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State v. Gamino Appellant's Brief Dckt. 35796

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IN THE SUPREME COURT OF THE STATE OF IDAHO

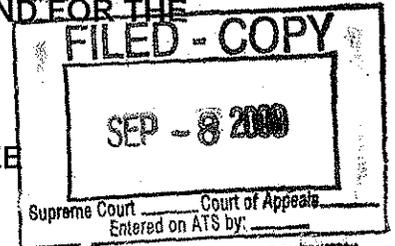
STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 35796
)
 v.)
)
 HARRISON GAMINO,) APPELLANT'S BRIEF
)
 Defendant-Appellant.)
 _____)

BRIEF OF APPELLANT

COPY

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BLAINE

HONORABLE ROBERT J. ELGEE
District Judge



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STATEMENT OF THE CASE

Nature of the Case

Harrison Gamino appeals from the district court's Order Re: Conditional Admission to Probation Violation. Mr. Gamino admitted to violating probation but preserved the right to challenge the denial of his motion to dismiss the violation. He asserts that, because the petition to revoke his probation was filed after his period of probation had expired, the district court lacked jurisdiction to extend his probation.

Statement of the Facts and Course of Proceedings

On February 18, 2004, Mr. Gamino was charged with two counts of burglary and one count of grand theft. (R., p.31.) Mr. Gamino pleaded guilty to one count of burglary, and on May 10, 2004, the district court imposed a unified sentence of seven years, with five years fixed, and the court suspended the sentence and placed Mr. Gamino on probation for a period of four years. (R., p.49-50.) His period of probation, therefore, was set to expire on May 10, 2008.

On July 21, 2005, the State filed a Petition To Revoke Probation, asserting several probation violations. On November 7, 2005, the district court entered an Order On Motion To Revoke Probation. (R., p.138.) Rather than revoking probation, the district court ordered, "that the defendant's sentence will be further suspended and probation is continued under the same terms and conditions as previously imposed," with several additional terms of probation. (R., p.140.)

On May 16, 2008, six days after the four-year period of probation expired, the State filed another Petition To Revoke Probation. (R., p.156.) The Report of Probation

violation, which was attached to the petition, is dated May 8, 2008. (R., p.182.) The report of violation alleges that Mr. Gamino still owed \$4,591.00 and had failed to follow through with the payment plan ordered by the district court. (R., p.182.) It further alleged that he owed \$300.00 in supervision fees. (R., p.183.)

Mr. Gamino filed a Motion To Dismiss Probation Violation, asserting that his probation expired on May 10, 2008, and because the State's petition was not filed in the district court until May 16, 2008, the court lacked jurisdiction to revoke probation. (R., p.190.) The district court denied the motion. (R., p.193.) Mr. Gamino then entered into a Conditional Admission To Probation Violation, wherein he admitted to the violation but reserved his right to appeal from the denial of his motion to dismiss. (R., p.195.) The district court entered an order on the conditional admission, extending Mr. Gamino's probation for another period of two years, but providing that probation would be terminated upon payment of restitution and fees. (R., pp.199-200.) Mr. Gamino appealed. (R., p.201.) He asserts that the district court erred by denying his motion to dismiss because his probation had expired by the time the State filed its petition to revoke probation.

ISSUE

Did the district court err by denying Mr. Gamino's motion to dismiss where probation had expired by the time the State filed its petition to revoke probation?

ARGUMENT

The District Court Erred By Denying Mr. Gamino's Motion To Dismiss Because Mr. Gamino's Probation Had Expired By The Time The State Filed Its Petition To Revoke Probation

A. Introduction

Mr. Gamino asserts that, because his probation expired on May 10, 2008, and the petition to revoke his probation was not filed until May 16, 2008, the district court lacked jurisdiction to rule on the State's petition and erred by denying the motion to dismiss on this basis.

B. The District Court Erred By Denying Mr. Gamino's Motion To Dismiss Because Mr. Gamino's Probation Had Expired When The State Filed Its Petition To Revoke Probation

The facts of this case are simple and undisputed. By the terms of his probation agreement, Mr. Gamino's period of probation expired on May 10, 2008. Six days after Mr. Gamino's probation expired, the State filed a petition to revoke his probation because Mr. Gamino had not paid restitution or fees. Mr. Gamino asserts that, because the State's petition was not filed before May 10, 2008, the district court lacked jurisdiction to act on the State's petition and the district court therefore, erred in denying his motion to dismiss on this basis.

This Court exercises free review over the application and construction of statutes. *State v. Harvey*, 142 Idaho 727, 730, 132 P.3d 1255, 1258 (Ct. App. 2006) (citing *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003)). Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *Id.* (citing *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho

654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000)). The language of the statute is to be given its plain, obvious, and rational meaning. *Id.* (citing *Burnight*, 132 Idaho at 659, 978 P.2d at 219.) If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Id.* (citing *Escobar*, 134 Idaho at 389, 3 P.3d at 67). When this Court engages in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. *Id.* (citing *Rhode*, 133 Idaho at 462, 988 P.2d at 688). To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and the legislative history. *Id.* It is incumbent upon the Court to give a statute an interpretation which will not render it a nullity. *Id.* (citing *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001)). A construction of a statute that would lead to an absurd result is disfavored. *Id.* (citing *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004)).

Idaho Code § 20-222 states:

The period of probation or suspension of sentence may be indeterminate or may be fixed by the court, and may at any time be extended or terminated by the court. Such period with any extension thereof shall not exceed the maximum period for which the defendant might have been imprisoned.

At any time during probation or suspension of sentence, the court may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the defendant to be arrested. Thereupon the court, after summary hearing may revoke the probation and suspension of sentence and cause the sentence imposed to be executed, or may cause the defendant to be brought before it and may continue or revoke the probation, or may impose any sentence which originally might have been imposed at the time of conviction.

I.C. § 20-222 (emphasis added). Therefore, *at any time during probation*, the district court may issue a warrant for violation of any of the conditions of probation and cause the defendant to be arrested. I.C. § 20-222. Thereupon, the court may revoke or continue probation. I.C. § 20-222. However, I.C. § 19-2602 states:

If it is proved to the satisfaction of the court that the terms and conditions upon which the defendant was placed on probation by the court or any of them have been violated or for any other cause satisfactory to the court, the court may, *at any time within the longest period for which the defendant might have been originally sentenced* by judgment of the court, issue a bench warrant for the rearrest of the defendant.

I.C. § 19-2602 (emphasis added). This statute seems to suggest that, so long as probation revocation proceedings are commenced within the time period for which a defendant might have been sentenced, the revocation is timely. However, this directly conflicts with the language of I.C. § 20-222, which requires that revocation proceedings occur “during probation.” I.C. § 20-222.

To the extent that these statutes conflict, I.C. § 20-222 applies. The rule of lenity requires that courts construe ambiguous criminal statutes in favor of the accused. *State v. Shanks*, 139 Idaho 152, 156, 75 P.3d 206, 210 (Ct. App. 2003). Further, if I.C. § 19-2602 were to control, the language of section 20—222 would be rendered meaningless. Finally, the Court of Appeals has clearly stated, “we . . . hold that so long as probation revocation proceedings are commenced *during the period of probation*, the court acts within its authority set forth in I.C. § 20-222 to revoke or continue probation.” *Harvey*, 142 Idaho at 731, 132 P.3d at 1259.

However, in this case, the district court held that I.C. § 19-2602 applied. (8/11/08 Tr., p.17, Ls. 15-23.) Specifically, the court stated:

In this case, I'm going to – my determination is going to be that the allegation is that the probation was not complied with during – the allegation arose during the four-year term in which the defendant was on probation and that the motion by the prosecutor is timely under 19-2602. It was at least signed before the probation terminated. It was not filed before the probation period set by the Court was terminated, but it was filed during the 10-year period under 19-2602.

(8/11/08 Tr., p.17, Ls. 15-23.) The district court erred by applying I.C. § 19-2602 rather than I.C. § 20-222. The rule of lenity requires any conflict between these statutes be interpreted in favor of Mr. Gamino and applying I.C. § 19-2602 renders I.C. § 20-222 meaningless. Probation revocation proceedings must be commenced during the period of probation and in this case they were not.

Further, the fact that the report of probation violation was created on May 8, 2008, and signed by the Department of Probation and Parole on May, 9, 2008, is irrelevant. (R., pp.182-183.) Probation revocation proceedings must be “*commenced* during the period of probation.” *Harvey*, 142 Idaho at 731, 132 P.3d at 1259 (emphasis added). The fact that the report was signed before the period of probation expired does not mean that revocation proceedings were “*commenced*.” The petition to revoke probation was filed on May 16, 2008, and this is the date that controls. (R., p.156.) The fact that the report was created and signed by a member of Department of Probation and Parole signifies only that the claims were being investigated by the Department; nothing was commenced in district court until May 16. (See R., p.3 (Register of Actions).)

Criminal cases are commenced by the actual filing of an information or an indictment. See *State v. Jones*, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004). They are not commenced by the prosecutor deciding to file a charging document. Likewise,

revocation proceedings are not commenced simply because the Department decides to issue a report of probation violation. They are commenced when an actual petition is filed in district court.

Finally, May 10, 2008, was the actual date that the period of probation expired and there is no argument that Mr. Gamino's period of probation had been tolled. In *Harvey*, the Court of Appeals discussed whether periods of probation can be tolled under I.C. § 20-222. In *Harvey*, the defendant was sentenced to a determinate term of twenty years for lewd conduct with a minor. *Harvey*, 142 Idaho at 728, 132 P.3d at 1256. Following a period of retained jurisdiction, the court suspended the sentence and placed Harvey on probation for a period of seven years. *Id.*, 142 Idaho at 729, 132 P.3d at 1257.

In 1989, the State filed a petition to revoke probation due to the fact that Mr. Harvey had remained away from his residence and had failed to inform his probation officer that he intended to change his residence. *Id.* Mr. Harvey was arrested on the violation in December, 1989. *Id.* Mr. Harvey admitted to the violations and on March 9, 1990, the district court continued his probation and ordered that he serve ninety days in jail. *Id.* On March 22, the State filed another petition for probation violation, asserting that Mr. Harvey had escaped from jail. *Id.* On March 23, the district court issued a warrant, which was served on October 9, 1991, in another state. *Id.* On December 6, the district court again continued Mr. Harvey's probation. *Id.*

On March 24, 1992, the State filed yet another petition for probation violation which was not served on Mr. Harvey until April 15, 1997 in another state. *Id.* On

June 17, 1997, the court revoked Mr. Harvey's probation and executed his sentence.

Id.

In 2002, Mr. Harvey filed a motion to correct an illegal sentence, asserting that the maximum period of time he could have been placed on probation was five years, and therefore his probation expired in 1991. *Id.* Alternatively, he asserted that because his probationary period was seven years, and it had never been extended by the court, his probation expired in 1993. *Id.*

The Court of Appeals disagreed and held that Mr. Harvey's period of probation had been tolled. The court stated, "[t]o determine that the tolling rule did not apply in this case and that the district court's jurisdiction over Harvey had expired would lead to a patently absurd result and nullify legislative intent that probation rehabilitate the defendant while protecting society." *Id.*, 142 Idaho at 731, 132 P.3d at 1259. The court stated:

[w]e therefore conclude that the Idaho legislature could not have intended for a probationer to have the ability to avoid the conditions of probation entirely by absconding from supervision until the probationary period expired. Thus, we hold that a probationary period is tolled from the date probation revocation proceedings are commenced until probation is continued or revoked.

Id. Mr. Gamino acknowledges that prior probation revocation proceedings were commenced against him in this case. On July 21, 2005, the State filed a Petition To Revoke Probation, asserting several probation violations. On November 7, 2005, the district court entered an Order On Motion To Revoke Probation. (R., p.138.) Rather than revoking probation, the district court ordered, "that the defendant's sentence will be further suspended and probation is continued under the same terms and conditions as

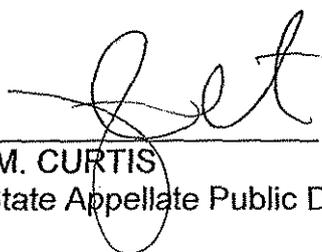
previously imposed," with several additional terms of probation. (R., p.140.) However, there are several reasons that his probation period should not be tolled.

First, the district court, when it continued probation, did not extend the probationary period. (R., p.140.) Second, the district court in this case specifically held that tolling did not apply because Mr. Gamino had not absconded from probation and that the period of probation expired on May 10, 2008. (8/11/08 Tr., p.14, Ls.18-24.) The court asked the prosecutor, "just removing issues here, there's no argument that the defendant absconded and the probation period is extended because he absconded; am I correct here?" (8/11/08 Tr., p.14, Ls.2-5.) The prosecutor responded, "[t]hat is correct." (8/11/08 Tr., p.14, L.6.) Finally, there is no policy reason for extending the period of probation in this case. There is no dispute that Mr. Gamino did not abscond and that he was being supervised. The Department of Probation and Parole had every opportunity to file the probation violation and have a warrant served on Mr. Gamino within the probationary period. It simply failed to do so. Therefore, as the district court found, Mr. Gamino's probation expired on May 10, 2008. Because the State failed to file its petition to revoke probation by that date, the district court erred by denying Mr. Gamino's motion to dismiss.

CONCLUSION

Mr. Gamino requests that the district court's order denying his motion to dismiss be reversed and his case remanded for further proceedings.

DATED this 8th day of September, 2009.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of September, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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