

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.)
)
) **JEFFREY ALAN DUWE,**)
)
) DOB: 10-20-67)
) SSN: 548-77-1446)
) IDOC: 71375)
)
) *Defendant.*)
)
)
 _____)

Case No. **CRF 2003 3661**

**MEMORANDUM DECISION AND ORDER
GRANTING PLAINTIFF'S MOTION TO
RESCIND PROBATION**

I. BACKGROUND.

On March 13, 2006, the plaintiff State of Idaho filed its Motion to Rescind Probation. On March 15, 2006, defendant Jeffrey Alan Duwe filed his Objection to Motion to Rescind Probation. Oral argument on the motion and objection was held March 20, 2006.

The State of Idaho correctly states the procedural background of this case. On September 17, 2003, Duwe was sentenced on two counts of Lewd Conduct With a Minor Under Sixteen, to two concurrent three year fixed sentence and nine years indeterminate for a total of twelve years, and placed on a retained jurisdiction pursuant to Idaho Code § 19-2601. At the sentencing hearing, Duwe denied he had committed the full extent of the acts testified to by his victim, even though the jury had found him guilty on both counts. Duwe was sentenced and ordered to that retained program with the expressed reason given by the Court at the sentencing hearing, and stated by the Court in its September 17, 2003 Sentencing Disposition order: "IT IS

RECOMMENDED THAT YOU TAKE ANY PROGRAMMING AIMED AT RECOGNIZING YOUR RESPONSIBILITY FOR THESE TWO OFFENSES.”

Sentencing Disposition, p. 2. Following completion of his retained jurisdiction, the State of Idaho Department of Corrections expressed the opinion that Duwe had made sufficient progress in addressing and reducing his denial and defensiveness, and that he deserves a chance to now receive a new psychosexual evaluation (to include a polygraph), as well as treatment in the community. On March 8, 2004, Duwe appeared for his scheduled jurisdictional review hearing. This hearing was timely as the Court’s 180 day jurisdiction period expired on March 15, 2004. At that March 8, 2004 hearing, the Court pointed out on the record that it was unwilling to consider probation until such updated psychosexual evaluation and polygraph testing was obtained, and Court continued the hearing to April 14, 2004. The testing was unable to be scheduled until April 29, 2004 so the hearing was again continued to May 6, 2004. Duwe remained in custody the entire time. At that May 6, 2004 hearing, the test results were presented, and based upon those results, the Court placed Duwe on probation for eight years.

II. ANALYSIS.

The State argues *State v. Diggie*, 140 Idaho 238, 240, 91 P.3d 1139, 1141 (Ct.App. 2004) holds the issue “of jurisdiction is fundamental, and may be brought to the Court’s attention at any time.” Motion to Rescind Probation, p. 2. The State argues *State v. Taylor*, 121 P.3d 961, 962 (2005) has construed Idaho Code 19-2601(4) narrowly:

The statute only permits a court to retain jurisdiction over a prisoner for 180 days. Upon the expiration of that time period, the court loses jurisdiction to place the prisoner on probation.

Motion to Rescind Probation, p. 2.

Duwe argues two points. First, that the State has offered no authority that a motion to rescind probation is appropriate. That is a hollow argument if the Court lacked jurisdiction back on May 6, 2004. *Diggie* indicates that a motion for an order revoking probation is the appropriate motion. 140 Idaho at 241, 91 P.3d at 1139.

The second argument is that the State should have filed an appeal to challenge the Court’s lack of jurisdiction, just as it did in *Taylor*. While a direct appeal of the May 6, 2004 order would have been an appropriate vehicle for a determination of the

jurisdictional issue, Duwe has offered no authority that it is the exclusive vehicle for doing so. Duwe urges a more narrow interpretation of *Diggie*, that “jurisdiction can be raised at any time in regards to an appeal.” Objection to State’s Motion to Rescind Probation, p. 2. That is not a quotation from *Diggie*, and indeed the Idaho Court of Appeals held that the district court in *Diggie* had lost its jurisdiction under Idaho Code § 19-2601(4) when that court placed *Diggie* on probation.

The Idaho Court of Appeals in *Diggie* left open the issue of whether extraordinary circumstances could allow an extension for district court action beyond the 180 day time period:

We deem it unnecessary to hold in this case that a sentencing court may never make a decision to place a defendant on probation within a reasonable time after the 180-day period of retained jurisdiction has expired where extraordinary circumstances exist that may explain or justify court action beyond the statutorily established period.

140 Idaho at 241, 91 P.3d at 1145. On July 1, 2005, the State of Idaho legislature specifically addressed that issue when it amended Idaho Code § 19-2601(4) to allow the court’s jurisdiction to be extended thirty days in limited circumstances. However, this statutory change is of no avail to Duwe for two reasons. First, the May 6, 2004 hearing occurred more than thirty days beyond the expiration of the 180 day period which was March 15, 2004. Second, the Idaho Supreme Court in *Taylor* indicated there would be no retroactive effect to this statutory change in Idaho Code § 19-2601(4) when it wrote: “In 2005 the statute was amended to extend the court’s jurisdiction for thirty additional days in limited circumstances, but in 2004 there was no exception to the expiration of the court’s jurisdiction.”

The remainder of *Taylor* answers the jurisdictional question in Duwe’s case:

Because the 180-day period of retained jurisdiction expired without the district court affirmatively placing the Defendant on probation, the Defendant remained committed to the custody of the Idaho Board of Correction. The district court’s judgment placing the Defendant on probation was therefore void because the court no longer had jurisdiction.

121 P.3d 961, 962-63. Clearly, the Court lost jurisdiction in this case as of March 15,

2004. The Court's act of placing Duwe on probation was void. There is no procedural defect to the State's Motion to Revoke Probation. Duwe remains and has remained at all times committed to the custody of the State of Idaho Board of Correction.

III. ORDER

IT IS HEREBY ORDERED the plaintiff State of Idaho's Motion to Rescind Probation is **GRANTED**.

DATED this 12th day of May 2006.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 2007 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Lynn Nelson
Prosecuting Attorney – Arthur Verharen
Probation & Parole

KOOTENAI County Sheriff

Idaho Department of Correction
[certified copy
Faxed to (208) 327-7445]

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy