

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 47031-2019
 Plaintiff-Respondent,)
) Ada County Case No.
 v.) CR-FE-2012-42
)
 GUY KELLY DUNNE,)
)
 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**

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Guy Kelly Dunne appeals the district court's order revoking his probation and retaining jurisdiction.

Statement Of The Facts And Course Of The Proceedings

Dunne pled guilty to misdemeanor DUI and felony leaving the scene of an injury accident. (R., pp. 59-61, 64-72.) The district court entered a judgment of conviction on the DUI but withheld judgment on the felony. (R., pp. 77-84.) The district court placed Dunne on probation for five years. (R., p. 79.) The order of withheld judgment was entered on June 6, 2012. (R., p. 78.)

Dunne later admitted violating his probation by committing misdemeanor domestic violence. (R., pp. 108-10, 129; see also R., pp. 144-51, 153.) On October 14, 2014, the district court ordered that "probation be reinstated for a period of **five (5)** years, to commence on October 8, 2014." (R., pp. 154-57 (bold original).)

The state filed a second notice of a probation violation on November 28, 2018, alleging that Dunne had violated his probation by committing the crimes of DUI and open container and also violated his probation by possession of alcohol. (R., pp. 159-66.) Dunne admitted violating his probation by committing a DUI and the state dismissed the other allegations. (R., p. 181.)

Dunne thereafter filed a motion to correct an illegal sentence asserting "the defendant's probation of 5 years had ended prior to the filing of the currently pending probation violation" and the court had illegally extended the probation beyond the five year maximum in the prior probation violation proceedings. (R., pp. 183-87.) The state

responded, arguing that the probation imposed in the 2014 probation violation proceedings was not a continuation of the prior probation but a new probation for five years. (R., pp. 190-92.) The district court denied the motion to correct an illegal sentence, concluding that a new five-year probation was imposed in 2014. (R., pp. 195-201.)

The district court revoked Dunne's withheld judgment, imposed a sentence of three years with two years fixed and retained jurisdiction. (R., pp. 204-07.) Dunne filed a timely notice of appeal. (R., pp. 208-10.)

ISSUES

Dunne states the issues on appeal as:

- 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?

(Appellant's brief, p. 6.)

The state rephrases the issues as:

Has Dunne failed to show error in the district court's conclusion that Dunne's probation had not expired by the time the state filed the probation violation allegations in 2018?

ARGUMENT

Dunne Has Failed To Show Error In The District Court's Conclusion That Dunne's Probation Had Not Expired By The Time The State Filed The Probation Violation Allegations In 2018

A. Introduction

The district court concluded that it had, after finding a probation violation, imposed a new five-year probation in 2014 rather than illegally attempting to extend the original 2012 probation past its maximum legal term of five years. (R., pp. 195-201.¹) Dunne argues “the 2014 order did not revoke either [Dunne’s] probation or his withheld judgment” and therefore constituted an illegal extension of his probation and deprived the district court of jurisdiction beyond the original five-year probationary term. (Appellant’s brief, pp. 7-16.) Dunne has failed to show that the district court misinterpreted its order or that the court lacked the ability to impose a new five-year probation upon finding Dunne had violated his first probation.

B. Standard Of Review

The interpretation of an unambiguous court order presents a question of law over which the appellate court exercises free review. Suchan v. Suchan, 113 Idaho 102, 106, 741 P.2d 1289, 1293 (1987); Sun Valley Ranches, Inc. v. Prairie Power Coop., 124 Idaho 125, 131, 856 P.2d 1292, 1298 (Ct. App. 1993). The interpretation of an ambiguous court order, on the other hand, presents a question of fact. Suchan, 113 Idaho at 106, 741 P.2d at 1293. Where the order is reasonably subject to conflicting interpretations, the appellate court must accept the trial court’s interpretation, particularly when the trial court is

¹ The district judge handling the case in 2018 was different than the district court who handled it in 2014, due to the latter’s retirement.

interpreting its own order, unless that interpretation is clearly erroneous. Id. at 107-08, 741 P.2d at 1294-95.

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004); State v. Dorn, 140 Idaho 404, 405, 94 P.3d 709, 710 (Ct. App. 2004).

C. The District Court Correctly Concluded That The 2014 Order Imposed A New Probationary Period And Was Not An Illegal Extension Of The 2012 Probation

Idaho Code § 20-222(1) states:

(1) 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); see also State v. Breeden, 129 Idaho 813, 815, 932 P.2d 936, 938 (Ct. App. 1997). “[A] court may at any time extend a period of probation so long as the probationary period does not exceed the maximum period for which the defendant might have been imprisoned.” State v. Gallipeau, 128 Idaho 1, 5, 909 P.2d 619, 623 (Ct. App. 1994) (citing I.C. § 20-222). The maximum probationary period that can be imposed for leaving the scene of an injury crash is therefore five years. See I.C. § 18-8007(2). The probationary period of five years originally imposed by the district court in 2012 was thus a proper, and maximum, period of probation.

“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.” I.C. § 19-2603 (emphasis added). See also I.C. § 20-222(2) (upon probation violation court “may continue or revoke the probation, or may impose any

sentence which originally might have been imposed at the time of conviction”). Thus, upon a violation of probation the court may place the defendant on a new period of probation. See Rodriguez v. State, 123 Idaho 28, 29, 843 P.2d 677, 678 (Ct. App. 1992).

Because the district court had legal authority to either “continue” the probation or to impose an entirely new probation, the central question of this case is which of these two options it invoked. The district court’s 2014 order found that Dunne willfully violated his probation and provided that “probation be reinstated for a period of **five (5)** years, to commence on October 8, 2014.” (R., p. 154-57 (bold original).) Although the “reinstated” language is not itself determinative, the fact that the court did not specifically “continue” the probation and the fact that the court imposed a new maximum term of probation with new conditions of probation all suggest that the probation imposed by the 2014 order was not merely a continuation of the old probation but was instead a new probation. The district court properly held that it had legal authority to order a new probation of up to five years upon the finding of a probation violation in 2014 and properly interpreted its prior order as having imposed a new probation instead of continued the old one.

Dunne contends that the district court could not legally impose a five-year probation after his 2014 probation violation because he had already served about two years on probation prior to his violation, and therefore the maximum probation time that could be ordered post-violation was approximately three years. (Appellant’s brief, pp. 7-16.) As shown above, and as articulated by the district court (R., pp. 195-200), this is not accurate because the court had all the sentencing options originally available to it, including a new probation. The district court correctly noted that, unlike serving a sentence, a defendant is not entitled to credit for time on probation against a new probationary period. Moreover,

if Dunne's legal analysis were adopted, a court facing a probation violation committed in the waning days or weeks of a probation would have a potentially unhealthy incentive to execute the sentence instead of continuing a probation that might be only a few days long or retaining jurisdiction with the option of thereafter imposing only a greatly shortened probationary period. Dunne has failed to show that the district court lacked statutory authority to impose a new five-year probation upon finding he violated his original five-year probation. Because the new probationary period was valid, the sentence was not illegal and the probation violation was timely.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Dunne's Rule 35 motion.

DATED this 27th day of December, 2019.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of December, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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