS USED TO REVOKE HIS PROBATION, AND THAT HE WAS ONLY TOO POOR TO MAKE ALL OF THE RESTITUTION PAYMENTS. REASONING SHOULD BE SUFFICIENT FOR A COMPETENT LAWYER TO HELP AND NOT HINDER HIS CLIENTS EFFORTS TO SHOW INNOCENCE OF INTENTIONAL WRONGDOING.

APPELLANT INJECTS THAT COUNSEL WAS NOT ACTING STRATEGICALLY BUT RATHER UNPROFESSIONALLY AND INCOMPETENTLY, AS WELL AS NEGLECTFUL.

THE STATE MAKES MENTION OF THE POSSIBILITY OF APPELLANT USING MATERIALS IN HIS OPENING BRIEF FOR MODIFICATION OF SENTENCE BY WAY OF POST CONVICTION RELIEF TO SENTENCING COURT. (pg. 9) IT APPEARS THAT THE STATE ALSO SEES MERIT TO THE FACTS AND QUESTIONS PRESENTED BY APPELLANT TO THE COURT OF APPEALS IN CONCERN TO EXCESSIVE SENTENCE. APPELLANT FEELS THAT THE JUDGES OF THE COURT OF APPEALS CAN MAKE THE DECISION FOR ADJUSTMENTS TO BE MADE IN SENTENCING AS WELL AS, OR BETTER THAN A LOWER COURT COULD. SINCE THE APPELLANT HAS THE OPTION OF APPEAL OR POST CONVICTION RELIEF FOR THE SAME POSSIBLE RESULT, THE STATE CANNOT RIGHTLY SAY THAT A POST CONVICTION RELIEF IS THE BETTER

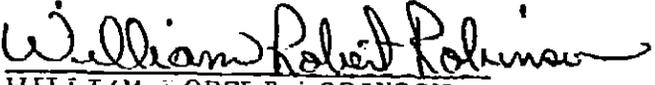
00119

ROUTE OF POSSIBLE SENTENCE MODIFICATION. REFER TO;
ARIZONA REVISED STATUTES-SUPPLEMENTARY PAMPHLET VOLUME 17
RULE 31. 1 page 451 $\frac{1}{2}$ $\frac{1}{2}$ STATE v. BROWN (1975) 112 Ariz. 29.
536 P. 2d 1047. & RULE 31.2 NOTE OF DECISION #1 STATE v.
CALDWELL (1977) 117 Ariz. 464, 573 P. 2d 864.

CONCLUSION

APPELLANT WISHES FOR THE COURT TO REALIZE THAT HE NEVER INTENTIONALLY NEGLECTED TO PAY RESTITUTION, ONLY THAT HE WAS UNABLE TO PAY THE AMOUNT IMPOSED ON A REGULAR BASIS DUE TO FINANCIAL HARDSHIP. APPELLANT SUBMITS THAT IF ALL FACTS CONCERNING THE ISSUE OF VIOLATION WERE CONSIDERED, INVESTIGATED, AND PRESENTED IN THEIR PROPER PERSPECTIVE THE SENTENCE IMPOSED BY THE COURT WOULD HAVE BEEN TO THE PRESUMPTIVE OR A LESSER TERM IN THE EVENT THAT THE COURT WOULD HAVE STILL REVOKED THE PROBATION AT ALL. I RESPECTFULLY REQUEST THAT THE COURT OF APPEALS CONSIDER THE FACTUAL ARGUMENTS PRESENTED BY APPELLANT AND RESENTENCE ME TO THE PRESUMPTIVE TERM OF 4 YEARS. APPELLANT ALSO WISHES FOR THE APPEALS COURT AS WELL AS THE STATE TO CONSIDER THAT MY CONSCIENCE IS A FORM OF PUNISHMENT THAT FAR OUTWEIGHS THE LENGTH OF A PRISON TERM.

RESPECTFULLY,


WILLIAM ROBERT ROBINSON
APPELLANT
SAFFORD CONSERVATION CENTER
BOX 791
SAFFORD, ARIZONA 85546

00120

A F F I D A V I T

TWO COPIES of Appellant's Reply Brief mailed this 3rd day of November, 1983, to Robert K. Corbin, Attorney General of Arizona, 1275 W. Washington, Criminal Division - 2nd Floor, Phoenix, Arizona, 85007.

One Copy of Appellant's Reply Brief mailed this 3rd day of November, 1983, to ART HAZELTON, DEPUTY PUBLIC DEFENDER, ATTORNEY FOR APPELLANT, 132 S. Central, 2nd floor, Phoenix, Arizona, 85004.

William Robert Robinson
WILLIAM ROBERT ROBINSON

Sworn and subscribed before me this 3rd day of November, 1983.

Laron Skinner
NOTARY PUBLIC

MY COMMISSION EXPIRES:

August 22, 1983



AFFIDAVIT OF RECEIPT DATE OF MAIL

IN RE: WILLIAM ROBERT ROBINSON 1 CA-CR 6703

PLEASE BE NOTIFIED THAT, ALTHOUGH APPELLEE'S ANSWERING BRIEF FILED WITH YOU OFFICE BY THE STATE OF ARIZONA ATTORNEY GENERAL'S OFFICE ON THE 21st DAY OF OCTOBER 1983, AFTER BEING MAILED ON THE 20th DAY OF OCTOBER 1983, IN REFERENCE TO THE ABOVE NUMBERED CRIMINAL CASE; APPELLANT WILLIAM ROBINSON'S COPY WAS NOT RECEIVED BY HIM THRU THE SAFFORD CONSERVATION CENTER MAIL ROOM UNTIL THE 27th DAY OF OCTOBER DUE TO THE DEPARTMENT OF CORRECTIONS HAVING TO TRANSFER THE MAIL FROM THE FORT GRANT TRAINING CENTER TO HIM AT THIS FACILITY.

Way Huff #1320 mail officer
10/31/83

SWORN AND SUBSCRIBED BEFORE ME THIS 31st DAY OF OCTOBER, 1983.

Lavon Skinner
LAVON SKINNER / NOTARY PUBLIC

MY COMMISSION EXPIRES:

August 22, 1987



03122

ORIGINAL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,
APPELLEE

v.

No. 1 CA-CR 6703

WILLIAM ROBERT ROBINSON
APPELLANT.

Maricopa County Superior Court
No. CR-113712

APPELLANTS OPENING BRIEF
(supplement)

WILLIAM ROBERT ROBINSON, APPELLANT
P.O. BOX 4000-R
FORT GRANT, ARIZONA 85643

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED APR 27 1983

GLEN D. CLARK, CLERK
By W. S. Clark

00123

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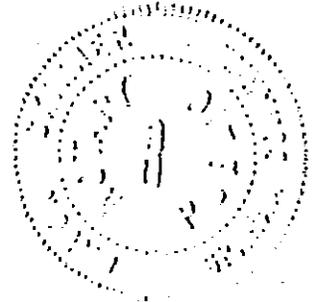
Wayne Huff #1320 Mail officer
10/31/83

SWORN AND SUBSCRIBED BEFORE ME THIS 31st DAY OF OCTOBER, 1983.

Lavon Skinner
LAVON SKINNER / NOTARY PUBLIC

MY COMMISSION EXPIRES:

August 22, 1987



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CLERK SUPREME COURT

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FILED APR 27 1983

GLEN D. CLARK, CLERK

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00123

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note: All points Appellant wishes to be referred to in documents provided
in following brief will be outlined in marker.

03124

ARGUMENT

APPELLANT SUBMITS THE COURT ERRORED IN IMPOSING SENTENCE IN EXCESS OF THE PRESUMPTIVE FOR THE FOLLOWING REASONS:

THE COURT FAILED TO CONSIDER THE MITIGATING FACTORS IN THE CASE.

MOST OF THE AGGRAVATING FACTORS RELIED ON BY THE COURT WERE LARGELY INACCURATE AS WELL AS SOME FACTORS BEING OF NO RELATION TO THIS CASE, ALL OF WHICH HAD A TENDENCY TO SWAY THE JUDGE'S DECISION TOWARD THE IMPROPER SENTENCE.

PUBLIC DEFENDER FOR THE DEFENDANT, JOEL BROWN, WAS NOT COMPETENT IN DEFENDING APPELLANT IN REVOCATION OR SENTENCING PROCEEDINGS.

APPELLANT FEELS THAT HIS PROBATION WOULD NOT HAVE BEEN REVOKED HAD THE PUBLIC DEFENDER ENTERED INTO EVIDENCE ALL INFORMATION PROVIDED TO HIM AS TO EXPLANATIONS FOR THE REASON OF BEING UNABLE TO PAY FINE AND RESTITUTION FOR WHICH PROBATION WAS SUBSEQUENTLY REVOKED.

AGGRAVATING FACTORS RELIED ON BY THE COURT, POINTS OF INACCURACY:

1) The court alleges the offense resulted in the death of a seventeen (17) year old person.

AS CAN BEEN SEEN IN DOCUMENT 1A TO BE FOUND IN THE FOLLOWING PAGES OF THIS BRIEF, THE VICTIM WAS NOT SEVENTEEN BUT TWENTY-ONE (21) YEARS OLD.

DOCUMENT 2A SHOWS THAT I CLEARLY TRIED TO CORRECT THE CONFUSION AS TO THE AGE OF THE VICTIM, ONLY TO BE UNSUCCESSFULL. DURING THE ATTEMPT TO CORRECT SUCH POINT, DOCUMENT 2A REFLECTS PUBLIC DEFENDER JOEL BROWN INTERRUPTED THE PROCEEDINGS AND TOLD ME TO TELL THE JUDGE THAT I HAD NOTHING FURTHER TO SAY. MR. BROWN ALSO STATED THAT THERE WAS NO FURTHER EVIDENCE TO PRESENT. DOCUMENT 4A SHOWS THAT THE COURT AGAIN REFERRED TO THE AGE OF THE VICTIM AS BEING SEVENTEEN, USING THE AGE AS AN AGGRAVATING FACTOR.

2) THE STATE CONTENDS THAT APPELLANT FAILED TO STOP AT A RED TRAFFIC SIGNAL.

DOCUMENT 5A WHICH CONTAINS COURT RECORDS OF A STATEMENT MADE BY OFFICER R. McCLOY (FIRST OFFICER TO THE SCENE) OF THE PHOENIX POLICE DEPARTMENT OBSERVING THAT " both drivers were somewhat at fault as the victim was timing the lights and was proceeding across the intersection at the legal rate of speed as soon as the light turned green."

IT IS APPELLANT'S ARGUMENT THAT OFFICER McCLOY'S OBSERVATION WAS CORRECT. SUCH OBSERVATION SHOULD BE CONSIDERED A MITIGATING FACTOR IN CONSIDERING PROPER SENTENCE, NOT AN AGGRAVATING FACTOR. AGAIN APPELLANT FEELS THAT COUNSEL WAS INEFFECTIVE IN NOT RESEARCHING THIS POINT AND BRINGING IT TO THE COURT'S ATTENTION.

IN DOCUMENT 6A OF THIS BRIEF FURTHER REFERENCE IS SHOWN TO THE 'light situation' WHICH OFFERS FURTHER CREDENCE THAT BOTH DRIVERS WERE AT FAULT.

3) The state contends that appellant had no drivers license in his possession.

DOCUMENT 7A REFLECTS THAT APPELLANT DID HAVE A TEXAS DRIVERS LICENSE IN HIS POSSESSION.

4) The state assumes the appellant was under the influence of intoxicating liquor at the time of the offense.

POLICE RECORDS WILL REFLECT IN A STATEMENT GIVEN TO POLICE AT THE TIME OF ARREST THAT APPELLANT DID ADMIT TO HAVING HAD ONLY 3 CANS OF BEER OVER A TWO HOUR PERIOD PRIOR TO THE ACCIDENT.

5) THE STATE ALLEGES THAT APPELLANT WAS ARRESTED ON A CHARGE OF DWI ON JUNE 1.

THE STATE AS WELL AS JOEL BROWN, PUBLIC DEFENDER, FAILED TO INFORM THE COURT THAT ARREST ON CHARGE OF DWI OCCURRED ON JUNE 1, 1980. SAID CHARGE WAS ULTIMATELY DISMISSED.

6) THE STATE ALSO USED A PRIOR CONVICTION NOT ALLEGED IN ANY OTHER PROCEEDINGS FOR CONVICTION OF THIS OFFENSE AS AN AGGRAVATING FACTOR FOR SENTENCING AFTER PROBATION REVOCATION.

IF PRIOR CONVICTION AS WELL AS PRIOR ARRESTS WHICH WERE DISMISSED WERE OF GREAT IMPORTANCE APPELLANT CONTENDS THAT THE STATE WOULD HAVE USED THESE INCIDENCES IN EARLIER COURT PROCEEDINGS.

8) AS IS REFLECTIVE IN THE TRANSCRIPTS OF THE REVOCATION HEARING, JACK WATSON, PROBATION OFFICER, DOES NOT STATE THAT APPELLANT HAD A 'very poor record of living up to the terms and conditions of probation' AS THE STATE CONTENDS. IT WAS MERELY THE ASSUMPTION OF THE COURT THAT PROBATIONER WAS NOT DOING WELL SIMPLY BECAUSE THE REVOCATION WAS FILED.

FURTHER DOCUMENTS UNDER "MITIGATING FACTORS" ENCLOSED IN THIS BRIEF WILL SHOW THAT APPELLANT WAS ONLY DOING POORLY IN TERMS OF MONEY DUE TO ECONOMIC DIFFICULTIES AND SURVIVAL EXPENSES THAT ULTIMATELY CAUSED HIM TO FALL BEHIND IN PAYMENTS TO THE COURT.

MITIGATING FACTORS THE COURT FAILED TO CONSIDER

ONE OF THE MAIN MITIGATING FACTORS AS CAN BEEN VERIFIED IN DOCUMENT 1B IS THAT THE APPELLANT DID SURRENDER TO SATISFY THE ARREST WARRANT FOR PROBATION REVOKATION AS SOON AS THE INFORMATION THAT A WARRANT WAS ISSUED. APPELLANT FEELS THAT A VOLUNTARY ACT THAT WILL INEVITABLY DEPRIVE HIM OF HIS FREEDOM AND PHYSICAL LIVLIHOOD SHOULD HAVE BEEN A MAJOR MITIGATING FACTOR CONSIDERED BY THE COURT AS IN THAT IT SHOWS THAT DEFENDANT IS TRYING TO CO-OPERATE WITH OFFICIALS AS WELL AS TO KEEP FROM HINDERING PROCEEDINGS IN THE MATTER AND FURTHER COMPLICATE MATTERS FOR ALL CONCERNED.

THE STATE ALSO FAILED TO TAKE IN TO ACCOUNT THE FACT THAT APPELLANT SUFFERED EMOTIONAL AND PHYSICAL, FINANCIAL AND EMPLOYMENTAL HARDSHIPS THAT FURTHER HINDERED HIS ABILITY TO PAY RESTITUTION AS ORDERED. DOCUMENT 2B IS TO BE USED AS REFERENCE ON THIS POINT.

THE STATE ASSUMED THAT I HAD VIOLATED THE TERMS OF MY PROBATION BY ADMITTING THAT I HAD IN FACT MISSED, OR RATHER FAILED TO PAY SOME OF THE RESTITUTION PAYMENTS AS ORDERED BY THE COURT. THE ADMISSION WAS TO BE TAKEN AS AN INABILITY TO PAY RESTITUTION PAYMENTS, NOT AN INTENTIONAL ACT TO REFUSE TO PAY AS CAN BEEN SHOWN IN DOCUMENT 3B. ALSO 4B & 5B

MITIGATING FACTORS WHICH APPELLANTS PUBLIC DEFENDER FAILED TO RESEARCH AND BRING TO THE ATTENTION OF THE COURT.

IN THE FOLLOWING PAGES AND DOCUMENTS IT CAN BE SHOWN THAT JOEL BROWN, PUBLIC DEFENDER, USED LITTLE OR NO STRADEGY AS WELL AS INEFFECTIVE JUDGE-
MENT IN DEFENSE OF APPELLANT.

DOCUMENT 1C SHOWS THAT MR. BROWN WAS AWARE THAT APPELLANT HAD EVIDENCE TO SUPPORT MY INABILITY TO MAKE THE MISSED PAYMENTS ON RESTITUTION. HOWEVER, MR. BROWN WAS WITHOUT THE AWARENESS TO ADVISE THE COURT TO DELAY SENTENCING UNTIL ALL EVIDENCE WAS AVAILABLE TO THE COURT SO AS TO PROPERLY DEFEND APPELLANT. MR. BROWN ONLY MADE SLIGHT MENTION AS TO REASONS FOR APPELLANT'S INABILITY TO PAY.

IN DISPOSITION PROCEEDINGS ON THE PROBATION REVOCATION THE COURT MADE REFERENCE TO A PRESENTENCE REPORT AS CAN BE SEEN IN DOCUMENT 2C. MR. BROWN FAILED TO HIMSELF REFER TO MANY OF THE FOLLOWING MITIGATING FACTORS IN THAT SAME PRESENTENCE REPORT.

- 1) DOCUMENT 3C: APPELLANT'S COOPERATIVE ATTITUDE TOWARD OFFICERS.
DEFENDANT'S UNSTABLE LIFE IN YOUNGER YEARS.
- 2) DOCUMENT 4C: THAT STATEMENT THAT DEFENDANT DOES HAVE REGARD FOR LAW AND ORDER.
THAT PROLONGED INCARCERRATION DOES NOT APPEAR TO BE A NECESSARY ASPECT.
FACTORS THE PRE-SENTENCE INVESTIGATOR CONSIDER AS WELL AS THE COURT IN GRANTING PROBATION TO APPELLANT.
- 3) DOCUMENT 5C: APPELLANT'S STATEMENT TO THE INVESTIGATOR AS TO HIS FEELINGS CONCERNING THE OFFENSE.
- 4) DOCUMENT 6C A MOTION TO MODIFY SENTENCE FILED AFTER PROBATION WAS GIVEN TO DEFENDANT ASKING TO BE RELEASED OF THE REMAINING 2 MONTHS 21 DAYS OF COUNTY JAIL TERM SO THAT APPELLANT COULD "GET A HEAD START ON FINE AND RESTITUTION PAYMENTS. THE MOTION WAS DENIED.
- 5) DOCUMENT 7C & 8C: RESTITUTION LEDGER REQUEST & FINE LEDGER REQUEST SHOWING THAT ANY REMAINING BALANCE WAS TO BE PAID NO LATER THAN OCTOBER 1, 1984.

ALSO THESE DOCUMENTS CONTAIN THE FOLLOWING PARAGRAPH:
"If probation expires and restitution (& fine) is not fully paid, it will be necessary to obtain a modification of the terms of probation or continue the defendant on probation until restitution is paid."

Appellant feels that since the probation officer was fully aware of all impending difficulties at the time of revocation proceeding which concerned restitution and fine delinquency the terms of probation should have been modified so that probationer could have successfully completed the term of probation.

00141

6) DOCUMENT 9C: THIS DOCUMENT SHOWS THAT DEPUTY ADULT PROBATION OFFICER WILLIAM ROBERSON DID RECOGNIZE THAT APPELLANT WAS UNDER FINANCIAL STRAIN FROM THE TIME OF HIS RELEASE ON PROBATION. APPELLANT FEELS THAT THE COURT SHOULD ALSO HAVE CONSIDERED SUCH FINANCIAL STRAIN IN CONSIDERING FINE AND RESTITUTION PAYMENTS IMPOSED ON SENTENCE AND THEREBY DECREASED THE AMOUNT TO BE REIMBURSED BY A SUBSTANTIAL MARGIN.

7) DOCUMENT 10C This document consists of the minutes of the Revocation Arraignment. The court finds the defendant "knowingly, voluntarily, and intelligently admits to violation of the terms"

APPELLANT CONTENDS THAT HE DID NOT INTENTIONALLY NEGLECT FINE AND RESTITUTION PAYMENTS AS CAN BE OBSERVED IN THE TRANSCRIPTS OF SAME PROCEEDING. FURTHER DOCUMENTS IN THE BRIEF WILL SHOW THAT APPELLANT WAS FINANCIALLY UNABLE TO PAY.

SHOULD THE APPEAL COURT THINK THIS POINT NEED FURTHER INVESTIGATION, JACK WATSON, PROBATION OFFICER HAS IN HIS FILE ON APPELLANT, NUMEROUS CORRESPONDENCE THAT SHOWS APPELLANT UNABLE TO MEET PAYMENTS AS WAS ORDERED BY THE COURT AS WELL AS INQUIRIES RELATED TO REQUESTING MODIFICATION OF THE TERMS OF PROBATION IN REGARD TO FINE AND RESTITUTION.

8) DOCUMENT 11C APPLICATION WAS MADE AT THE PROBATION DEPT.'S JOB BANK ON AUGUST 2, 1982 IN SEARCH OF EMPLOYMENT. MR. WATSON ARRANGED THE APPOINTMENT. THE APPLICATION CLEARLY SHOWS THAT APPELLANT HAD GONE AS FAR AS TO LIVE IN A POVERTY AREA OF PHOENIX SO AS TO SIMPLY HAVE A PERMANENT PLACE OF RESIDENCE AS IS REQUIRED BY THE PROBATION DEPT. TO ALL PROBATIONERS, NOT TO MENTION BEING UNEMPLOYED.

APPELLANT FEELS THAT MR. WATSON WAS UNCARING OF PROBATIONERS EMOTIONS AND LIVING CONDITIONS AND ACTED FAR TOO HASTILY IN THE WRONG DIRECTION IN RESOLVING THE MATTER OF INABILITY TO PAY RESTITUTION AND FINE BY FILING A MOTION TO REVOKE PROBATION.

9) DOCUMENT 12C SHOWS THAT APPELLANT DID MEET HIS REQUIREMENT TO ATTEND AN ALCOHOL COUNSELING PROGRAM AND DID SO AT HIS OWN EXPENSE WHICH ADDED TO HIS FINANCIAL BURDEN.

10) DOCUMENT 13C IS A STATEMENT OF SERVICES RENDERED BY A PSYCHOLOGIST SEEN BY DEFENDANT AT HIS OWN EXPENSE AND ON HIS OWN INITIATIVE IN SEARCH OF EMOTIONAL RELIEF.

MERIT SHOULD HAVE BEEN GIVEN TO THE FACT THAT THE OFFENSE RESULTED IN FUTURE EMOTIONAL TRAUMA AND MENTAL STRAIN SUFFERED BY THE APPELLANT AS WELL AS HIS ABILITY TO RECOGNIZE AND DO SOMETHING ABOUT IT.

00142

- 11) DOCUMENT 14C FURTHER ILLUSTRATES THE APPELLANT WAS SUFFERING EMOTIONAL STRAIN AND EVENTUALLY SUFFERED AN ANXIETY REACTION WHILE AT WORK, THE RESULT OF WHICH CAUSED APPELLANT TO SUFFER FURTHER FINANCIAL LOSS. PROBATION OFFICER WAS AWARE OF THE REASON FOR SUCH ANXIETY.
- 12) DOCUMENTS 15C, 16C, & 17C ARE INCOME TAX FORMS AND WAGE STATEMENTS FOR THE two (2) YEARS APPELLANT WAS FUNCTIONING ON PROBATION BEFORE THE REVOKATION OF PROBATION WAS FILED.

DURING THAT PERIOD APPELLANT WAS AWARDED A TOTAL OF \$ 11,600. (approximately) after taxes (FICA tax for 1981 can not be shown. \$ 260.00 was estimated for being withheld for that year.)

APPELLANT IS SHOWN TO HAVE EARNED ONLY AN AVERAGE OF \$5,800.00 per year FOR EACH OF THE TWO YEARS ON PROBATION. IN ORDER TO HAVE MET THE PAYMENTS REQUIRED BY THE COURT APPELLANT WOULD HAVE BEEN REDUCED TO \$3551.44 per year FOR LIVING EXPENSES. EVEN BEFORE RESTITUTION PAYMENTS WERE MADE APPELLANT HAD AN INCOME BELOW POVERTY LEVEL. IF NOT FOR SOME FINANCIAL ASSISTANCE FROM RELATIVES APPELLANT WOULD NOT HAVE BEEN ABLE TO HAVE PAYED THE \$1500.00 TOWARD RESTITUTION THAT WAS PAYED. NEEDLESS TO SAY THE PROBATION OFFICER WAS AWARE THAT APPELLANT WAS UNDER A GREAT DEAL OF STRAIN AND IN POOR HEALTH AS A RESULT.

***MY FINAL QUESTION IS AS FOLLOWS:

SHOULD THE PROBATION OFFICER BEEN MORE CONSIDERATE OF MY FINANCIAL SITUATION IN REGARD TO MY OBLIGATIONS TO MYSELF AS WELL AS THE FINE AND RESTITUTION PAYMENTS THEREBY TAKING DIFFERENT MEASURES TO HELP ME FINDING THE PROPER SOLUTION TO RESOLVE THE PROBLEM, EVEN IF IT MEANT MODIFICATION OF THE RESTITUTION PAYMENTS TO A LESSER AMOUNT OR EXTENSION OF THE TIME OF EXPIRATION OF PROBATION?

IS A MAN REQUIRED TO GO SO FAR AS TO STARVE HIMSELF AND RUIN HIS NERVES AND HEALTH?

WHEN SUCH AN ISSUE AS THIS ARISES BE FORE THE COURT FOR REVIEW SHOULDN'T THE DEFENDANT HAVE A LAWYER CAPABLE OF INFORMING THE COURT OF ALL ASPECTS SURROUNDING A PERSONS FAILURE TO PAY HIS DEBTS?

UNDER ARIZONA DEFINITIONS OF LAW THE WORD "Intentionally" means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct.

"Voluntary act" means a bodily movement performed consciously and as a result of effort and determination.

APPELLANT SUBMITS THAT HE DID NOT INTEND, USE EFFORT OR DETERMINATION IN BEING TOO POOR TO MAKE SOME OF THE RESTITUTION PAYMENTS, WHICH SHOULD HAVE BEEN CONSIDERED A MITIGATING FACTOR AT SENTENCING AS WELL AS AT REVOCATION HEARING.

REFERENCES OF CIMINAL LAW

WEST'S FEDERAL PRACTICE DIGEST 2d 268.1 (6)

C.A.La. 1980. Defendant is entitled by the due process clause of the Fourteenth Amendment to trial free from fundamental unfairness including any unfairness which would stem from blatantly incompetent counsel; defendant is also entitled by the right to counsel provision of the Sixth Amendment to reasonably effective assistance of counsel.

FEDERAL REPORTER 687, 2d SERIES 687 F.2d 659 (1982)

1. CRIMINAL LAW 641.13 (1)

Attorney is required to exercise the customary skill and knowledge which normally prevails at the time and place, and determination whether any given action or omission by defense counsel amounted to ineffective assistance cannot be divorced from consideration of the peculiar facts and circumstances that influenced counsel's judgement. U.S.C.A. Const. Amend 6.

6. 641.13 (6)

Mere possibility that investigation might have produced nothing of consequence for the defense could not serve as a justification for trial defense's counsel's failure to perform such investigation in the first place.

WEST'S FEDERAL PRACTICE DIGEST 2d 270.2 Matter's considered; presentence report.

C.A.Ala. 1981. Sentences based upon erroneous and material information or assumptions violate due process. U.S.C.A. CONST. AMEND. 5. S. v. Tobias, 662 F.2d 381

C.A.Wash. 1981. Where trial judge relies on materially false or unreliable information during sentencing, there is violation of defendant's due process rights. U.S.C.A. Const. Amends. 5, 14. U.S. v. Williams, 668 F2d 1064.

D.C.Mo. 1981. A sentence imposed on basis of inaccurate information is an illegal sentence imposed in violation of due process. U.S.C.A. CONST. AMENDS. 5, 14. U.S. v. DeMier, 520 F.Supp. 1160, affirmed 671 F.2d 1200.

ARIZONA REVISED STATUTES - ANNOTATED-

RULE 27.7 UNDER COMMENTS..... The necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case is apparent. 389 U.S. at 135.

RULE 27.2 Under Comments..... This provision is included to protect the probationer from arbitrary conditions or regulations, to provide a formal means short of violation and revocation proceedings for the probationer to have ambiguous conditions or regulations clarified, to provide added flexibility to the probation process, see ABA, Standards Relating to Probation 3.3 (approved Draft 1961) and, on the suggestion of probation officials, to provide a means

for invoking the authority of the court when the probationer seems to be slipping towards revocation without risking the ultimate sanction. Ariz.Rev.Stat. Ann. 13-1657(D) (Supp.1972) gives the sentencing court the power to modify the terms of probation.

**APPELLANT ALSO SUBMITS THAT TRIAL COURT, AT THE TIME OF IMPOSITION OF PROBATION, DEFENDANT SHOULD HAVE BEEN PROPERLY ADVISED THAT IF THERE WERE ANY PROBLEMS WITH THE RESTITUTION ORDER, THAT UPON PROPER APPLICATION, THE COURT WOULD HEAR THE MATTER. WHEN PROBATIONER REQUESTED THE POSSIBILITY OF SUCH MODIFICATION TO THE PROBATION DEPT., HE WAS NOT ADVISED THAT THERE WAS EVEN THE POSSIBILITY OF MODIFICATION, MUCH LESS THE PROPER CHANNELS TOWARD APPLICATION.

**EVIDENCE OF SUCH INQUIRIES AND DATES CAN BE FOUND IN THE PROBATION DEPT. FILE ON DEFENDANT IN THE FORM OF WRITTEN CORRESPONDENCE AS WELL AS ORAL CORRESPONDENCE WITH THE PROBATION OFFICER.

↑
CONSTITUTIONAL LAW 83(3)
CRIMINAL LAW 982.5 (2)

" should defendant become unable to pay thru no fault of his own, he could seek modification of condition"

STATE v. MONTGOMERY 115 Ariz. 583, 566 P2d 1329 (1977)

Appellate courts do not interfere with the trial court's discretionary authority to impose conditions of probation unless the conditions violate fundamental rights.....

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REQUEST TO RECTIFY SENTENCE

IN LIGHT OF THE FACT THAT THERE WERE MANY DIFFERENT SENTENCING OPTIONS OPEN TO THE COURT IN THE EVENT THAT YOU FIND THAT THE COURT DID VIOLATE MY FUNDAMENTAL RIGHTS, AND THAT THE COURT WRONGFULLY REVOKED MY PROBATION FOR INABILITY TO PAY RESTITUTION IN FULL, AS WELL AS HAVING BEEN POORLY REPRESENTED BY COUNSEL AND NEGLECTED BY THE PROBATION OFFICER, (which I feel supported by law can be shown in the preceeding pages) I respectfully request that, with the authority vested in you, present sentence of five years be vacated and that you will reduce the sentence to the presumptive or modify the sentence back to probation along with the conditions of such probation per your instructions.

RESPECTFULLY,

Wm. R. Robinson

WILLIAM ROBERT ROBINSON #46149
P.O. BOX 4000-R
FORT GRANT, ARIZONA 85643

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SIX COPIES of Appellant's supplemental brief mailed this 26th day of April, 1983, to CLERK OF COURT, COURT OF APPEALS, STATE OF ARIZONA, DIVISION ONE, 1700 West Washington Street, Phoenix, Arizona 85007.

TWO COPIES of Appellant's Opening Supplemental Brief mailed this 26th day of April, 1983, to ROBERT K. CORBIN, Attorney General of Arizona. 1275 W. Washington, Criminal Division - 2nd Floor, Phoenix, Arizona 85007.

ONE COPY of Appellant's Opening Supplemental Brief mailed this 26th day of April, 1983, to H. ALLEN GERHARDT, Deputy Public Defender, Attorney for Appellant, 132 South Central, 2nd Floor, Phoenix, Arizona 85004.

Wm. R. Robinson

WILLIAM ROBERT ROBINSON #46149
P.O. BOX 4000-R
FORT GRANT, ARIZONA 85643

Subscribed before me, a Notary Public, on the 25th day of April, 1983.

Karen W. Bernadine
NOTARY PUBLIC

My Commission Expires Dec. 13, 1985

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