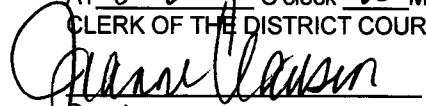


FILED 6/4/19

AT 8:00 O'clock a M
CLERK OF THE DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
)
Plaintiff,)
)
vs.)
)
REUBEN MYLES HOFFMAN)
DOB: 07/08/1984)
)
)
Defendant.)

Case No. **CR28-18-13829**

**MEMORANDUM DECISION AND
ORDER DENYING I.C.R. 35 MOTION
AND NOTICE OF RIGHT TO APPEAL**

I. FACTUAL HISTORY AND PROCEDURAL BACKGROUND

This matter comes before the Court on Defendant Reuben Hoffman’s (Hoffman) Motion to Correct Illegal Sentence. A hearing was held on May 16, 2019, and the Court heard oral argument from Hoffman; the plaintiff in this matter, the State of Idaho (the State) did not provide argument, but instead deferred to the discretion of the Court. At the conclusion of the hearing, the Court took the matter under advisement.

A Criminal Complaint was filed on August 23, 2018, formally charging Hoffman with the crime of operating a motor vehicle while under the influence, Idaho Code (I.C.) §§ 18-8004, 18-8005(6). Crim. Compl., 1. This was Hoffman’s second charge of driving under the influence (DUI) in Kootenai County, Idaho.¹ *Id.* On January 18, 2019, for his second DUI offense in Kootenai County, Idaho, Judge Scott L. Wayman sentenced Hoffman to 365 days in jail (with 186 days suspended and credit for 149 days served), and ordered Hoffman to be on supervised probation

¹ Hoffman was convicted for driving under the influence in case number CR2018-4042, on or about the 25th day of May, 2019, in the County of Kootenai, State of Idaho. Crim. Compl., 2. Hoffman was convicted for driving under the influence in case number CR2008-1155, on or about the 27th day of October, 2008, in the County of Boundary, State of Idaho. *Id.*

for a period of two years. The court minutes show that Judge Wayman discussed the probation terms and conditions with Hoffman on the record. Judge Wayman additionally ordered Hoffman to apply to the Kootenai County Mental Health Court, and successfully complete the program if accepted. The court minutes show Judge Wayman discussed that term and condition with Hoffman. The court minutes show that Judge Wayman asked Hoffman if he accepted the terms and conditions of probation and Hoffman verbally accepted those terms and conditions. Additionally, on January 18, 2019, Hoffman provided his signature on the Supervised Probation Order, which is part of the Judgment. Judgment, 4. Those documents were filed later that same day.

On February 5, 2019, Hoffman was provided with the Probation Agreement; Hoffman initialed next to each term and condition, and provided his signature at the bottom of the document. Kootenai County Misdemeanor Probation, Probation Agreement, 1. The Probation Agreement was filed later that day.

On February 19, 2019, a Motion for Probation Violation was filed by the State explaining that Hoffman had violated two terms and conditions of his probation. Mot. for Probation Violation, Attach. 1. On March 15, 2019, this case was ordered reassigned to the undersigned District Judge, by Senior District Judge Fred M. Gibler. The reassignment was because the undersigned presides over the Mental Health Court. No disqualifications were filed by either party after that reassignment.

On or about April 22, 2019, Hoffman was accepted into the Mental Health Court program, but chose to self-terminate from the program shortly thereafter, on April 29, 2019. Hoffman's decision to self-terminate from the program constituted an additional probation violation.

On May 2, 2019, a hearing was held on the State's Motion for Probation Violation, along with the additional allegation that Hoffman self-terminated from the Mental Health Court program, and Hoffman was provided with the opportunity to either admit or deny the allegations against him. At the hearing, the State informed the Court that they were planning to withdraw the original two

probation violation allegations, and proceed only with the allegation that Hoffman self-terminated from the Mental Health Court program. Hoffman admitted to self-terminating from the program, and requested that he serve his underlying jail sentence in lieu of continuing on probation. The Court denied Hoffman's request and continued Hoffman on his probation. In doing so, this Court imposed no new terms of probation on Hoffman, nor did this Court extend the period of Hoffman's probation. At the May 2, 2019, hearing, the Court continued Hoffman on his supervised misdemeanor probation, informed him that the term of that probation ended on January 18, 2021, and that he was released from custody immediately in this case and that any remaining portion of his sentence was "still available to me [the Court], to be used in the future if there are any further problems in this case." Hr'g on Mot. to Correct Illegal Sentence, May 11, 2019, 10:22 a.m. Inherent in that explanation is the fact that this Court felt it could best satisfy the paramount requirement of protecting the public by having Hoffman on supervised probation, as opposed to him simply serving out his jail sentence. Counsel for Hoffman then objected and asked that sentence be imposed. The Court overruled that objection and continued Hoffman on probation. No reason was given by counsel for Hoffman or by Hoffman as to what term and condition(s) he found to be too onerous.

On May 3, 2019, Hoffman filed the Motion to Correct Illegal Sentence. The reasons stated by counsel for Hoffman, in its entirety, are as follows:

On May 2, 2019, the Defendant appeared before the Court and admitted to Violating the terms of his probation. The Court found the Defendant to be in Violation of his probation, imposed a sanction, and ordered the Defendant to continue on probation. The Defendant rejected probation, and informed the Court he chose to not accept probation. The Court ordered probation over the Defendant's objection.

"A defendant may decline probation when he deems its conditions too onerous, and demand instead that he be sentenced by the court." *Franklin v. State*, 87 Idaho 291, 294, 392 P.2d 552, 555 (1964). "[Defendant] had the right at any time to decline probation and instead serve the suspended portion of the sentence..." *State v. Josephson*, 125 Idaho 119, 122, 867 P.2d 993, 996 (Ct. App. 1993).

In this case, the Defendant had the right to reject probation and serve the

remainder of his sentence; which right he exercised. The Court ignored the Defendant's exercise of this right and ordered him onto probation.

Because the Court's Order placing Defendant on probation was illegal, in Violation of Defendant's right to "decline probation and instead serve the suspended portion of the sentence," Defendant requests the Court modify his sentence to impose the remainder of his suspended jail time.

Since Defendant has remained in custody since that May 2 hearing, and since Defendant attempted to exercise his right to remain in custody on this case at that hearing, Defendant further requests the Court correct its computation of Defendant's credit for time served and give him additional credit for time served from May 2 through the date the Court corrects its illegal sentence.

Mot. to Correct Illegal Sentence, 1--2 . For the reasons set forth below, the Court finds Hoffman's Motion to Correct Illegal Sentence to be without merit.

II. STANDARD OF REVIEW

Review of an "illegal" sentence is limited to legal questions surrounding the defendant's sentence, and any factual issues must be apparent from the face of the record. *State v. Meier*, 159 Idaho 712, 713, 366 P.3d 197, 198 (Ct. App. 2016). Because the rule is limited to legal questions surrounding defendant's sentence, the factual issue must be apparent from the face of the record, otherwise the Court exceeds the narrow scope of its authority. *State v. Clements*, 148 Idaho 82, 84, 218 P.3d 1143, 145 (2009). The decision to place the defendant on probation or continue a defendant on probation is in the discretion of the Court. *State v. Mitchell*, 77 Idaho 115, 119, 289 P.2d 315 317 (1955); I.C. § 19-2601(2).

III. ANALYSIS

A. The decision of the Court to continue Hoffman on his probation is not an action that falls within the purview of Idaho Criminal Rule 35.

Hoffman submitted the Motion to Correct Illegal Sentence "pursuant to I.C.R. 35," but failed to provide the specific subsection of the rule that Hoffman argues applies to this matter.

Therefore, the Court will discuss all three subsections of Idaho Criminal Rule (I.C.R.) 35.

I.C.R. 35(a) states that "[t]he court may correct a sentence that is illegal from the face of the record at any time." I.C.R. 35. On January 18, 2019, Judge Wayman sentenced Hoffman to 365 days of

incarceration for his second offense of driving under the influence, pursuant to I.C. § 18-8004 and I.C. § 8005(6). Judge Wayman suspended 186 days and provided 149 days of credit for time served. This sentence was not illegal when it was imposed, and is not illegal from the face of the record. Therefore, this subsection of Rule 35 is not applicable to Hoffman's case.

The first part of I.C.R. 35(b) reads, "[w]ithin 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction, a motion may be filed to correct or reduce a sentence and the court may correct or reduce the sentence." I.C.R. 35. First, the Court's decision on May 2, 2019, to continue Hoffman on probation, does not qualify as the imposition of Hoffman's sentence; the imposition of Hoffman's sentence occurred on January 18, 2019. Second, as discussed above, Hoffman's sentence was not illegal when it was imposed, thus no corrections need be made to it.

Lastly, the substantive portion of the motion filed by Hoffman is asserting that Hoffman has the right to reject the Court's decision to continue Hoffman on probation; Hoffman's motion is not requesting a correction or reduction in the sentence imposed by Judge Wayman. Therefore, this subsection of Rule 35 is not applicable to Hoffman's case.

The second part of I.C.R. 35(b) reads, "[t]he court may also reduce a sentence on revocation of probation or on motion made within 14 days after the filing of the order revoking probation." I.C.R. 35. This subsection is not applicable to Hoffman's case, as Hoffman is not requesting a reduction in his sentence.

The last part of I.C.R. 35(b) reads, "[m]otions are considered and determined by the court without additional testimony and without oral argument, unless otherwise ordered. A defendant may only file one motion seeking a reduction of sentence." I.C.R. 35. This subsection is not applicable to Hoffman's case, as Hoffman is, again, not seeking a reduction of his sentence.

Finally, I.C.R. 35(c) reads, "[a] motion to correct a court's computation of credit for time served, granted pursuant to Idaho Code § 18-309 or 19-2603, may be made at any time." I.C.R. 35. This

subsection is not applicable to Hoffman's case.

In conclusion, Rule 35 is not applicable to Hoffman's case, as the Court's decision to continue Hoffman on his probation is not covered by either Rule 35(a), 35(b), or 35(c).

B. If this Court were to reach Hoffman's arguments on the merits, Hoffman's claims must be denied.

As mentioned above, I.C.R. 35 is not the appropriate vehicle with which to bring this matter to the Court. If the Idaho Criminal Rules allowed for a motion for reconsideration other than via I.C.R. 35 (this Court finds they do not), and this Court could somehow reach the merits of Hoffman's claims and arguments, the Court must still reject Hoffman's claims.

1. Hoffman did not object to a term or condition of probation at any time prior to signing the probation agreement, but instead agreed with every term and condition of probation, as evidenced by his initials next to each term and condition of probation, as well as by his signature at the bottom of the Probation Agreement.

Hoffman argues that he has the right to reject the Court's decision to continue him on probation, and should be permitted to serve his underlying jail sentence when he so demands. Mot. to Correct Illegal Sentence, 1–2. In support of his position, Hoffman cites to a single sentence from *State v. Josephson*, 125 Idaho 119, 867 P.2d 993 (Ct. App. 1993), and a single sentence from *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964). The *Josephson* case covers the assertion made in the *Franklin* case, so *Franklin* need not be discussed in too much detail. The single sentence from *Josephson* is: “[Defendant] had the right at any time to decline probation and instead serve the suspended portion of the sentence...” *State v. Josephson*, 125 Idaho 119, 122, 867 P.2d 993, 996 (Ct. App. 1993).” Mot. to Correct Illegal Sentence, 2. It is the “at any time” language that counsel for Hoffman seizes upon. That is misplaced. Counsel for Hoffman's quote from *Josephson* is accurate, as the pertinent portion of that case reads, “[h]ad Josephson found the consent to search condition of probation to be too onerous, he had the right at any time to decline probation and instead serve the suspended portion of the sentence, *State v. Gawron*, 112 Idaho 841,

843, 736 P.2d 1295, 1297 (1987); *State v. Sandoval*, 92 Idaho 853, 861, 452 P.2d 350, 358 (1969); *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964), which in this case consisted of only a fine and community service.” 125 Idaho 119, 122, 867 P.2d 993, 996 (Ct. App. 1993). The Court notes that *Josephson* concerned the initial imposition of probation terms (“Following his sentencing for the assault convictions, Josephson failed to report to his probation officer.” 125 Idaho at 121, 867 P.2d at 995), and not a situation such as the present case where probation was continued following a probation violation. Likewise, *Franklin* dealt with a defendant who had his sentence withheld and probation terms initially imposed, and did not address the situation such as the present case where probation was continued following a probation violation.

While the *Josephson* decision has the words “at any time”, the cases to which the Idaho Court of Appeals cited in *Josephson* for that proposition, do not have such “at any time” language. *State v. Gawron* does not state “at any time”, but instead reads: “It is also noted that if a defendant considers the conditions of probation too harsh, he has the right to refuse probation and undergo the sentence.” 112 Idaho at 843, 736 P.2d at 1297. *Gawron* also involved the initial imposition of probation terms (the term at issue was that Gawron submit to reasonable searches) and not a situation such as the present case where probation was continued following a probation violation. *State v. Sandoval* does not state “at any time”, but instead reads: “A defendant may decline probation, should he consider its terms too onerous, and demand instead to be sentenced by the court. *Franklin v. State, supra*, and cases cited therein.” 92 Idaho at 861, 450 P.2d at 358. *Sandoval* did not deal with a probation violation in which his terms of probation were continued. In *Sandoval*, the defendant was initially put on probation for involuntary manslaughter and had his license suspended as a condition of probation. 92 Idaho at 854, 450 P.2d at 351. Sandoval argued that since he was a migrant farmworker, he was required to drive to the job, and such term of probation constituted cruel and unusual punishment. 92 Idaho 853, 861, 450 P.2d 350, 358. The Idaho Supreme Court held:

When it is remembered that defendant's crime arose out of the operation of a motor vehicle, the condition of probation prohibiting him from driving bears a reasonable relationship to his crime and to his rehabilitation. To impose such condition was not an abuse of discretion. There has been no showing that the condition is impossible of fulfillment. Nor is the period of probation excessive.

Id. (citations and footnotes omitted). *Franklin v. State* does not state, “at any time”, but instead reads: “A defendant may decline probation when he deems its conditions too onerous, and demand instead that he be sentenced by the court. *Application of Oxidean*, 195 Cal.App.2d 814, 16 Cal.Rptr. 193 (1961); *People v. Alexander*, 182 Cal.App.2d 281, 6 Cal.Rptr. 153 (1960); *People v. Caruso*, 174 Cal.App.2d 624, 345 P.2d 282 (1959); *In re Osslo*, 51 Cal.2d 371, 334 P.2d 1 (1958); *Birnbaum v. United States*, 107 F.2d 885, (4th Cir. 1939), 126 A.L.R. 1207; 24 C.J.S. Criminal Law, *supra*.” 87 Idaho at 298. 392 P.2d at 555. The Court has read each of the cases cited by the Idaho Supreme Court in *Franklin*. Neither *Oxidean*, *Alexander*, *Caruso*, *Osslo*, nor *Birnbaum* deal with a denial of probation terms following a probation violation hearing. Each of those cases concern terms and conditions of probation that were imposed at sentencing.

The California case of *In re Osslo* is instructive on the “at any time” issue. In that case, probationers filed a motion to have their case reduced to a misdemeanor and pay a fine instead of being placed on probation. 1 Cal.2d 371, 372, 334 P.2d 1, 3. This was the first time petitioners expressed to the trial court their desire to reject probation. The Supreme Court of California held:

In *People v. Billingsley* (1943), *supra*, 59 Cal.App.2d Supp. 845, 850, it is said that “Doubtless election to serve the sentence rather than accept probation must be timely made or probation will be deemed to have been accepted.” We do not now decide whether a defendant might in some circumstances lose his right to disavow probation by failure to make “timely” manifestation of “election to serve the sentence rather than accept probation.” In the circumstances of this case petitioners' assertion of that right, made promptly upon the unsuccessful termination (as to all but one provision) of their attacks on the terms of probation by appeal and application for certiorari, was timely.

1 Cal.2d 371, 382, 334 P.2d 1, 8-9. In that case, from the time of imposition of probation terms, probationers had contested certain probation provisions, first through a habeas corpus action, then appeals. *In re Osslo* cites *Billingsley*, where the defendant refused probation at the time it was

imposed. The Superior (Appellate) Court of California held in *Billingsley*: “Doubtless election to serve the sentence rather than accept probation must be timely made or probation will be deemed to have been accepted. In the case at bar, the appellant has, within proper time, exercised her election by a rejection of probation, and she should be imprisoned under her original sentence.” *People v. Billingsley* (1943), *supra*, 59 Cal.App.2d Supp. 845, 850 (Cal. App. 1943). *In re Osslo* and *Billingsley* make it clear that the time for Hoffman to have refused probation was when Judge Wayman originally imposed his probation terms and conditions on January 18, 2019. Instead of rejecting those terms, Hoffman accepted them.

Going back to *Josephson*, the issue was whether the defendant’s consent to searches of his person and property, a condition in his probation agreement, was voluntary or involuntary. 125 Idaho 119, 122, 867 P.2d 993, 996 (Ct. App. 1993). In affirming the district court’s finding that Josephson’s consent to search was indeed voluntary and supported by evidence on the record, including the fact that Josephson signed the probation agreement, the Idaho Court of Appeals noted that “Josephson did not, in fact, consider the consent involuntary or objectionable until *after* a search pursuant to the consent resulted in his arrest.” *Id.* (emphasis added). The Court then stated:

Had Josephson found the consent to search condition of probation to be too onerous, he had the right at any time to decline probation and instead serve the suspended portion of the sentence, *State v. Gawron*, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987); *State v. Sandoval*, 92 Idaho 853, 861, 452 P.2d 350, 358 (1969); *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964), which in this case consisted of only a fine and community service. Josephson did not raise objection to terms of his probation before Judge Schroeder at the time of sentencing, when his probation officer presented him with the probation agreement in October 1990, when he appeared before Judge Schroeder on a subsequent probation violation report in August 1991, or at any other time prior to his arrest in the present case.

Id. at 122, 867 P.2d at 996. The Court held that since Josephson did not raise an objection to the particular consent to search condition of his probation until after he was arrested in 1992 based on that very condition, Josephson’s waiver of his Fourth Amendment rights was voluntary. *Id.* The facts in *Josephson* are essentially the facts in Hoffman’s case. Inserting the facts of this case to that

holding, “Josephson [Hoffman] did not raise objection to terms of his probation before Judge Schroeder [Judge Wayman] at the time of sentencing, when his probation officer presented him with the probation agreement in October 1990 [on February 5, 2019].” The Josephson decision does not describe the “subsequent probation violation report in August 1991.” Even if that fact could breathe life into Hoffman’s argument, Hoffman has still not set forth why he feels his probation is too onerous.

Similar to *Josephson*, where the defendant did not object to the condition at-issue contained in the probation agreement until after he was arrested for violating his probation, here, Hoffman did not object to being on probation in any regard until after he was arrested for violating his probation. The Court in *Josephson* used the words “at any time” when describing when a defendant can decline the imposition of probation. The context of the Court’s decision provides that “at any time” means any time before the defendant signs the probation agreement. The Court in *Josephson* makes it a point to state that Josephson agreed to the terms and conditions of probation, as acknowledged by his signing of the probation agreement, and only objected to the consent to search condition of his probation at a later date – after a search of his property was conducted and it was discovered that he violated his probation. The very next sentence explains that if Josephson had found the consent to search condition of his probation to be too onerous, he could at any time refuse to sign the probation agreement, ultimately declining probation, and instead serve the underlying jail sentence. Though not the focus of the decision, the Court in *Josephson* makes clear that when a defendant signs the probation agreement, they are agreeing to the terms and conditions contained in the agreement. If a defendant disagrees with a term or condition, he or she can object to said term or condition and instead serve the underlying sentence; otherwise, simply, he or she agrees to comply with the terms and conditions by signing the agreement.

Here, Hoffman could have, at any time prior to signing the agreement, objected to a term or condition that he found to be too onerous. That did not occur here. Hoffman instead initialed next

to each term and condition contained in his probation agreement, and provided his signature at the end of the agreement. Therefore, Hoffman agreed with the terms and conditions of his probation.

More recently, the Idaho Court of Appeals in *State v. Santana* held:

A defendant has the right to decline probation when he or she deems its conditions too onerous and may, instead, serve the suspended portion of the sentence. *State v. McCool*, 139 Idaho 804, 807, 87 P.3d 291, 294 (2004); *State v. Gawron*, 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987). It is essential that defendants receive notice of the substantive conditions of their probations at sentencing for two reasons. First, notice apprises defendants of what conduct the court expects of them. *See Medley*, 73 Idaho at 480-81, 253 P.2d at 797-98. Second, notice affords defendants the opportunity to consider the terms and determine whether to accept probation. *See McCool*, 139 Idaho at 807, 87 P.3d at 294.

162 Idaho 79, 82, 394 P.3d 122, 126 (Ct. App. 2017). The Idaho Court of Appeals did not use the “at any time” language. *Santana* was not informed by the Court or in writing about a Fourth Amendment waiver. *Santana* dealt with the initial imposition of probation terms and conditions, and did not involve continuation of probation following a probation violation. In the present case, as mentioned in more detail above, on January 18, 2019, Judge Wayman covered the terms and conditions of probation with Hoffman on the record, to which Hoffman verbally accepted and accepted by his signature on the Supervised Probation Order (Judgment, 4), and Hoffman acknowledged those same terms and conditions on February 5, 2019, when he signed the Probation Agreement. Kootenai County Misdemeanor Probation, Probation Agreement, 1.

In conclusion, *Josephson* does not support Hoffman’s position that the defendant has the power to reject the Court’s decision to simply continue him or her on probation following a probation violation, and at that time demand instead to serve the underlying jail sentence. The cases cited by *Josephson*, to wit, *Gawron*, *Sandoval*, and *Franklin*, do not support Hoffman’s position that the defendant has the power to reject the Court’s decision to simply continue him or her on probation following a probation violation, and at that time demand instead to serve the underlying jail sentence. Nor does *Santana*. However, *Josephson*, *Gawron*, *Sandoval*, *Franklin*, and *Santana* do support the position that a defendant may decline the initial imposition of probation

if he finds a term or condition of probation to be too onerous, and instead of signing the probation agreement, the defendant may choose to serve the underlying jail sentence.

2. Even if Hoffman had the right to decline probation after his probation violation and his supervised probation was continued, Hoffman has not identified a particular condition of probation that he considers to be too onerous.

Unlike the defendant in *Josephson* who found the particular consent to search condition of probation to be too onerous, Hoffman has not identified a particular condition that he considers to be too onerous. Hoffman has not once stated that the terms and conditions of his probation, as a whole, or individually, are too onerous. Hoffman has only indicated to the Court that he rejects the Court's decision to continue him on probation, but has failed to provide the Court with any reason as to why that is. No explanation was provided to the Court by Hoffman or by his lawyer at the hearing on May 2, 2019. No explanation was provided to the Court by Hoffman or by his lawyer in the Motion to Correct Illegal Sentence filed by Hoffman. No explanation was provided to the Court by Hoffman or by his lawyer at the hearing on May 16, 2019. In all likelihood, the Court may assume that Hoffman is making this demand because he would rather serve his very limited amount of jail time and be free from the 'confines' of probation, as opposed to having to be a law-abiding citizen on probation for two years. But the Court cannot make that assumption and the Court is left with the fact that no explanation has ever been made by Hoffman or his lawyers as to what terms and conditions of supervised probation are too onerous.

At the admit/deny hearing for Hoffman's probation violation, the prosecuting attorney indicated that Hoffman was now unwilling to comply with the terms of probation. (Admit/Deny Hr'g, May 2, 2019, 11:42 AM). Additionally, Hoffman's attorney stated that Hoffman wanted to do his time instead of his probation. *Id.* Hoffman's attorney stated he was of the belief that "probation is a choice, and you can always choose to not do probation and serve your sentence." *Id.* Further, in Hoffman's Motion to Correct Illegal Sentence, Hoffman states, "[t]he Court found

[Hoffman] to be in violation of his probation...and ordered [Hoffman] to continue on probation. The Defendant rejected probation, and informed the Court he chose to not accept probation.” Mot. to Correct Illegal Sentence, 1. While it is generally understood that Hoffman does not want to be on probation, the record is devoid of any objections by Hoffman to any particular terms of probation. On the contrary, Hoffman signed the Supervised Probation Order on January 18, 2019, and initialed each term and condition of the Probation Agreement on February 5, 2019.

In *State v. Gawron*, the Idaho Supreme Court noted “that if a defendant considers the conditions of probation too harsh, he has the right to refuse probation and undergo the sentence.” 112 Idaho 841, 843, 736 P.2d 1295, 1297 (1987). Once again, the defendant must consider a condition of probation to be too harsh or too onerous before he or she has the right to refuse probation. In *State v. Sandoval*, the Idaho Supreme Court stated, “A defendant may decline probation, should he consider its terms too onerous, and demand instead to be sentenced by the court.” 92 Idaho 853, 861, 452 P.2d 350, 358 (1969) (citing *Franklin v. State*, 87 Idaho 291, 298, 392 P.2d 552, 555 (1964) (“A defendant may decline probation when he deems its conditions too onerous, and demand instead that he be sentenced by the court.”). In *Franklin*, the Idaho Supreme Court cited to *People v. Caruso*, 174 Cal. App. 2d 624, 647, 345 P.2d 282, 296 (1959), for the following proposition:

The terms of probation are discretionary and as our Supreme Court has recently stated: ‘Probation is a privilege, an act of grace or clemency,’ and if the conditions imposed appear to a defendant to be more onerous than he cares to accept, he has the right to refuse probation and to insist that sentence be pronounced. *In re Osslo*, 51 Cal.2d 371, 377, 381, 334 P.2d 1.

In considering the above case law, it is abundantly clear that a criminal defendant must identify a particular term or condition of probation, or all terms and conditions for that matter, as being too onerous. Hoffman has not done that. A defendant does not have the right to reject a court’s decision to continue him or her on probation simply because he or she no longer wants to be on probation. Case law shows the defendant must state why he finds a specific term (or all terms) to

be too onerous. Hoffman has failed to do that.

Instead, Hoffman simply “rejected probation, and informed the Court he chose to not accept probation.” Mot. to Correct Illegal Sentence, 1. If Hoffman had identified a particular term or condition of probation as being too onerous when Judge Wayman discussed probation with Hoffman, or when Hoffman was presented with the Probation Agreement, Hoffman would have been within his right to decline probation and instead serve his underlying jail sentence. However, that did not occur here, as Hoffman agreed with each term and condition of probation, and signed the Probation Agreement.

Hoffman then came before the Court on a probation violation, 104 days after having probation imposed, and asserted that he had the right to reject the Court’s decision to continue him on probation. That position is not supported by I.C.R. 35(a)–(c), nor is it supported by the case law put forth by Hoffman, or the additional case law found by this Court.

Finally, there is perhaps a reason why all the cases the Court has reviewed from Idaho appellate courts and reported decisions from other jurisdictions all discuss the right to refuse probation at sentencing and that this Court can find no cases where the right to refuse probation arises at a later date, upon probation violation, where the Court decides to continue probation and not add any new terms. Probation is a contract that a defendant is entitled to refuse and to insist upon a normal sentence. *Smith v. State*, 349 P.3d 1087, 1092 (Alaska Ct. App. 2015). That contract was entered into by Hoffman with Judge Wayman on January 18, 2019. Since this Court changed no terms of probation and did not add additional time to the period of probation, this Court has done nothing to alter the terms of that contract Hoffman made with Judge Wayman back on January 18, 2019. Instead, Hoffman now seeks to alter the term of that agreement that he made with his sentencing judge. That should not be allowed.

In summary, Hoffman has not convinced the Court that he has the right to reject the Court’s decision to continue him on probation.

IV. CONCLUSION AND ORDER

From a procedural standpoint, the decision of the Court to continue Hoffman on his probation is not an action that falls within the purview of Idaho Criminal Rule 35. For that reason alone, Hoffman’s Motion to Correct Illegal Sentence must be denied. Additionally, were there a procedural mechanism for this Court to reconsider its decision (this Court finds there is not such a mechanism), and that this Court could consider the merits of Hoffman’s argument, that argument is not supported by the cases Hoffman cites, *Josephson* and *Franklin*, nor is it supported by *Gawron*, *Sandoval* or *Santana*.


IT IS HEREBY ORDERED Hoffman’s Motion to Correct Illegal Sentence is DENIED.

NOTICE OF RIGHT TO APPEAL

YOU, REUBEN MYLES HOFFMAN, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer.

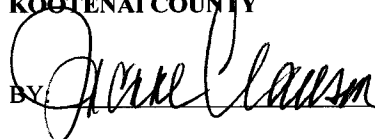
DATED this 4th day of June, 2019.


JOHN T. MITCHELL, District Judge

I hereby certify that on the 4th day of June, 2019 a true and correct copy of the foregoing Order was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Counsel - Benjamin Onosko *pa.faxe@kegov.us*
Prosecuting Attorney - *KCPAICOURTS@kegov.us*
Kootenai County Adult Misdemeanor Probation
KcMpe@kegov.us

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: , Deputy