

1-21-2015

## State v. Murphy Respondent's Brief Dckt. 41634

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**COPY**

STATE OF IDAHO,	)	
	)	No. 41634
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-2010-17464
	)	
DARCY DEAN MURPHY,	)	
	)	
Defendant-Appellant.	)	
	)	

**BRIEF OF RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

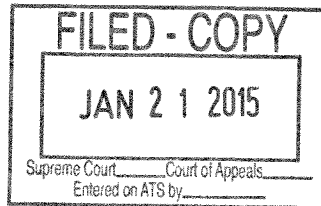
**HONORABLE CHERI C. COPSEY  
District Judge**

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**ATTORNEYS FOR  
PLAINTIFF-RESPONDENT**

**ATTORNEY FOR  
DEFENDANT-APPELLANT**

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## STATEMENT OF THE CASE

### Nature Of The Case

Darcy Dean Murphy appeals from the district court's order denying his motion for credit for time served.

### Statement Of Facts And Course Of Proceedings

In Ada County Case No. CR-FE-2010-17464, the state charged Murphy with felony driving under the influence.<sup>1</sup> (#40812 R., pp.10-11, 25-26, 29-30.) Pursuant to a plea agreement, Murphy pled guilty and the court imposed a unified 10-year sentence with three years fixed and retained jurisdiction. (#40812 R., pp.38-51.) At the retained jurisdiction review hearing, the court referred Murphy to drug court. (#40812 R., pp.58, 66.) After Murphy was accepted into drug court, the district court placed Murphy on probation and ordered the completion of drug court as a condition of probation. (#40812 R., pp.70-83.) Murphy's conditions of probation also included 180 days of jail "to be imposed in the discretion of the probation officer/Drug Court Judge." (R., p.8 (Appendix A<sup>2</sup>).)

Approximately five months later, on December 30, 2011, the state filed a Motion for Bench Warrant for Probation Violation, alleging Murphy violated his probation by failing to "successfully complete the Ada County Drug Court," pay fines, costs, and restitution, and reimburse the Ada County Public Defender's Office. (#40812 R., pp.90-92.) On January 10, 2012, the state filed a motion

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<sup>1</sup> The Court has entered an order taking judicial notice of "the Clerk's Record and Reporter's Transcript filed in prior appeal No. 40812, *State v. Murphy*." (R., p.2.)

requesting that Murphy be discharged from drug court for violating several terms of the drug court agreement. (#40812 R., pp.96-98.) The following day, January 11, 2012, the court entered an “Order for Jail Program(s),” which required Murphy to participate in the Active Behavioral Change and Moral Reconciliation Therapy programs at the Ada County Jail. (#40812 R., p.99.) Murphy was not, however, discharged from drug court at that time nor is there any indication in the record that the state’s December 30, 2011 motion for probation violation was adjudicated at that time. Instead, Murphy continued participating in drug court. (#40812 R., pp.6-7.)

On July 17, 2012, Murphy signed the “Phase II – Contract” for drug court and attended drug until February 2013. (#40812 R., pp.7-8, 104-105.) On February 12, 2013, Murphy admitted violating his probation and his drug court agreement, and the district court discharged him from drug court. (#40812 R., pp.107, 112; #40812 Tr., pp.5-11.) The court revoked Murphy’s probation on February 19, 2013, and ordered Murphy’s sentence executed. (#40812 R., pp.113-116.) At that time, the court indicated in its judgment that Murphy was “to receive credit for two hundred eighty-five (285) days previously served which ***includes*** any time served on a prior retained jurisdiction.” (#40812 R., p.115 (emphasis original).) Murphy filed a timely notice of appeal. (#40812 R., pp.120-122.) The Idaho Court of Appeals affirmed the district court’s decision to revoke probation and affirmed Murphy’s sentence. State v. Murphy, 2014 Unpublished Opinion No. 457 (Idaho App. April 15, 2014).

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<sup>2</sup> A copy of Murphy’s Probation Agreement is attached hereto as Appendix A.

While his direct appeal was pending, Murphy filed a *pro se* motion for credit for time served along with a supporting affidavit. (R., pp.11, 13-14.) In his affidavit, Murphy wrote: "I served these days in Ada County Jail on Case # CR-FE-2010-17464. Records of these are attached [sic]. I feel I should be credited these days I served. I have approx[imately] 4 months of time I was not credited for that I did serve on this case." (R., p.13 (punctuation modified).) The documents attached to Murphy's affidavit included records from the Ada County Sheriff's Office sent to Murphy in response to his request for information for jail time served "from 7/13/2011 to 2/23/2013" in "Case# CR-FE-2010-17464." (R., p.16 (cover letter from Sheriff's Office (bold omitted), pp.17-29 (records).)

The district court entered an order denying Murphy's request. (R., p.30.) Murphy filed a timely notice of appeal. (R., pp.32-36; see Order to Reinstate Appellate Proceedings dated April 25, 2014 (finding appeal timely "pursuant to prison mail box rule").)

## ISSUE

Murphy states the issue on appeal as:

Whether the district court erred in denying Mr. Murphy's motion for credit for time served.

(Appellant's Brief, p.5.)

The state rephrases the issue as:

Should this Court reject Murphy's argument that drug court staff recommendations and reports regarding jail time and the service of jail time related thereto, which service is included as a condition of probation, are the "functional equivalent" of a warrant for a probation violation and probation revocation proceedings for purposes of calculating credit for time served?



## ARGUMENT

### Murphy Has Failed To Show Error In The Denial Of His Request For Credit For Time Served As Part Of Drug Court, Which Was A Condition Of His Probation

#### A. Introduction

Murphy challenges the denial of his motion for credit for time served, arguing that he is entitled to credit for time he spent in jail during his participation in drug court. (Appellant's Brief, pp.8-14.) Because Murphy agreed to drug court and discretionary jail time as a condition of probation, the district court correctly denied Murphy's request for credit for time served in jail as part of drug court.

#### B. Standard Of Review

"The question of whether a sentencing court has properly awarded credit for time served to the facts of a particular case is a question of law, which is subject to free review by the appellate courts." State v. Vasquez, 142 Idaho 67, 68, 122 P.3d 1167, 1168 (Ct. App. 2005) (citing State v. Hale, 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989)). The appellate courts "defer to the trial court's findings of fact, however, unless those findings are unsupported by substantial and competent evidence in the record and are therefore clearly erroneous." State v. Covert, 143 Idaho 169, 170, 139 P.3d 771, 772 (Ct. App. 2006) (citing State v. Davis, 139 Idaho 731, 734, 85 P.3d 1130, 1133 (Ct. App. 2003)).

C. Murphy Is Not Entitled To Credit For Time Served During Drug Court Because Such Time Was Served As A Condition Of Probation

“Generally, I.C. § 19-2603 governs credit for time served as it relates to the revocation of probation.” State v. Denny, 157 Idaho 217, \_\_\_, 335 P.3d 62, 64 (Ct. App. 2014); see also I.C. § 18-309 (when “the defendant by any legal means is temporarily released from . . . imprisonment and subsequently returned thereto, the time during which he was at large must be computed as part of” his term of imprisonment). Idaho Code § 19-2603 provides that the time a defendant is “at large under [a] suspended sentence shall not be counted as a part of the term of his sentence, but the time of the defendant’s sentence shall count from the date of service of [the] bench warrant.” Thus, “[i]f a probationer has been arrested for a probation violation, the defendant’s incarceration from the time of service of the bench warrant will count as part of the sentence.” State v. Covert, 143 Idaho 169, 170, 139 P.3d 771, 772 (Ct. App. 2006) (citations omitted).

The Court of Appeals has held that a probationer “likewise receive[s] credit for time served when he or she has been held on the functional equivalent of a bench warrant.” Denny, 157 Idaho at \_\_\_, 335 P.3d at 64 (citations omitted). For example, in State v. Buys, 129 Idaho 122, 128, 922 P.2d 419, 425 (Ct. App. 1996), the Court of Appeals held that an order for incarceration, issued while Buys was on probation, was the “functional equivalent of a bench warrant issued as a consequence of an alleged violation of probation terms.” The Court of Appeals reasoned that “[t]he order had an effect upon Buys’ liberty even though he was also arrested pursuant to a warrant for [rape]” because Buys

“would have been eligible for release on bond in the rape case if he had not been subject to the [order for incarceration].” Id. “Similarly, where [an] arresting officer delivers a probationer to the county jail with an agent’s warrant, that warrant is sufficient for the detention of the probationer.” Covert, 143 Idaho at 170, 139 P.3d at 772 (citing I.C. § 20-227).

On appeal, Murphy argues that he is entitled to credit for time served for two periods of time he was incarcerated during his tenure in drug court. (Appellant’s Brief, p.9.) The first period was from December 13, 2011, through February 22, 2012, and the second period was from January 15, 2013 through February 25, 2013. (Appellant’s Brief, p.9.) Murphy’s claim fails because the periods for which he seeks credit were served as a condition of his probation.

One of the conditions in Murphy’s Probation Agreement provides: “The probationer shall serve 180 *additional* days in the Ada County Jail . . . and 180 days suspended to be imposed in the discretion of the probation officer/Drug Court Judge.” (R., p.86 (emphasis original) (Appendix A).) Murphy “is not entitled to credit for the time he voluntarily surrendered to gain probation.” State v. Banks, 121 Idaho 608, 610, 826 P.2d 1320, 1322 (1992); see also State v. Jakoski, 132 Idaho 67, 68, 96 P.2d 663, 664 (Ct. App. 1998) (citations omitted) (“The law in this area is well settled. A period of incarceration that is a term and condition of probation will not be credited to a defendant whose probation is subsequently revoked.”). The district court, relying on Banks and Jakoski, correctly denied Murphy’s request, stating:

The record reflects that as a term of probation, the defendant was placed in Drug court on July 13, 2011, and served the dates in

question as a sanction for violation of Drug Court rules. The Court does not give credit for jail time when it is a term of probation. A defendant whose probation is revoked is not entitled to credit for any period of incarceration served as a term and condition of that probation. *State v. Banks*, 121 Idaho 608, 826 P.2d 1320 (1992); *State v. Jakoski*, 132 Idaho 67, 966 P.2d 663 ([Ct. App.] 1998).

(R., p.30 (Appendix B).)

Murphy acknowledges the rule that he is not entitled to credit for jail time served as a condition of probation, but argues the rule does not apply in his case because, he argues, recommendations and reports from drug court staff that result in incarceration are the “functional equivalent” of a bench warrant.<sup>3</sup> (Appellant’s Brief, pp.7-13.) With respect to the period of incarceration that began on December 13, 2011, Murphy relies on the drug court counselor’s recommendation for indeterminate jail “while staff reviews whether or not [Murphy] should continue in Drug Court” as being the functional equivalent of a warrant. (Appellant’s Brief, p.10; PSI<sup>4</sup>, p.140.) Murphy also characterizes this

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<sup>3</sup> Implicit in Murphy’s argument is an acknowledgment that the court never issued a bench warrant pursuant to the state’s December 30, 2011 Motion for Bench Warrant for Probation Violation.

<sup>4</sup> References to “PSI” are to the electronic file MurphyPSI.pdf, which is included in the record in Docket No. 40812.

term of incarceration as one “based on pending revocation proceedings.”<sup>5</sup> (Appellant’s Brief, p.12.) Murphy characterizes the drug court-related incarceration in this manner in an effort to support his claim that incarceration related to drug court rule violations is the functional equivalent of incarceration pending disposition of alleged probation violations. There is, however, a distinction between the two because probation violation proceedings are initiated in order to determine whether probation will be revoked and the defendant’s sentence executed; therefore, time served during that interim period is properly credited toward the defendant’s sentence. Drug court-related incarceration, even if imposed for the purpose of determining whether the defendant will be terminated from drug court is not the functional equivalent of incarceration pending disposition of alleged probation violations because deciding whether to terminate a defendant from drug court does not also resolve the question of

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<sup>5</sup> Murphy also claims “he was incarcerated awaiting disposition on pending allegations of probation violation starting on December 13, 2011, and ending on January 15, 2012.” (Appellant’s Brief, p.12.) The basis for this assertion is unclear given that the state did not file its motion for probation violation until December 30, 2011 (R., p.90), and, as noted, a warrant never issued in relation to the motion. Murphy could not be “incarcerated awaiting disposition on pending allegations of probation violation” on December 13, 2011, when the allegations were not filed until 17 days later. Murphy makes a similar claim in relation to his second challenged period of incarceration that began on January 15, 2013, claiming “the record clearly shows that [he] was incarcerated awaiting disposition on pending allegations of probation violation starting on January 15, 2013, and ending on February 21, 2013.” (Appellant’s Brief, p.13.) Although the state’s probation violation allegations were finally addressed at a hearing on February 5, 2013, at which time Murphy admitted violating his probation and violating the drug court rules, and agreed to discharge from drug court, there is nothing in the record to support Murphy’s claim that the jail time he began serving on January 15, 2013, was for the purpose of “awaiting disposition” on the state’s probation violation motion, as opposed to time served as part of drug court.

whether the defendant's probation will be revoked and his sentence executed. Termination from drug court and revocation of probation present two separate questions for the court. This view is consistent with the fact that the state filed a motion for probation violation and a separate motion to terminate the defendant from drug court, and it is consistent with the different legal standards governing both decisions. Compare R., p.74 (regarding termination from drug court) with State v. Sanchez, 149 Idaho 102, 233 P.3d 33 (2009) (legal standards for finding a defendant violated his probation and revocation of probation).

While termination from the drug court program may result in the revocation of probation, that does not mean jail time served as part of drug court is the functional equivalent of jail time served pending the disposition of probation violation allegations or that the drug court staff's recommendations or reports relating to jail time, regardless of the basis for the recommendation, is the functional equivalent of a bench warrant for purposes of I.C. § 19-2603. Murphy's argument to the contrary would effectively render the discretionary jail time authorized as part of drug court meaningless.

Murphy's argument relating to the period of incarceration that began on January 15, 2013, is essentially the same as his argument related to the term of incarceration that began on December 13, 2011, except that his claim of functional equivalence to a bench warrant in relation to the January 15 term is predicated on a notation in the Drug Court Progress Report that staff was recommending discharge as opposed to recommending indeterminate jail while staff reviewed whether Murphy should continue in drug court. (Appellant's Brief,

p.13; PSI, pp.126, 140.) This difference is significant because it highlights the distinction, discussed above, between incarceration pending disposition of a probation violation allegation and consideration of whether a defendant should be terminated from the drug court program.

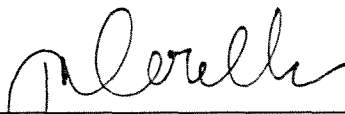
Further, even if this Court agrees with Murphy that jail time served as part of drug court for the sole purpose of deciding whether the defendant should be terminated from the program should be credited towards his sentence, it is anything but clear from the record that the purpose of Murphy's incarceration starting on January 15, 2013, was for this reason since the Drug Court Progress Report only notes that staff was recommending discharge, not that Murphy be incarcerated pending that determination. (PSI, p.126.) Thus, at a minimum, Murphy has failed to show error in the district court's determination that he is not entitled to credit for that period of time because the time was served "as a sanction for violation of Drug Court rules." (R., p.30.)

Because the district court correctly denied Murphy's motion for credit for time served, Murphy has failed to show any basis for reversal.

#### CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Denny's third motion for credit for time served.

DATED this 21<sup>st</sup> day of July 2014.

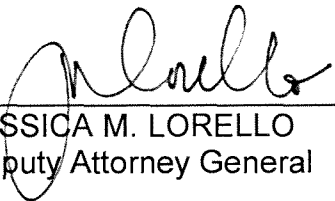
  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21<sup>st</sup> day of January 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN DICKSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General



# **APPENDIX A**

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO

Plaintiff,

vs.

Case No. CR-FE-2010-17464

DARCY DEAN MURPHY

Defendant.

PROBATION AGREEMENT

SUSPENDED IMPOSITION OF SENTENCE

WITHHELD JUDGMENT

TERM OF PROBATION: 10 years beginning 2 February, 2011

PROBATION CONDITIONS:

RECOMMEND CLOSE SUPERVISION

1. That the probation is granted to and accepted by the probationer, subject to all its terms and conditions, and with the understanding that the Court may, at any time, in case of the violation of the terms of probation, cause the probationer to be returned to the Court, for the imposition of sentence as prescribed by law, or any other punishment as the court may see fit to hand down. **The probationer shall report to Probation & Parole within 48 hr. of release from incarceration.**

2. That the probationer shall be under the legal custody and control of the Director of Probation and Parole of the State of Idaho and the District Court and subject to the rules of probation as prescribed by the Board of Correction and the District Court. **THE PROBATION OFFICER MAY NOT CHANGE THESE CONDITIONS.**

3. General Conditions applicable to all probationers, to-wit:

- a.  The probationer does hereby agree and consent to the search of his/her person, automobile, real property, and any other property, at any time, and at any place, by any law enforcement officer, peace officer, or probation officer, and does waive his/her constitutional rights to be free from such searches.
- b.  The probationer shall not violate State, Federal, or Municipal penal laws.
- c.  All residences shall be approved by the probation officer. The probationer shall not change residence without first obtaining written permission from the probation officer.
- d.  The probationer shall submit a truthful written report to the probation officer each and every month and report in person when requested.
- e.  The probationer shall not leave the State or Fourth Judicial District (Ada, Boise, Elmore, and Valley counties) **without first obtaining** written permission from the probation officer.
- f.  The probationer shall complete any training or counseling program established by the probation officer.
- g.  The probationer shall contact Vocational Rehabilitation or some other vocational program identified by his/her probation officer, get an evaluation and follow all recommendations made.
- h.  The probationer shall contribute such monthly sum for probation supervision as shall be established by the Idaho State Board of Correction. (I.C. 20-225).
- i.  The probationer shall pay all court imposed costs and fees in such manner as shall be established by the probation officer.
- j.  The probationer shall become and remain fully employed or be enrolled as a full time student; he/she shall not terminate employment without securing other employment.
- k.  The probationer shall submit, at his/her own expense, to a chemical test of his/her blood, breath or urine for the detection of substance abuse, including a breathalyzer test, when requested by the probation officer or other law enforcement officer.
- l.  The probationer shall not associate with individuals specified by the probation officer or by this Court.
- m.  The probationer shall not visit **or enter** any establishment where alcohol is a major source of income (**a bar**).
- n.  The probationer shall submit to a polygraph examination at his/her own expense if requested by the probation officer.
- o.  The probationer shall not purchase, carry or have in his/her possession any firearm/s or other weapons.
- p.  The probationer shall not purchase, possess or consume any alcoholic beverages while on probation.
- q.  The probationer shall not purchase, possess, or consume any drug or narcotic unless specifically prescribed by a medical doctor.
- r.  If the probationer does not have a high school degree, the probationer shall acquire a GED or high school diploma with the time set by the probation officer.
- s.  If the probationer is ordered to pay child support, the probationer shall commence and regularly pay court ordered child support payments and submit written evidence of the same to the probation officer.
- t.  The probationer shall **not** operate any motorized vehicle while on probation unless properly licensed and insured.

4. SPECIAL DUI CONDITIONS (THOSE CHECKED), TO-WIT:

The probationer shall pay \$ 350 ~~or what remains of the previously imposed \$ \_\_\_\_\_~~ to the public defenders office for attorney fee reimbursement in such manner as shall be established by the probation officer.

The probationer shall make restitution of \$ 100 ~~or what remains of the previously imposed \$ \_\_\_\_\_~~ in the amount and manner established by the probation officer.

The probationer shall pay a fine in the amount of \$ 2000 (~~\$ \_\_\_\_\_ suspended~~) ~~or what remains of the previously imposed \$ \_\_\_\_\_~~ in the amount and manner established by the probation officer.

The probationer shall not associate or have contact with \_\_\_\_\_ unless specifically approved by his/her probation officer.

The probation shall successfully complete the following programs (those checked):  ~~cognitive self change I & II~~;  ~~substance abuse program~~ identified by his/her probation officer;  anger management;  women's issues;  parenting;  consumer credit counseling;  Drug Court \_\_\_\_\_

~~The probationer shall attend 4-12 step meetings or some other program approved by his/her probation officer, per week for 30 months and submit written confirmation of the same to the probation officer.~~

The probationer shall attend \_\_\_\_\_ 12 Step meetings ~~or some other program approved by his/her probation officer~~, in the first \_\_\_\_\_ days after he/she is released from local incarceration.

~~The probationer shall complete 100 hours of community service work as set by his/her probation officer. The probationer is required to pay a 60 cents per hour community service fee to provide workers compensation insurance (SB/1355, Ch.233, '94 Sess. Laws) for a total fee of \$ 60.00.~~

The probationer shall serve 180 additional days in the Ada County Jail, \_\_\_\_\_ without options, \_\_\_\_\_ with options and 180 days suspended to be imposed in the discretion of the probation officer/Drug Court Judge.

If given options, he/she is ordered to have work release privileges and must make those arrangements by \_\_\_\_\_ and begin serving within \_\_\_\_\_ ( ) months of this judgment.

The probationer shall complete 20 days in the Sheriff Inmate Labor Detail program as set by the probation officer.

The probationer shall surrender his/her driver's license to his/her probation officer. The license shall be suspended for 5 year period to begin following release from incarceration or following the end of any period of suspension, disqualification or revocation existing at the time of the violation, whichever is longer.

~~As a fundamental condition of probation, the probationer shall not operate any motorized vehicle, even if he/she is properly licensed, while on probation unless the vehicle has a functioning interlock device.~~

~~As a fundamental condition of probation, the probationer shall not possess, consume or purchase alcohol.~~

That probationer shall, at his/her own expense, complete the Victims Panel program not later than ninety (90) days after his/her release from any local incarceration.

The Court allows the probationer to be transferred by the Board of Corrections to the \_\_\_\_\_.

That probationer may complete the ABC program and/or the substance abuse program in the Ada County Jail and upon completion, she/he may apply for early release.

That pursuant to I.C. § 19-2524 probationer shall get a mental health evaluation and/or substance abuse evaluation and follow all recommendations \_\_\_\_\_.

That probationer shall have a 9:30 p.m. curfew until changed by his/her probation officer.

That probationer shall sign up for & take random Etc/Ets tests through the Ada County Drug Court Treatment Center at his/her own expense.

That probationer cannot live with his mother Margi Bess-Murphy

That probationer \_\_\_\_\_

5. THAT THE PROBATIONER, IF PLACED ON PROBATION TO A DESTINATION OUTSIDE THE STATE OF IDAHO, OR LEAVES THE CONFINES OF THE STATE OF IDAHO, WITH OR WITHOUT PERMISSION OF THE DIRECTOR OF PROBATION AND PAROLE, DOES HEREBY WAIVE EXTRADITION TO THE STATE OF IDAHO, AND ALSO AGREES THAT THE PROBATIONER WILL NOT CONTEST ANY EFFORT BY ANY STATE TO RETURN THE PROBATIONER TO THE STATE OF IDAHO.

This is to certify that I have read or had read to me and fully understand and accept all the conditions, regulations and restrictions under which I am being granted probation. I will abide by and conform to them strictly and fully understand that my failure to do so may result in the revocation of my probation and commitment to the Board of Correction to serve the sentence originally imposed.

DATE: 7/14/2011

[Signature]  
Probationer's Signature

# **APPENDIX B**

OCT 10 2013

CHRISTOPHER D. RICH, Clerk  
By LUCILLE DANSEREAU  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATE OF IDAHO,

Plaintiff,

vs.

DARCY DEAN MURPHY,

Defendant.

Case No. CR-FE-2010-0017464

ORDER DENYING DEFENDANT'S  
REQUEST FOR CREDIT  
FOR TIME SERVED

The Court has reviewed the motion filed by the defendant on October 7, 2013, and the record in this matter. The record reflects that as a term of probation, the defendant was placed in Drug Court on July 13, 2011, and served the dates in question as a sanction for violation of Drug Court rules. The Court does not give credit for jail time when it is a term of probation. A defendant whose probation is revoked is not entitled to credit for any period of incarceration served as a term and condition of that probation. *State v. Banks*, 121 Idaho 608, 826 P.2d 1320 (1992); *State v. Jakoski*, 132 Idaho 67, 966 P.2d 663 (1998).

The defendant's motion is hereby denied.

**IT IS SO ORDERED.**

Date: Oct 9 2013

Cheri Copsey  
CHERI C. COPSEY  
District Judge

*Handwritten mark*