

Uldaho Law

Digital Commons @ Uldaho Law

Idaho Supreme Court Records & Briefs, All

Idaho Supreme Court Records & Briefs

10-22-2019

State v. Dunne Appellant's Brief Dckt. 47031

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"State v. Dunne Appellant's Brief Dckt. 47031" (2019). *Idaho Supreme Court Records & Briefs, All*. 7750. https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/7750

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ Uldaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs, All by an authorized administrator of Digital Commons @ Uldaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47031-2019
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR-FE-2012-42
v.)	
)	
GUY KELLY DUNNE,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

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

HONORABLE PETER BARTON
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

**ATTORNEYS FOR
DEFENDANT-APPELLANT**

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	2
ISSUES PRESENTED ON APPEAL.....	6
ARGUMENT.....	7
I. The District Court Did Not Have Jurisdiction To Revoke Mr. Dunne’s Probation In 2019	7
A. Introduction	7
B. Standard Of Review.....	7
C. The District Court Did Not Have Jurisdiction To Revoke Mr. Dunne’s Probation In 2019	9
II. The District Court Erred When It Denied Mr. Dunne’s Motion To Correct An Illegal Sentence.....	14
A. Introduction	14
B. Standard Of Review.....	15
C. The District Court Erred When It Denied Mr. Dunne’s Motion To Correct An Illegal Sentence	15
CONCLUSION.....	17
CERTIFICATE OF SERVICE.....	17

TABLE OF AUTHORITIES

Cases

City of Sandpoint v. Sandpoint Indep. Highway Dist., 126 Idaho 145 (1994) 12

Grand Canyon Dories v. Idaho State Tax Commission, 124 Idaho 1 (1993)..... 8, 12

Meyers v. City of Idaho Falls, 52 Idaho 81 (1932)..... 8

Payette River Owners Ass'n v. Board of County Comm'rs of Valley County, 132 Idaho 551
(1999) 8

Peltier v. State, 119 Idaho 454 (1991) 13, 16

Porter v. Board of Trustees, Preston School Dist. No. 201, 141 Idaho 11 (2004) 8

State v. Burnight, 132 Idaho 654 (1999) 8

State v. Clements, 148 Idaho 82 (2009) 15

State v. Escobar, 134 Idaho 387 (Ct. App. 2000) 8

State v. Gamino, 148 Idaho 827 (Ct. App. 2010) 14

State v. Harvey, 142 Idaho 727 (Ct. App. 2006) 4, 15

State v. Kesling, 155 Idaho 673 (Ct. App. 2013) 14

State v. Ligon-Bruno, 152 Idaho 274 (Ct. App. 2011) 14

State v. Pedraza, 101 Idaho 440 (1980) 9, 12, 16

State v. Rogers, 140 Idaho 223 (2004) 7

State v. Yager, 139 Idaho 680 (2004) 7

Stonebrook Const., LLC v. Chase Home Fin., 152 Idaho 927 (2012) 8

Twin Lakes Canal Co. v. Choules, 151 Idaho 214 (2011) 12

Verska v. St. Alphonsus Regional Medical Center, 151 Idaho 889 (2011) 8

Statutes

I.C. § 18-8007 1, 5, 10

I.C. § 19-2601*passim*
I.C. § 19-2603*passim*
I.C. § 20-222*passim*
I.C. § 20-227 11

Rules

I.C.R. 35(a)*passim*

STATEMENT OF THE CASE

Nature of the Case

In 2012, pursuant to a plea agreement, Guy Kelly Dunne pled guilty to one count of felony leaving the scene of an accident. He received a withheld judgment and was placed on probation for five years. In 2014, after Mr. Dunne admitted to violating some of the terms and conditions of probation, the district court reinstated him on probation for another five-year period of time. In 2018, the State filed a motion for probation violation. Thereafter, Mr. Dunne moved the district court to dismiss his case, asserting that he had an illegal sentence because he had been on probation for six years—one year longer than the maximum possible sentence. The district court denied the motion and Mr. Dunne admitted to violating one of the terms and conditions of probation. This time the district court revoked the withheld judgment and sentenced Mr. Dunne to three years, with one year fixed, but retained jurisdiction.

On appeal, Mr. Dunne contends that the district court erred in revoking his probation and in denying his I.C.R. 35(a) motion to correct an illegal sentence because the maximum probationary term had expired, yet he remained on probation. The sentence for a violation of I.C. § 18-8007 is five years, and Mr. Dunne had already served six years on probation when his withheld judgment and probation were revoked. Mr. Dunne contends that the district court's determination that his probation was not extended or continued in 2014, and that the 2014 reinstatement of Mr. Dunne on probation was the equivalent of probation revocation, was error. (R., pp.198-200.) The district court's decision circumvented the maximum probationary period set forth in I.C. §§ 19-2601 and 20-222 to keep Mr. Dunne on probation past the maximum sentence allowed by law. The district court did not have jurisdiction to revoke Mr. Dunne's probation based upon events that occurred after the maximum statutorily authorized period of

probation had ended. Where the maximum period of time Mr. Dunne could have been on probation ran out on October 7, 2017, and his probation violation was not filed until November 28, 2018, Mr. Dunne's case should be closed.

Statement of the Facts & Course of Proceedings

On January 2, 2012, Guy Dunne was involved in an automobile accident. (Presentence Investigation Report (*hereinafter*, PSI),¹ p.43.) He drove away, not realizing the passenger had sustained injuries. (PSI, p.43.) He failed the field sobriety tests and an analysis of his breath alcohol content resulted in .191/.188. (PSI, pp.43, 67.)

Based on these facts, Mr. Dunne was charged by information with one count of aggravated DUI and one count of felony leaving the scene of an injury accident. (R., pp.59-60.) Pursuant to a plea agreement, Mr. Dunne pled guilty to an amended information charging him with misdemeanor DUI and felony leaving the scene. (R., pp.59-60, 65-72.) In exchange, the State agreed to recommend a sentence of five years, with two years fixed, suspended, and a maximum jail sentence of 60 days with work release. (R., p.67.) The State also agreed to recommend that the sentence be concurrent with Mr. Dunne's federal sentence.² (R., p.67.)

At the sentencing hearing on June 1, 2012, the district court withheld judgment and placed Mr. Dunne on probation for five years. (R., pp.78-85.) Mr. Dunne was to serve thirty

¹ Appellant's use of the designation "PSI" includes the packet of documents grouped with the electronic copies of the PSI, and the page numbers cited shall refer to the corresponding page of the electronic file.

² Mr. Dunne was employed as a mail carrier by the U.S. Postal Service for fourteen years. (PSI, pp.30, 45.) In 2010, when he was [REDACTED] he sustained a foot injury and was prescribed opiates for the pain. (PSI, pp.5, 44-45, 52.) His resulting addiction to painkillers culminated in a theft of 24 postal packages containing opioid pain medications, from which followed federal mail theft charges and Mr. Dunne's termination from his career employment. (PSI, pp.44-45, 48, 51.) Mr. Dunne's father is a retired mail carrier, who worked in Boise for forty-five years—longer than any other mail carrier in town. (PSI, pp.46-47.)

days in jail, with an additional thirty days of time to be served at the discretion of his probation officer. (R., p.80.)

Two years later, on June 9, 2014, the State filed a report of probation violation. (R., p.111.) The State claimed that Mr. Dunne violated the terms and conditions of his probation by committing misdemeanor domestic violence. (R., pp.108-121.) On August 5, 2014, Mr. Dunne admitted to violating some of the terms and conditions of his probation, and he was subsequently screened for veteran's court and mental health court. (R., pp.124, 130.) An amended motion for probation violation was filed on September 5, 2014, in which the State alleged that Mr. Dunne committed misdemeanor domestic violence and domestic violence in the presence of a child, and that he possessed ammunition and knives and consumed an alcoholic beverage on August 20, 2014. (R., pp.144-151.) On October 8, 2014, the district court reinstated Mr. Dunne on probation for five years, with the same terms and conditions entered by the court in the order withholding judgment filed on June 6, 2012. (R., pp.154-158.) The district court required additional conditions of probation including domestic violence and critical thinking courses, substance abuse and mental health treatment, and ongoing supervision for medication management. (R., p.155.)

Over four years later, on November 28, 2018, the State filed another motion for probation violation. (R., pp.159-166.) The State claimed that Mr. Dunne violated the terms and conditions of his probation by being charged with a misdemeanor DUI and possession of an open container, and by drinking alcohol. (R., pp.159-160.) On January 23, 2019, Mr. Dunne admitted to violating one of the terms and conditions of his probation. (1/23/19 Tr., p.9, Ls.2-23.)

Prior to disposition, on March 22, 2019, Mr. Dunne filed a motion to correct an illegal sentence. (R., pp.183-187.) Mr. Dunne asserted that his sentence was illegal pursuant to

I.C. §§ 19-2601 and 20-222(1). (R., p.184.) Mr. Dunne asserted that the maximum time he could be placed on probation had ended over a year prior to the filing of the probation violation allegation. (R., p.183.) Counsel for Mr. Dunne argued that I.C. § 19-2603 dealt with the pronouncement and execution of judgment after a probation violation and thus was not applicable to Mr. Dunne’s circumstance—where the court continued him on the withheld judgment. (4/17/19 Tr., p.20, Ls.7-16; p.21, Ls.6-8; p.21, Ls.9-17.)

The district court denied Mr. Dunne’s Rule 35(a) motion after a hearing. (R., pp.195-202.) In denying the motion, the district court relied on statutory language authorizing a court to “impose any sentence which originally might have been imposed at the time of conviction.” (R., p.199.) The district court first noted that Mr. Dunne’s 2014 probation proceedings tolled the duration of his probation for 128 days, pursuant to *State v. Harvey*, 142 Idaho 727 (Ct. App. 2006). (R., p.196.) The district court summarized the issue before it as, “whether two years into Mr. Dunne’s five years of probation, upon the finding of a probation violation by Mr. Dunne, the sentencing court could impose another five years of probation, or only three years.” (R., p.196.)

In analyzing the propriety of Mr. Dunne’s probationary term, the district court examined three statutes, I.C. §§ 19-2601(7), 19-2603, and 20-222. (R., pp.196-200.) The district court recognized that I.C. § 19-2601(7) limited probation so that under “a conviction or plea of guilty for a felony the period of probation may be for a period of not more than the maximum period for which the defendant may have been imprisoned.” (R., p.196.) The court also examined I.C. § 19-2603 governing withheld judgments, which provides, in pertinent part, that when a court determines that a defendant has violated the terms or conditions of probation it may, if judgment has been withheld, “pronounce any judgment which it could have originally pronounced.” (R., p.197.) The district court referenced this language and the maximum

sentence for a violation of I.C. § 18-8007(2), the code section which Mr. Dunne had pled guilty to violating in 2012, and concluded, “a withheld judgment with 5 years’ probation is a judgment which could have been originally pronounced. And so it was a sentence that could be pronounced on October 8, 2014. That is the sentence Mr. Dunne received on October 8, 2014.” (R., p.197.)

The court concluded that, although I.C. § 20-222(1) limits a court’s discretion in extending probation to “the maximum period for which the defendant might have been imprisoned,” that limitation does not apply to Mr. Dunne’s case because “Mr. Dunne’s probation was not extended under Section 20-222(1) but was re-instated following a finding of violation under Section 19-2603 or Section 20-222.” (R., pp.199-200.) After analyzing the three subsections of I.C. § 20-222, the court concluded that none of the subsections applied to Mr. Dunne’s situation, but alternatively concluded that the section providing for “revocation” may be applicable where the Legislature may have intended “revoke” to mean to revoke and then re-instate on new (harsher) terms (as in Mr. Dunne’s situation), so that the language of § 20-222 was not entirely surplusage. (R., pp.199-200.) The court also concluded that the language of I.C. § 19-2603 applied to Mr. Dunne’s circumstances, because the court “pronounce[d] any judgment which it could have originally pronounced.” (R., p.200.)

On May 1, 2019, the district court revoked the withheld judgment it had entered on June 1, 2012, and sentenced Mr. Dunne to three years, with one year fixed, but retained jurisdiction. (5/1/19 Tr., p.9, Ls.7-21; R., pp.204-207.)

Mr. Dunne filed a notice of appeal timely from the judgment of conviction and the district court’s order denying his Rule 35(a) motion. (R., pp.208-210, 213-217.)

ISSUES

- I. Did the district court have jurisdiction to revoke Mr. Dunne's probation in 2019?
- II. Did the district court err when it denied Mr. Dunne's Motion To Correct An Illegal Sentence?

ARGUMENT

I.

The District Court Did Not Have Jurisdiction To Revoke Mr. Dunne's Probation In 2019

A. Introduction

Mr. Dunne contends that the district court lacked subject matter jurisdiction when it revoked his probation in 2019, because the violation that constituted the basis for the district court's decision occurred after the court's jurisdiction had expired. Mr. Dunne's probation should have been over on October 7, 2017; the acts that constituted the sole basis for the probation violations occurred in November of 2018. The district court's decision circumvented the plain language of I.C. §§ 19-2601 and 20-222—statutes limiting the maximum time period a defendant may be on probation—to keep Mr. Dunne on probation past the maximum sentence allowed by law. The district court did not have jurisdiction to revoke Mr. Dunne's probation based upon events that occurred after the maximum statutorily authorized period of probation had ended.

B. Standard Of Review

While personal jurisdiction may be waived, subject matter jurisdiction cannot be waived and “may be raised at any time, including for the first time on appeal.” *State v. Rogers*, 140 Idaho 223, 227 (2004). “Issues about the district court's jurisdiction are issues of law, over which [Idaho appellate courts] exercise independent review.” *Id.*

A question of statutory interpretation is a question of law over which the Idaho Supreme Court exercises free review. *State v. Yager*, 139 Idaho 680, 689 (2004). Where the language of a statute is plain and unambiguous, the appellate court must give effect to the statute as written,

without engaging in statutory construction. *State v. Burnight*, 132 Idaho 654, 659 (1999); *State v. Escobar*, 134 Idaho 387, 389 (Ct. App. 2000). “A statute is ambiguous where the language is capable of more than one reasonable construction.” *Verska v. St. Alphonsus Regional Medical Center*, 151 Idaho 889, 896 (2011) (quoting *Porter v. Board of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14 (2004)). Statutory language is not ambiguous “merely because the parties present differing interpretations to the court.” *Stonebrook Const., LLC v. Chase Home Fin.*, 152 Idaho 927, 931 (2012) (quoting *Payette River Property Owners Ass’n v. Board of County Comm’rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)). Rather, statutory language “is ambiguous where reasonable minds might differ or be uncertain as to its meaning.” *Id.* An unambiguous statute would have only one reasonable interpretation; an alternative interpretation that is unreasonable would not make the statute ambiguous. *Verska*, 151 Idaho at 896. The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659. If the language is clear and unambiguous, the appellate court does not need to look to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389.

Another important rule of statutory construction is *in pari materia*; “Statutes are *in pari materia* when they relate to the same subject.” *Grand Canyon Dories v. Idaho State Tax Commission*, 124 Idaho 1, 4 (1993) (quoting *Meyers v. City of Idaho Falls*, 52 Idaho 81, 89-90 (1932)). Statutes which are *in pari materia* are to be “taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions.” *Id.*

C. The District Court Did Not Have Jurisdiction To Revoke Mr. Dunne's Probation In 2019

In Idaho, upon a finding of guilt, the district court may, among other things, suspend the execution of judgment and place the defendant on probation under I.C. § 19-2601(2). Another option available to the district court is, pursuant to I.C. § 19-2603(3), the court may withhold judgment. In both situations, the defendant is placed on probation. *See State v. Pedraza*, 101 Idaho 440, 442 (1980).

The statute governing withheld judgment is I.C. § 19-2601(3). That statute provides, in relevant part, that when a defendant has been convicted or has entered a plea of guilty in district court, the court may:

Withhold judgment on such terms and for such time as it may prescribe and may place the defendant on probation under such terms and conditions as it deems necessary and appropriate.

I.C. § 19-2601(3).

The statutes limiting a period of probation are I.C. §§ 19-2601(7); 20-222(1). The relevant portion of Idaho Code § 19-2601(7) provides:

The period of probation ordered by a court under this section under . . . a conviction or plea of guilty for a felony the period of probation may be for a period of *not more than the maximum period for which the defendant might have been imprisoned*.

Idaho Code § 19-2601(7) (emphasis added). Idaho Code § 20-222(1) includes nearly identical language limiting the probationary period:

The period of probation or suspension of sentence shall 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*.

I.C. § 20-222(1) (emphasis added).

In Mr. Dunne’s case, on October 8, 2014, his probation was reinstated for a period of five years, commencing on October 8, 2014 “upon the same terms and conditions entered by this Court in the Order Withholding Judgment and Order of Probation and Commitment filed on June 6, 2012.” (R., p.155.) The 2014 court added four special conditions and gave Mr. Dunne credit for sixty-nine days served. (R., p.155.) In 2014, the district court did not sentence or impose judgment on Mr. Dunne. (See R., pp.154-57.) Mr. Dunne was still on probation under a withheld judgment. He remained on probation, under the withheld judgment, until 2018—a period of six years. (R., pp.159-66.) “[U]nder a conviction or plea of guilty for a felony the period of probation may be for a period of not more than the maximum period for which the defendant might have been imprisoned.” I.C. § 19-2601(7); *see also* I.C. § 20-222(1). The offense of leaving the scene of an injury accident carries a maximum penalty of five years in the state penitentiary. I.C. § 18-8007. Thus, Mr. Dunne’s six-year period of probation on the withheld judgment exceeded the maximum permitted by statute.

Both I.C. §§ 19-2601 and 20-222(1) cap the probationary period at “the maximum period for which the defendant may [might] have been imprisoned.” I.C. §§ 19-2601, 20-222(1). Mr. Dunne contends that his probationary sentence exceeded the maximum allowable by I.C. §§ 19-2601 and 20-222(1), and the district court failed to realize that the statutes were required to be read *in pari materia*, instead finding none of the statutes governing the maximum time a defendant could be placed on probation were applicable in Mr. Dunne’s situation. (R., pp.199-200.)

The applicable statutes governing the court’s choices after the defendant is accused of a probation violation are I.C. §§ 20-222(2) and 19-2603. I.C. § 20-222(2) provides, in pertinent part:

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(2) (emphasis added). Thus, the court dealing with the probation violation has three choices: (i) to revoke the probation and have the imposed sentence executed; or (ii) to continue or revoke probation; or (iii) to impose any sentence which originally might have been imposed. I.C. § 20-222(2).

Idaho Code § 19-2603 provides:

When the court finds that the defendant has violated the terms and conditions of probation, *it may, if judgment has been withheld, pronounce any judgment which it could originally have pronounced*, or, if judgment was originally pronounced but suspended, revoke probation. The time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence. The defendant shall receive credit for time served from the date of service of a bench warrant issued by the court after a finding of probable cause to believe the defendant has violated a condition of probation, for any time served following an arrest of the defendant pursuant to section 20-227, Idaho Code, and for any time served as a condition of probation under the withheld judgment or suspended sentence.

I.C. § 19-2603 (emphasis added). If the court pronounces judgment, it necessarily revokes the withheld judgment.

Where, in 2014, Mr. Dunne's probation was reinstated for a period of five years, "upon the same terms and conditions" of the withheld judgment entered in 2012, the district court did not sentence or impose judgment on Mr. Dunne. (*See R.*, pp.154-57.) Mr. Dunne was still on probation under a withheld judgment. Thus, the district court erred by finding that Mr. Dunne's probation was not extended or continued. (*R.*, pp.198-200.) The district court erred by finding that Mr. Dunne's reinstatement on probation was the equivalent of revoking probation.

(R., pp.198-200.) The district court's holding was contrary to the plain language of the applicable statutes, and Idaho Supreme Court precedent.

In *State v. Pedraza*, the Idaho Supreme Court outlined the options available to the court once a criminal defendant is adjudged guilty of the charged crime. 101 Idaho 440, 442 (1980). The Court examined the interplay between I.C. §§ 19-2603 and 20-222, explaining that I.C. § 20-222:

[R]epeatedly refers to “probation or suspension of sentence” and therefore must apply to probation which follows the suspension of execution of judgment as well as probation following a withheld judgment. The last paragraph of that section is the source of this controversy.

“20-222. INDETERMINED OR FIXED PERIOD OF PROBATION OR SUSPENSION OF SENTENCE REARREST AND REVOCATION.

“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.” (Emphasis added.)

We are convinced that the portion of the statute which permits a court to “impose any sentence which originally might have been imposed at the time of conviction” refers only to a revocation of probation following a withheld judgment, while the portion which permits the original “sentence imposed to be executed” refers to a revocation of probation following a suspension of the execution of judgment and sentence. Construing this language any other way would lead to an irreconcilable conflict between I.C. ss 19-2603 and 20-222. Such a conflict would lead to the implicit repeal of I.C. s 19-2603, since it was enacted prior to I.C. s 20-222.

Id. 101 Idaho at 442 (1980) (internal citations omitted).³

³ It is well-settled in Idaho that where an irreconcilable inconsistency exists between statutes *in pari materia*, the latest expression of the legislature will control. *Grand Canyon Dories*, 124 Idaho at 5. Courts must construe statutes “under the assumption that the [L]egislature knew of all legal precedent and other statutes in existence at the time the statute was passed.” *Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, 218 (2011) (quoting *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150 (1994)).

The district court erred in finding the language of I.C. § 19-2603 providing the court may “pronounce any judgment which it could originally have pronounced” applied to Mr. Dunne’s case in 2014. (R., p.197.) This is because the court did not pronounce a judgment in 2014, and I.C. § 19-2603 is only applicable in circumstances where judgment is pronounced. *See* I.C. § 19-2603. In Mr. Dunne’s case, the 2014 order did not revoke either his probation or his withheld judgment, thus, as the *Pedraza* Court explained, the language “impose any sentence which originally might have been imposed at the time of conviction” does not apply as it “refers only to a revocation of probation following a withheld judgment.” *Id.*

Similarly, In *Peltier v. State*, Mr. Peltier sought post-conviction relief, alleging that his original sentence had been unlawfully increased from five years to twenty years after a probation violation. 119 Idaho 454 (1991). The Idaho Supreme Court, in a plurality opinion, ultimately reversed the summary dismissal of Mr. Peltier’s petition due to lack of notice; however, the Court analyzed Mr. Peltier’s claim that the district court lacked jurisdiction over him and concluded that language of I.C. § 19-2601 allowed for the court to impose “any sentence which originally might have been imposed at the time of conviction, so long as it was within the statutory limits.” *Id.* 119 Idaho at 460. The Court concluded that, at the original sentencing hearing for lewd conduct, the district court told Mr. Peltier it was withholding judgment but that it could impose up to life imprisonment if he violated the terms of his probation. *Id.* 119 Idaho at 460-61. Thereafter the district court withheld judgment and placed Mr. Peltier on probation for five years. *Id.* 119 Idaho at 459. When Mr. Peltier violated his probation, the district court did not violate Mr. Peltier’s double jeopardy rights by imposing a sentence of twenty years, but suspending the sentence for twenty years of probation. *Id.* 119 Idaho at 461.

Because there was no revocation of the withheld judgment and imposition of a sentence until after the maximum possible probationary period had already expired, the Court's holding in *Peltier* does not apply here. Mr. Dunne was originally placed on probation on June 1, 2012. (R., pp.78-79.) Although the probationary period was tolled for 128 days while Mr. Dunne's probation violation was pending, Mr. Dunne's probation was statutorily required to have ended in October of 2017. (R., pp.185-86.)

Further, the district court did not have subject matter jurisdiction to revoke Mr. Dunne's probation in 2019. *See* I.C. § 20-222; I.C. § 19-2601(7); *see also State v. Kesling*, 155 Idaho 673 (Ct. App. 2013) (holding district court lacked jurisdiction to revoke probation after expiration of maximum lawful period of probation for offense of conviction); *State v. Ligon-Bruno*, 152 Idaho 274 (Ct. App. 2011) (holding that the failure to commence revocation proceedings during the period of probation was a jurisdictional defect); *State v. Gamino*, 148 Idaho 827 (Ct. App. 2010) (holding that probation revocation proceedings must be initiated during the period of probation).

The district court lost jurisdiction over Mr. Dunne in October of 2017 and, therefore, it did not have the authority to revoke his probation in 2019. This Court should remand the case with an order that the probation violation allegation be dismissed and the case closed.

II.

The District Court Erred When It Denied Mr. Dunne's Motion To Correct An Illegal Sentence

A. Introduction

Mr. Dunne asserts that the district court erred when it denied his motion. It is clear from the face of the record, that the order re-imposing Mr. Dunne's probationary period in 2014 is in violation of the statute, but it was not until 2017 that the probationary period became unlawful

from the face of the record. Mr. Dunne asserts that the district court erred by denying his motion to correct an illegal sentence. Mr. Dunne respectfully requests that this Court vacate the order denying his motion to correct an illegal sentence, and remand the case with orders that the probation violation allegation be dismissed and Mr. Dunne's case be closed.

B. Standard Of Review

Idaho Criminal Rule 35(a) permits a district court to correct an illegal sentence at any time. *State v. Clements*, 148 Idaho 82, 84 (2009). “[T]he term ‘illegal sentence’ under I.C.R. 35 is narrowly interpreted as a sentence that is illegal from the face of the record, *i.e.*, does not involve significant questions of fact or require an evidentiary hearing.” *Id.* at 86. Generally, whether a sentence is illegal or was imposed in an illegal fashion is a question of law, over which an appellate court exercises free review. *Id.* at 84.

C. The District Court Erred When It Denied Mr. Dunne's Motion To Correct An Illegal Sentence

It is Mr. Dunne's contention that his probation of five years had ended prior to the filing of the 2018 probation violation. (R., pp.183-85.) Mr. Dunne's probation had expired prior to the filing of the current probation violation because Mr. Dunne was placed on probation on June 1, 2012, for the statutory maximum period of five years. (R., pp.78-85.) Had there been no probation violations filed, that period would have expired on June 1, 2017. During a period of probation violation, the probationary period is tolled from the commencement of the violation to the reinstatement on probation. *State v. Harvey*, 142 Idaho 727 (Ct. App. 2006). Here, the period from June 2, 2014 to October 8, 2014, a total of 128 days, is the relevant period of tolling. (R., p186.) Even if the probationary period was extended for 128 days past the original

expiration date of June 1, 2017, the time Mr. Dunne could lawfully be on probation expired on October 7, 2017. (R., p.186.)

In his motion, Mr. Dunne acknowledged that cases like *State v. Pedraza*, 101 Idaho 440 (1980), and *Peltier v. State*, 119 Idaho 454, 460 (1991), held that, upon a revocation of probation following a withheld judgment a defendant may have a maximum statutory sentence imposed. (R., p.185.) However, Mr. Dunne maintained that “[t]he loss of the withheld judgment, and the ability to impose sentence for the maximum period is the entirety of the differences afforded the court in the instance of probation violations on a withheld judgment.” (R., p.185.)

As he asserted in his motion:

In the present case, the defendant did not have a sentence imposed. His probation was continued and amended to a term that exceeded the statutory limit. There is no authority for an extension of probation in this case beyond the original 5 years.

...

In the present case, the court continued the defendant on probation and modified a condition of probation, i.e. the length, beyond the statutory maximum allowed.

(R., p.185) (emphasis in original.)

Mr. Dunne asserts that the district court erred in denying his motion to correct an illegal sentence. He asks that this Court reverse the denial of his motion and remand the case to the district court with instructions to grant his Rule 35(a) motion, dismiss the probation violation allegation, and close his case.

CONCLUSION

Mr. Dunne respectfully requests that this Court remand with instructions to grant his Rule 35(a) motion, dismiss the probation violation allegation, and close his case.

DATED this 22nd day of October, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2019, I caused a true and correct copy of the foregoing APPELLANT’S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

SJC/eas