

FILED _____

AT _____ O'clock _____ M
CLERK, 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.)
)
 CRAIG WAYNE AXTELL,)
)
)
 Defendant.)
)
 _____)

Case No. **CRF 2003 22537**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
"MOTION TO RECONSIDER
OCTOBER 18, 2011 MEMORANDUM
DECISION"**

I. PROCEDURAL HISTORY AND BACKGROUND.

On October 18, 2011, this Court entered and filed its "Memorandum Decision and Order on Defendant's Motion to Dismiss." That memorandum decision reads as follows:

I. FACTUAL BACKGROUND.

Defendant Craig Wayne Axtell (Axtell) was placed on probation and violated his probation several times, the most recent being a finding of probation violation which occurred following a Report of Violation filed on July 29, 2011. Axtell filed a Motion to Dismiss on September 15, 2011, claiming that his period of probation had run prior to July 29, 2011, and thus, the probation violation should be dismissed. Motion to Dismiss, p. 1.

On May 18, 2004, Axtell was sentenced by this Court on the felony crime Eluding a Peace Officer, Idaho Code § 18-1404, to two years fixed, two years indeterminate for a total unified sentence of four years, and was sent on a retained jurisdiction. On November 4, 2004, this Court placed Axtell on three years of supervised probation. Axtell's probation period was extended at various points in time thereafter, the most recent being an extension which occurred on May 12, 2011, for an additional four

months, until September 12, 2011. The maximum period of probation for the offense of Eluding a Peace Officer is five years, the maximum period of time Axtell could have been sentenced. I.C. § 19-2604(7), I.C. § 20-222.

II. ANALYSIS.

In calculating the maximum period of time for Axtell's probation, November 4, 2004, is when the five year maximum period of probation began running, at the moment the Court announced probation terms in open court. *State v. Russell*, 122 Idaho 515, 517, 835 P.2d 1326, 1328 (Ct.App. 1991). Axtell correctly argues that under *State v. Harvey*, 142 Idaho 727, 731-32, 132 P.3d, 1255, 1259-60 (Ct.App. 2006), the maximum probation period is tolled from the time a probation violation proceeding is commenced to the time the defendant is placed back on probation. Motion to Dismiss, p. 2. Axtell concedes the five year period is tolled from September 13, 2005, the date a Report of Violation was filed, until December 20, 2005, the date this Court continued Axtell's probation as the result of his September 13, 2005, probation violation. *Id.* This Court agrees with those dates and the 98 days tolling. However, Axtell absconded on July 15, 2005, which would add another **59** days to the tolling period. Axtell then argues the five year period is tolled again from September 26, 2008, until June 18, 2009, for another period of tolling of 265 days. *Id.* However, the Court issued a Bench warrant for Axtell's arrest on September 22, 2008, so an additional **four** days must be added. Axtell then argues the five year period is tolled again from October 5, 2010, to May 12, 2011, for another period of tolling of 582 days. *Id.* This Court agrees with that period and the number of days. Axtell acknowledges a Report of Probation Violation was filed on August 15, 2007 (actually, this Court issued an Order to Show Cause why probation should not be violated), with an order modifying probation entered at the September 27, 2007, hearing. *Id.* Axtell argues he should not have the five year period tolled for these **43** days because he was not in custody. *Id.* Axtell argues that, with all the probation tolling to which Axtell accepts, the maximum probation period would have ended on June 8, 2011. *Id.* This Court agrees with that calculation, but finds additional days should be added to the tolling period.

Harvey makes it clear that a person's probationary period is extended while he is in custody on a probation violation (and gets a concomitant credit for time served on his sentence). *Harvey* also clarified that the time period a person absconds from probation also tolls the probationary period: "We 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." 142 Idaho 727, 731, 132 P.3d 1255, 1259. The Idaho Supreme Court adopted that ruling from *Harvey* in *State v. Doe*, 147 Idaho 326, 329, 208 P.3d 730, 733 (Idaho 2009):

In 2002, *Harvey* filed an I.C.R. 35 motion to correct an illegal sentence. He argued that when the district court revoked his probation, it lacked jurisdiction to do so.

Interpreting I.C. § 20-222, the Court of Appeals determined that a probationary period is tolled “from the date probation revocation proceedings are commenced until probation is continued or revoked.” 142 Idaho at 731, 132 P.3d at 1259. The Court of Appeals reasoned that not applying the tolling rule would lead to a patently absurd result “nullify[ing] legislative intent that probation rehabilitate the defendant while protecting society” and that “the Idaho legislature could not have intended for a probationer to avoid the conditions of probation entirely by absconding from supervision until the probationary period expired.” *Id.* at 731, 132 P.3d at 1259.

See also *State v. Gamino*, 148 Idaho 827, 829, 230 P.3d 437, 439 (Ct.App.,2010).

Adding the 59, 4 and 43 days, results in an additional 106 days being added to Axtell’s June 8, 2011, calculation, extending his maximum probation term to September 22, 2011, ten days after his probation term as set by this Court expired. But more importantly, and dispositive of Axtell’s Motion to Dismiss, Axtell’s maximum probation term ended September 22, 2011, which is over a month after the August 15, 2011, Report of Violation was filed.

IT IS HERBY ORDERED THAT CRAIG WAYNE AXTELL’s Motion to Dismiss is **DENIED**.

Memorandum Decision and Order on Defendant’s Motion to Dismiss, pp. 1-3.

(emphasis in original).

On November 2, 2011, the day before Axtell’s disposition hearing on his probation violation was scheduled, counsel for Axtell filed a “Motion to Reconsider October 18, 2011 Memorandum Decision.” Axtell argued that the period of tolling from July 15, 2005, to September 12, 2005, should not be considered by the Court because the allegation that Axtell absconded, found in the September 12, 2005, Report of Violation, had been withdrawn by the State at the December 20, 2005, admit-deny hearing. Motion to Reconsider October 18, 2011 Memornadum [sic] Decision, p. 2. Axtell also argues that the period of tolling from August 15, 2007, to September 27, 2007, should not be considered by the Court because the August 15, 2007, motion to show cause was initiated only for Axtell’s failure to timely complete his

community service. *Id.*

II. ANALYSIS.

As previously discussed by this Court, the holding of *Harvey* is clear: “Thus, we hold that a probationary period is tolled from the date probation revocation proceedings are commenced until probation is continued or revoked.” 142 Idaho 727, 731, 132 P.3d 1255, 1259. The Idaho Supreme Court in *Harvey* could have limited that period to the time period that a bench warrant was outstanding, or the time period that a defendant had in fact absconded (the Idaho Supreme Court discussed that very scenario in the sentence that preceded the above quoted holding), but the Idaho Supreme Court did not make such a limitation. The Idaho Supreme Court in *Harvey* discussed the situation involving a probation violation filed and later being determined by the district court to have in fact been committed (*Id.*), but did not include that fact situation or that language in its holding.

The period from July 15, 2005, to the September 12, 2005, Report of Violation should not be considered as a period of tolling by the Court for the simple reason that “probation revocation proceedings were commenced” on September 12, 2005. If, in fact, Axtell were later found to have actually absconded from probation on July 15, 2005, then, based on the *dicta* in *Harvey*, such tolling could occur. However, because the prosecutor withdrew that allegation (that Axtell had absconded as of July 15, 2005) at the December 20, 2005, hearing, that period cannot be counted as tolled time. Had the probation officer filed the Report of Violation on July 15, 2005, then under *Harvey*, the tolling would have begun on that date. The probation officer did not file the Report of Violation for another two months, and that failure is fatal to the tolling of the time period. That, combined with the State’s withdrawal of the allegation of

absconding, eliminate any ability to resurrect that tolled period.

Axtell's argument that the period of tolling from August 15, 2007, to September 27, 2007, should not be considered by the Court because the August 15, 2007, motion to show cause was initiated only for Axtell's failure to timely complete his community service is without merit for two reasons. First, under the express terms of the holding in *Harvey*, the "probation revocation proceedings were commenced" on August 15, 2007, with the filing of the Affidavit on Failure to Complete Community Service and Motion to Show Cause Why Probation Should not be Revoked. Second, while this filing may have "only" been due to Axtell's alleged failure to timely perform community service, *Harvey* makes it clear "...it would be unreasonable to conclude that a probationer could violate conditions of probation and keep the clock running at the same time, thereby annulling both the principle and purpose of probation." *Id.*, citing *State v. Hackett*, 363 S.C. 177, 609 S.E.2d 553, 554-55 (S.C. Ct.App. 2005). While the *dicta* in *Harvey* then discusses the fact that *Hackett* dealt with absconding, the Idaho Supreme Court quoted the *Hackett* with apparent approval in *Harvey*.

The Court has also read *United States v. Izatt*, 2010 WL 2867818 (D. Idaho 2010), in which Federal District Judge Edward Lodge interpreted *Harvey*. This Court agrees with Judge Lodge's not adopting Izatt's argument that just because the probation period is tolled by initiation of probation revocation proceedings, it is unjust to require a probationer to adhere to his probation terms and conditions from the time probation revocation proceedings are initiated until the probationer has had his probation revoked and sentence imposed or placed back on probation. However, that is not the issue in the present case.

The fact that the tolled period from July 15, 2005, to the September 12, 2005,

is no longer applicable causes Axtell's maximum probationary period to have ended prior to the filing of the July 27, 2011, Report of Violation.

III. ORDER.

IT IS HEREBY ORDERED Axtell's "Motion to Reconsider October 18, 2011 Memorandum Decision" is GRANTED.

IT IS FURTHER ORDERED Axtell's Motion to Dismiss filed September 15, 2011, is GRANTED. This case is DISMISSED and Axtell is discharged from his felony supervised probation.

IT IS FURTHER ORDERED the Report of Violation filed July 27, 2011, is of no effect.

IT IS FURTHER ORDERED the probation violation evidentiary hearing/disposition hearing in this case scheduled for December 15, 2011, is VACATED.

IT IS FURTHER ORDERED counsel for Axtell shall prepare a Judgment consistent with this Memorandum Decision and Order.

DATED this 29th day of November, 2011.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of November, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

- ___ Defense Attorney – MARTIN NEILS 446-1701
- ___ Prosecuting Attorney – ANNA ECKHART
- ___ Probation & Parole, fax: 769-1481
- ___ Community Service (Interoffice Mail)
- ___ KOOTENAI County Auditor (Interoffice Mail)

- ___ KOOTENAI County Sheriff (Certified Copy)
- ___ Idaho Department of Correction
[certified copy faxed to (208) 327-7445]
- ___ IDOC CCD, fax (208) 658-2186

___ Defendant, at Kootenai Co. Jail
CLERK OF THE DISTRICT COURT KOOTENAI COUNTY
BY: _____
Deputy