

On June 20, 2006, a bench warrant was issued by Judge Marano for a probation violation. The bench warrant was served on Vaudreuil that same day. The bench warrant noted that Vaudreuil was sentenced on three counts of Idaho Code § 39-6312. On October 19, 2006, a hearing was held and Judge Marano determined Vaudreuil had violated his probation and ordered him to serve an additional 335 days in the county jail.

After serving that time in jail, Vaudreuil was released and was still on probation. On May 17, 2007, another bench warrant was issued by Judge Marano for another probation violation. That bench warrant was also served that same day. The bench warrant noted that Vaudreuil was sentenced on three counts of Idaho Code § 39-6312. Vaudreuil served an additional 187 days and was released on November 20, 2007, pursuant to a court order dismissing the Order to Show Cause proceeding.

On December 28, 2008, Vaudreuil filed a Motion for Credit for Time Served, requesting that all time served on the two bench warrants be applied and given credit for each of his three counts, Count I, Count III and Count IV. In other words, Vaudreuil wanted one day credit on *each* of his three counts of violating a protective order, for each day served under the bench warrants, even though his sentences were imposed consecutively. Judge Marano held a hearing on that motion on January 17, 2008. Briefs were filed, and on February 21, 2008, Judge Marano issued his Order Denying the Defendant's Motion for Credit for Time Served. On March 31, 2008, Vaudreuil filed his Notice of Appeal. The parties briefed the issue on appeal and stipulated to submit the appeal on the briefs without argument, pursuant to Idaho Appellate Rule 34(a). Accordingly, the appeal is now at issue.

II. ANALYSIS.

Whether a court properly applies the law governing credit for time served is a question of law which over which reviewing courts exercise free review. *State v. Brashier*,

130 Idaho 112, 113, 937 P.2d 424, 425 (Ct.App. 1997). Where a probationer has been arrested for a probation violation, the defendant's incarceration will count from the time of the service of the bench warrant as part of the sentence. See I.C. § 19-2603; *State v. Lively*, 131 Idaho 279, 280, 954 P.2d 1075, 1076 (Ct.App. 1998); *State v. Covert*, 143 Idaho 169, 170, 139 P.3d 771, 772 (Ct.App. 2006). A defendant is entitled to credit for those periods of incarceration served prior to disposition of a probation violation disposition, which are not served voluntarily as a condition of probation, but not entitled to time served after the commencement of probation if incarceration was imposed as a condition of probation. *Covert*, 143 Idaho 169, 170, 139 P.3d 771, 772.

Vaudreuil was sentenced to consecutive jail terms with 335, 305, and 185 days suspended respectively, and consecutive periods of probation by Magistrate Judge Marano. Vaudreuil then served 522 days pursuant to the issuance of two bench warrants for probation violations. Adopting Vaudreuil's argument would allow him to triple that credit for time served on his three consecutive sentences.

Vaudreuil claims Judge Marano erred in denying Defendant's Motion for Credit for Time Served pursuant to the bench warrants. Vaudreuil refines the issue as whether the incarceration imposed and served pursuant to the bench warrants was based on each of the three separate offenses for which he was sentenced. Appellant's Brief, p. 4. Idaho Code § 19-2508 states that a bench warrant must be in "substantially in the following form", and the form itself lists several things, one of which is: "...of the crime of _____." Vaudreuil argues that because I.C. § 19-2507 describes the format of a bench warrant and requires the bench warrant designate the crime forming the basis of the warrant, his arrest on the bench warrants for the specific crimes in the warrants means that any jail time served should be counted as credit for time served on *each* of the three counts listed on the

face of the warrants. Appellant's Brief pp. 4-5. The bench warrants stated Vaudreuil was, "Sentenced on Idaho Codes: 39-6312, 39-6312, 39-6312" and were issued because Vaudreuil had allegedly violated the terms and conditions of his probation.

The State of Idaho argues the language in I.C. § 19-2507 provides a basic guideline for the form of a bench warrant, and the purpose of a warrant containing a general statement of the crime a defendant was convicted of is so that the arresting officer can inform defendant of the underlying basis for the arrest. Respondent's Reply Brief, p. 3. The State goes on to claim Vaudreuil's argument (that listing all three counts on the bench warrants means Vaudreuil should receive credit on all three counts) is not appropriate and "negates the clear intent of Judgments entered in this case." *Id.*

This Court agrees with the State of Idaho's interpretation. This Court is not persuaded by Vaudreuil's argument that just because I.C. § 19-2507 indicates the bench warrant should list the crime or crimes for which a defendant has been found guilty (as the bench warrants in this case did), Vaudreuil gets credit for each day served under those warrants on each of the three sentences which were imposed consecutively. Such an interpretation would allow the statute which simply suggests a form to be used for bench warrants, trump Judge Marano's deliberate decision to sentence Vaudreuil consecutively. Such an interpretation would in essence "reward" a defendant sentenced consecutively for multiple charges who is later placed on probation, to then violate his or her probation and convert the judge's consecutive sentences to concurrent sentences.

Such an interpretation would also serve to make part of Vaudreuil's sentence consecutive (the portion served immediately after sentencing), and part of Vaudreuil's sentence concurrent (the portions served at two separate times under the two bench warrants). "Such hybridization of consecutive and concurrent sentences is erroneous."

Mickelson v. Idaho State Correctional Institution, 131 Idaho 352, 355, 955 P.2d 1131, 1134 (Ct.App. 1998). The Idaho Court of Appeals went on to state:

A sentence is *either* consecutive to or concurrent with another sentence, but never both. A singular sentence simply cannot be partially concurrent and partially consecutive to another sentence.

Id. (emphasis in original).

Vaudreuil does not argue Idaho Code § 18-309 in his brief, and that statute provides him his strongest argument. Idaho Code § 18-309 deals with the computation of a term of imprisonment and states:

In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to the entry of judgment, if such incarceration was for the offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently return thereto, the time during which he was at large must not be computed as part of such term.

The Idaho Supreme Court has held that the purpose of I.C. § 18-309 “is clearly to give a person convicted of a crime credit for such time as he may have served prior to the actual sentencing upon conviction.” *State of Idaho v. Hoch*, 102 Idaho 351, 352, 630 P.2d 143, 144 (1981). The Idaho Supreme Court found the intent of the legislature was not “that a person so convicted should have that credit pyramided simply because he was sentenced to consecutive terms for separate crimes.” *Id.* In *Hoch*, the defendant Hoch was arraigned on two charges of burglary and was unable to post bond. *Id.* Hoch spent 383 days in confinement before he pled guilty and sentenced on the two counts to consecutive five-year terms. *Id.* The Idaho Supreme Court affirmed the district court’s order and denied Hoch’s motion asserting that I.C. § 18-309 required that he be given 383 days for *each* of the five-year sentences on the two counts (which, since imposed consecutively, would have

amounted to a total of 766 days credit under Hoch's argument). *Id.*

While *Hoch* was not cited to the Court by either party, *Hoch* is on point and controlling. The majority decision in *Hoch* is fairly conclusory. The dissent in *Hoch* is better written and more logically supported than the majority decision. The dissent focuses on the language in Idaho Code § 18-309 that reads: "In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to the entry of judgment, *if such incarceration was for the offense for which the judgment was entered.*" Focusing on that italicized language of the statute, the dissent of Justice Bistline holds both statutory construction and fairness require that if you are in custody not for serving your sentence, but instead on a warrant that mentions all your charges, counts or crimes for which you are being held, you should receive credit on each count. 102 Idaho 351, 352-56, 630 P.2d 143, 144-148. However, the dissenting opinion of Justice Bistline is not the present state of the law in Idaho. This Court must follow the majority decision in *Hoch*.

When there is controlling precedent on questions of Idaho law "the rule of stare decisis dictates that we follow it, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990). While it is important that parties and their counsel have predictability regarding the law so that they may make informed decisions in the conduct of their affairs, when the judicial interpretation of a statute is manifestly wrong, stare decisis does not require that we continue an incorrect reading of the statute. "We have stated frequently that we will not follow prior incorrect decisions merely because the cases exist. The rule to stand by decided cases and to maintain former adjudications contemplates more than blindly following a former decision even if it is manifestly wrong." *Sherwood v. Carter*, 119 Idaho 246, 256, 805 P.2d 452, 462 (1991).

Greenough v. Farm Bureau Mut. Ins. Co. of Idaho, 142 Idaho 589, 592-93, 130 P.3d 1127, 1130-31 (2006). While this Court finds the dissent in *Hoch* to be more intellectually honest

than the majority opinion, the majority opinion avoids the absurd situation of allowing a person who pleads to or is found guilty of multiple charges, who then is given the privilege of probation by a judge, to then convert his consecutive sentence to a concurrent sentence by violating his probation. The majority decision in *Hoch* is not “manifestly wrong”, it is not “unjust”, but the dissent simply provides a more intellectually honest interpretation of Idaho Code § 18-309.

In addition to *Hoch*, *Mickelson* is also on point. Being decided seven years after *Hoch*, *Mickelson* certainly indicates the majority decision in *Hoch* is the state of the law in Idaho. The Idaho Court of Appeals in *Mickelson* wrote:

This Court has previously held that when a defendant is incarcerated for more than one offense before judgment is entered, he or she is entitled to have credit for jail time served applied toward both sentences if the sentences are imposed to run concurrently. However, if the sentences are imposed to run consecutively, a defendant is not entitled to have credit for jail time applied to each consecutive sentence since it would result in affording a defendant double credit. See, e.g., *State v. Brashier*, 127 Idaho 730, 738, 905 P.2d 1039, 1047 (Ct.App.1995) (a defendant is entitled to credit for time served prior to entry of judgment if incarceration was for the offense for which the judgement was entered); *State v. Hernandez*, 120 Idaho 785, 820 P.2d 380 (Ct.App.1991) (a defendant is only entitled to have credit for time actually served in confinement applied to concurrent sentences; a defendant is not entitled to pyramid his time to receive credit for more time than he has actually served); *State v. Hale*, 116 Idaho 763, 779 P.2d 438 (Ct.App.1989) (defendant is entitled to receive credit for time served if incarceration is for the offense upon which the defendant is later sentenced); *Matthews v. State*, 113 Idaho 83, 741 P.2d 370 (Ct.App.1987) (trial court did not err in applying defendant's credit for time served only to one of two sentences where sentences were consecutive, but result would be different if sentences were concurrent).

Mickelson, 131 Idaho 352, 355, 955 P.2d 1131, 1134.

In *State v. McCarthy*, 145 Idaho 397,_____, 179 P.2d 360, 361 (Ct.App. 2008) the district court issued a bench warrant following the filing of alleged probation violations. While McCarthy was in jail awaiting disposition of the charged probation violations, an arrest warrant was served on the defendant for the new charges arising from the same acts

that constituted the probation violation. *Id.* The Idaho Court of Appeals reasoned that although the Idaho Supreme Court has held that a defendant whose probation is revoked cannot receive credit for time served in jail *as a condition of probation*, credit must be given for jail incarceration after arrest for a *probation violation*. *Id.* at 361 (citations omitted) (emphasis in original). The Court of Appeals further stated that where a defendant is jailed for three counts of delivery of drugs and given *concurrent* sentences, he is entitled to credit against each sentence for the period of his pre-judgment incarceration. *Id.* at 362 (citing *State v. Hernandez*, 120 Idaho 785, 791-792, 820 P.2d 380, 386-387 (Ct.App. 1991)). The Court of Appeals contrasted *consecutive* sentences, stating:

[C]redit must only be allowed on only one of multiple consecutive sentences because conferring credit on each of the consecutive sentences would give the defendant credit for more time than he actually spent in confinement.

Id. The reasoning of the Idaho Supreme Court and Court of Appeals is equally applicable in Vaudreuil's case. Vaudreuil should not receive credit for more time than he actually spent in confinement on his consecutively imposed sentences.

III. CONCLUSION AND ORDER.

For the reasons stated above, Appellant Vaudreuil is entitled to credit for time served for incarceration after his arrest for a probation violation, but this credit is limited to only one of his three consecutive sentences. The decision of Judge Marano in his February 21, 2008, Order Denying the Defendant's Motion for Credit for Time Served is AFFIRMED;

IT IS HEREBY ORDERED this matter is REMANDED to the Magistrate Division.

Dated this 15th day of August, 2008.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2008 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Anna M. Eckhart
James A. Raeon

Hon. Eugene A. Marano

By _____
Jeanne Clausen, Deputy Clerk