

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20060412-CA
v.)	
)	F I L E D
Tyi McKinlay,)	(August 2, 2007)
)	
Defendant and Appellant.)	2007 UT App 262

Fifth District, Cedar City Department, 041500016
The Honorable G. Michael Westfall

Attorneys: Robert C. Miner and Edward R. Montgomery, Salt Lake City, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

Before Judges Greenwood, Davis, and Thorne.

GREENWOOD, Associate Presiding Judge:

Defendant Tyi McKinlay appeals the trial court's revocation of his probation. Defendant argues that the trial court committed plain error when it sentenced him to prison following a probation violation. Defendant also claims that his trial counsel rendered ineffective assistance in failing to inform the trial court of the applicable law regarding extensions of probation and failing to alert the trial court that Defendant was not receiving sex offender therapy. We affirm.

Defendant argues that the trial court committed plain error by revoking his probation based on its mistaken belief that it could not extend Defendant's probationary period. To establish plain error and "to obtain appellate relief from an alleged error that was not properly objected to," Defendant must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant." State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993).

Defendant also argues that his counsel rendered ineffective assistance by not informing the trial court of the relevant law regarding probation, or alerting the trial court that Defendant was not receiving sex offender treatment, a condition of his probation. "To establish ineffective assistance of counsel, [Defendant] must meet the heavy burden of showing that (1) trial counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him." State v. Chacon, 962 P.2d 48, 50 (Utah 1998). We review ineffective assistance of counsel claims as a matter of law. See id.

Both Defendant's plain error claim and his ineffective assistance of counsel claim require that Defendant be prejudiced by errors committed by the trial court or his attorney's deficient performance. See Dunn, 850 P.2d at 1208-09 (stating that to demonstrate error, the defendant must establish that "absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant"); Chacon, 962 P.2d at 50 (stating that in order to show ineffective assistance of counsel, Defendant must show that "counsel's deficient performance prejudiced him"). Our review of the record convinces us that any error that occurred in Defendant's case was not prejudicial. See State v. Powell, 2007 UT 9, ¶21, 154 P.3d 788 (holding that even though the defendant satisfied the first two elements of plain error, his claim failed because the defendant did not show that the error was "prejudicial to [the defendant's] substantive rights"); State v. Strain, 885 P.2d 810, 814 (Utah Ct. App. 1994) (stating that "in cases in which it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, we will do so without addressing whether counsel's performance was professionally unreasonable" (quotations omitted)).

We agree with Defendant that the trial court expressed the incorrect understanding that Defendant's probationary period could not legally be extended, and neither party corrected the trial court. In fact, upon Defendant's probation violation, the trial court could have extended his probation for approximately four months, see Utah Code Ann. § 77-18-1(11)(a)-(b) (2003), or the trial court could have ordered that the entire two-year probationary period commence anew, see id. § 77-18-1(12)(e)(ii). However, even if the trial court had been aware of these options, there is not "a reasonable likelihood of a more favorable outcome for the appellant." Dunn, 850 P.2d at 1208-09. This is because the trial court's primary concern was that Defendant receive inpatient sex offender treatment, and the trial court had no

information indicating that Defendant would have been accepted into inpatient sex offender treatment if his probation were extended.

During Defendant's time on probation he was expressly rejected from inpatient sex offender treatment. All of the information before the trial court indicated that no inpatient sex offender program was likely to accept Defendant. Further, the trial court was not willing to allow Defendant outpatient, non-residential sex offender treatment because Defendant posed a societal risk. These facts, together with Defendant's violation of his probation and inability to establish that he would be accepted into an inpatient sex offender treatment program while on probation, left the trial court with few options. The trial court undoubtedly would have revoked Defendant's probation anyway.

Finally, Defendant alleges ineffective assistance of trial counsel because counsel did not correct the trial court's incorrect belief that it could not extend Defendant's probation, and failed to inform the trial court that Defendant was not receiving sex offender therapy after he became eligible for it. Defendant argues that there is a reasonable probability that the trial court would not have revoked Defendant's probation if the trial court had been aware of its option to keep Defendant in jail on probation. Further, Defendant argues he might have received sex offender treatment if trial counsel had informed the court that Defendant was not receiving treatment at the time he was eligible.

For the same reasons stated above, even if trial counsel's performance was deficient it did not prejudice Defendant. Defendant has provided no evidence that he would have been accepted into a residential sex offender treatment program if he had remained on probation. The responsibility for providing this evidence fell on Defendant. "If a defendant is aware of any 'nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective,' Utah R. App. P. 23B, defendant bears the primary obligation and burden of moving for a temporary remand." State v. Litherland, 2000 UT 76, ¶16, 12 P.3d 92. Defendant did not do this. Because an "appellate court will presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which defendant is aware," id. at ¶17, we conclude that Defendant has presented insufficient evidence to support his claim that the trial court would have extended Defendant's probation if the trial court knew

that option was available. Consequently, Defendant has not shown prejudice.

Accordingly, we affirm.

Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

James Z. Davis, Judge

William A. Thorne Jr., Judge