

STATE OF IDAHO)
County of KOOTENAI)^{ss}

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 ON DEFENDANT'S MOTION
TO DISMISS**

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.**

DATED this 18th day of October, 2011

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

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

Defense Attorney - Martin Neils
Prosecuting Attorney - Anna Eckhart

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy