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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO

Plaintiff,

vs.

HARLEY T. JANISIK

Defendant.

Case No. CR 2007-18039-C

MEMORANDUM DECISION

This matter is on appeal from a decision of the magistrate below denying defendant's motion for relief under ICR 35. The appellant appeared by Benson Barrera, Barrera Law Office, Boise. The plaintiff appeared by Middleton City Prosecuting Attorney Todd M. Lakey, Meridian. Briefing is completed and neither party has requested oral argument. The time for doing so having expired, the court deems the matter submitted on the briefs.

For reasons stated, and because I conclude that the defendant's probation had expired before any of the instant proceedings had begun, the decision of the magistrate below on defendant's motion under Rule 35 is reversed, the underlying order of

disposition on probation violation is vacated, and the case is remanded with directions to dismiss the case.

Facts and Procedural History

The defendant was charged and convicted on his guilty plea of simple battery, a misdemeanor. The judgment of conviction on this charge was entered and filed on February 7, 2008. By this judgment, the defendant was sentenced to 180 days in jail, with credit for 45 days served and the remainder suspended, and placed on probation for a period of 24 months – being the maximum two year period available to the magistrate under the law for the crime committed.

On August 11, 2008, within the two year period, a petition or motion for probation violation was filed and a warrant was issued. The defendant was arrested on this warrant 17 days later, on August 28, 2008. Eventually, in proceedings before the magistrate, the defendant admitted the probation violation, and on October 16, 2008, the magistrate entered his orders of disposition on the violation. The magistrate again suspended any additional jail sentence and imposed probation upon terms, with the relevant part of the order stating, "... supervised probation until 10/16/10..." This was a date two years out from the date of the new order. Defendant was represented by counsel. There was no objection raised at the time of disposition, nor any later motion or other proceeding to alter or amend the new order.

On April 30, 2010, a new motion or petition for probation violation was filed and a warrant issued. The defendant was not arrested on this warrant until January 31, 2013. After some confusion, the defendant appeared for disposition on this motion on April 2,

2013. The defendant was found to be in violation of his probation, his probation was revoked and a 67 day jail sentence was imposed.

A motion under ICR 35 was argued to the magistrate on April 23, 2013, arguing that all time for any period of probation had expired prior to the second motion for violation, and therefore the court had no jurisdiction over the defendant at the time of disposition. The magistrate denied the motion.

This appeal followed.

Analysis

I think the law is clear that the term of probation imposed in connection with any particular judgment of conviction (or withheld judgment) cannot exceed the maximum time of sentence for the particular crime as imposed by the court at the time of original sentencing. As is relevant here, the maximum period of probation on a misdemeanor conviction is two years, or 24 months. Idaho Code 19-2601(7) and Idaho Code 19-3921 provide that “the period of probation ordered by a court...under a conviction or plea of guilty for a misdemeanor...may be for a period of not more than two (2) years.” These code sections do not allow for an extension of probation beyond two years, unless the probationer is involved in a problem solving court and even then the extension would be limited to one year. I.C. 19-2601(7); 19-3921. In addition, these statutes provide for the imposition of probation after “a conviction or plea of guilty for a misdemeanor” which this court understands to be the original conviction at the conclusion of a jury trial or at the time of the entry of plea, not at the time disposition is ordered on a probation violation. Finally, the court notes that the State has relied on Idaho Code 20-222 in support of its argument that probation may be extended, however, in *State v. Horejs*, the

Idaho Court of Appeals held that “Examining all of the statutory provisions together, it is apparent that I.C. § 19–2601(7) addresses both misdemeanors and felonies. Section 19–3921 applies only to misdemeanors, and section 20–222 applies only to felonies. This interpretation harmonizes and gives effect to all of the statutory provisions and reconciles any superficial inconsistencies without nullifying the specific terms of sections 19–2601(7) and 19–3921 that authorize two-year probation periods for misdemeanants.” *State v. Horejs*, 143 Idaho 260, 266, 141 P.3d 1129, 1135 (Ct. App. 2006).

The maximum time for any period of probation is measured by the terms imposed at the time of the original sentence. This sentence was imposed on February 7, 2008, which meant that, barring any event that would extend the term, the probation would have expired and the court would lose all jurisdiction over the case on February 7, 2010.

The law does provide that if probation is violated and charges are filed on the violation, the running of this time is tolled until the defendant is arrested and brought before the court on the new charges. *See State v. Harvey*, 142 Idaho 727, 132 P.3d 1255 (Ct. App. 2006). Here, charges for probation violation were filed on August 11, 2008, and the defendant was arrested on these charges on August 28, 2008, and the court entered its orders of disposition on the new charges on October 16, 2008, being a period of 66 days. This tolled the running of the time of defendant’s probation from February 7, 2010 until April 13, 2010.

When the defendant appeared for disposition on the probation violation on October 16, 2008, the maximum period of probation available to the court was the period from that date until April 13, 2010 at the very latest – being the period of two years as originally imposed plus the hiatus while the defendant was at large after the violation was

charged and until his arrest or disposition on the new charge. The court had jurisdiction to lessen or commute the original sentence imposed, but had no jurisdiction to increase the custodial sentence of the defendant, by imposing a longer period of probation than originally imposed. The language purporting to extend the time of probation beyond the term available to the court was a nullity.

It is not an argument that the defendant consented to the additional terms by failing to object or failing to file an earlier motion to alter or amend. Custodial jurisdiction over a defendant, whether incarcerated or in community custody, cannot be acquired or extended by waiver or consent.

The State argues that under I.C. § 20-222, the court can, at any time, enter any sentence which might originally be imposed. The argument fails. The second paragraph of this section is necessarily limited by the first paragraph, which limits the maximum period of custody to a defined maximum. Under the state's argument, a misdemeanor defendant's community custody could be extended into perpetuity by the device of repeatedly bringing late term violations and resentencing the individual upon disposition to new maximum terms of probation. I do not accept this premise.

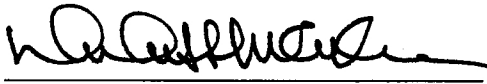
Finally, the State argues that the defendant's motion made pursuant to Idaho Criminal Rule 35 was untimely filed pursuant to the time limitations in I.C.R. 35(b). However, the court finds that a motion challenging an illegal sentence is made pursuant to Idaho Criminal Rule 35(a) which may be made at any time. In this case, the defendant challenged the court's imposition of an extended period of probation beyond the statutory maximum for misdemeanor probation and the court finds this to be a challenge to an

illegal sentence and that I.C.R. 35(a) is applicable and the defendant's motion was timely filed.

Conclusion

For reasons stated, the order of the court below denying defendant's motion under Rule 35 is reversed. The order of disposition on probation violation, entered April 2, 2013, is vacated. The matter is remanded with directions to dismiss all proceedings.

Dated this 4th day of November, 2013



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order is forwarded to the following persons by U.S. Mail, first class postage prepaid; by hand delivery; by courthouse basket; or by facsimile copy:

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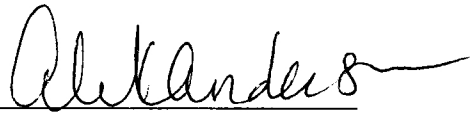
1115 Albany

Caldwell, ID 83605

CHRIS YAMAMOTO

Clerk of the District Court

By: _____

A handwritten signature in cursive script, appearing to read "Alexander", written over a horizontal line.

Deputy Clerk