

FILED 6-204

AT 9:34 O'clock AM

CLERK, DISTRICT COURT

[Signature]
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)
)
)
)
)
) Defendant.)

Case No. **CRF 2003 3661**

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
I.C.R. 35 MOTION FOR LENIENCY,
GRANTING DEFENDANT'S MOTION
FOR CREDIT FOR TIME SERVED,
AND NOTICE OF RIGHT TO APPEAL**

I. BACKGROUND.

On September 17, 2003, Duwe was sentenced as follows:

Count I Lewd Conduct With a Minor Under Sixteen, (a felony), Idaho Code § 18-1508, committed on July 21, 2002 – to the custody of the Idaho State Board of Correction for a fixed term of three (3) years followed by an indeterminate term of nine (9) years, for a total term not to exceed twelve (12) years. This sentence is to run CONCURRENT with the sentence imposed in Count II.

Count II Lewd Conduct With a Minor Under Sixteen, (a felony), Idaho Code § 18-1508 committed on November 15-24, 2002 – to the custody of the Idaho State Board of Correction for a fixed term of three (3) years followed by an indeterminate term of nine (9) years, for a total term not to exceed twelve (12) years. This sentence is to run CONCURRENT with the sentence imposed in Count I.

On that date Duwe was sent to prison on a retained jurisdiction program. On October 23, 2004, Duwe filed a Notice of Appeal regarding several issues.

On February 18, 2004, the Addendum to Pre-Sentence Investigation was received

by the Court. That document recommended probation but also recommended:

Obtaining a complete psychosexual evaluation from a qualified examiner to assess for needs, deviant thoughts and fantasies, and to provide direction and meaning to a treatment program. This should include a full-disclosure polygraph to ensure that Mr. Duwe has been truthful in detailing his sexual history.

Addendum to Pre-Sentence Investigation, p. 4. This report also pointed out the Court's jurisdiction will expire on March 15, 2004. Under Idaho Code § 19-2601(4), a court may sentence a defendant to the custody of the state board of correction for 180 days, and the prisoner will remain committed to the board of correction if not affirmatively placed on probation by the court.

On March 8, 2004, Duwe had his jurisdictional review hearing before this Court. At that hearing the Court continued the hearing to allow defendant to obtain an updated psychosexual evaluation and polygraph testing, in order for the Court to assess whether probation was justified. On March 26, 2004, the State of Idaho filed its "Motion to Relinquish Jurisdiction" on the ground that the Court's jurisdiction had expired on March 15, 2004. That motion was heard on April 14, 2004, and the Court denied that motion. The decision to deny that motion was made before the Idaho Supreme Court issued its decision in *State v. Taylor*, 142 Idaho 30, 121 P.3d 961 (2005). On May 6, 2004, the Court heard the continued jurisdictional review hearing. Having received and read the updated psychosexual evaluation of Edward J. Averett dated May 4, 2005, the Court placed Duwe on eight (8) years probation.

II. DUWE'S I.C.R. 35 MOTION.

On March 13, 2006, the State filed its "Motion to Rescind Probation", to which Duwe filed his "Objection to State's Motion to Rescind Probation". Oral argument was held on this motion on March 20, 2006. On May 12, 2006, this Court entered its

"Memorandum Decision and Order Granting Plaintiff's Motion to Rescind Probation". On May 31, 2006, Duwe filed his "Motion for Reconsideration of Order Revoking Probation Pursuant to I.C.R. 35", stating such motion is being "...made as a plea for leniency."

A hearing was requested, but not noticed up for hearing. The decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally imposed sentence is directed to the sound discretion of the district court. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct.App. 1994). No hearing is necessary on the grounds stated in the motion, for the reasons stated below.

A motion to reduce sentence is a motion for leniency. *State v. Strand*, 137 Idaho 457, 50 P.3d 472 (2002). The decision to grant or deny leniency is left to the sound discretion of the court. *Id.*

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. ... Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe....

* * *

However, if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion. (Citations omitted) *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987).

See also State v. Adams, 137 Idaho 275, 47 P.3d 778 (Ct.App. 2002).

The sentence imposed on September 17, 2003, was and is an appropriate sentence given Duwe's social and criminal history and the crimes for which sentence was imposed. It must be kept in mind that there were two counts of Lewd Conduct With a Minor Child, two victims, and events that occurred several months apart. A lesser sentence would depreciate the seriousness of Duwe's crimes. I conclude that the sentence imposed was and is necessary for the protection of society and the deterrence of Duwe and others.

The Court is mindful that Duwe had no prior criminal record. The Court

acknowledges that following his retained jurisdiction where he finally admitted the acts he performed, he was evaluated and was found to be an acceptable risk to be placed on probation while given sex offender treatment, and while on probation he was successful. At the time he was sentenced, there was no sex offender treatment available in prison. At the present time, that has changed. Duwe can receive treatment while in prison, and this will probably be at a more intensive level than while on probation. Once Duwe has served his fixed portion of his sentence, if he is as successful in prison programming as he was on probation, he should be eligible for parole.

III. DUWE'S MOTION FOR CREDIT FOR TIME SERVED.

On May 22, 2006, Duwe file his "Motion for Credit for Time Served", which contained limited briefing. Again, in this motion, Duwe requested a hearing but did not notice the matter for hearing.

Credit for time served is a creature of a statute. See Idaho Code §18-309 and Idaho Code §19-2603. While not cited in this case, often motions for credit for time served are made pursuant to I.C.R. 35. The decision whether to conduct a hearing on an I.C.R. 35 motion is directed to the sound discretion of the district court. *State v. Peterson*, 126 Idaho 522, 887 P.2d 67 (Ct.App. 1994). No hearing is necessary on the grounds stated in the motion, for the reasons stated below.

Duwe claims Idaho Code § 18-309 states a defendant is entitled to credit for time served for any time spent in incarceration, and that he is entitled to credit for the time he spent on probation prior to the Idaho Supreme Court's determination that the district court did not have jurisdiction to place him on probation. Motion for Credit for Time Served, p. 1. Duwe argues that under *State v. Taylor*, 142 Idaho 30, 31-31, 121 P.3d 961, 963 (2005), Duwe "remained committed to the custody of the Idaho Board of Correction" even

Supreme Court's decision in *Taylor*, and the District Court's decision in *Duwe*, Taylor was illegally released from imprisonment. Thus, Idaho Code § 18-309 is not applicable. At oral argument, the State of Idaho argued that Taylor's probation was a legal release. That position is not consistent with the decisions immediately just mentioned, and that position is inconsistent with the position that the State of Idaho at all times took in those cases.

In *Taylor v. State*, Taylor's second argument was that he is entitled to credit for time served is based on the language of the Idaho Supreme Court in *State v. Taylor*, 142 Idaho 30, 121 P.3d 961 (2005):

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 at 962-63. (emphasis added). (Taylor's) Motion for Credit for Time Served, p. 2, *Taylor v. State*, Kootenai County Case No. CV 2005 7267.

This Court noted in its "Memorandum Decision and Order Granting Petitioner's Motion for Credit for Time Served", p. 3, in *Taylor v. State*, Kootenai County Case No. CV 2005 7267: "While it seems odd that Taylor should get credit for time served when he was not actually in custody, this Court is unable to interpret the language of the Idaho Supreme Court's decision in *Taylor* any other way."

Duwe asks for credit for time served for all time he spent on probation after March 15, 2004. Duwe fails to inform the Court when he went back into custody following the Idaho Supreme Court's decision in *State v. Taylor*, 142 Idaho 30, 121 P.3d 961 (2005). Duwe also fails to note that he has already been given credit for time served from March 15, 2004 to May 6, 2004, the date he was actually released from

custody and placed on probation. The last calculation for credit for time served by this Court was on May 6, 2004, and Duwe was given credit for 366 days time served up to that date. For reasons stated below, Duwe is entitled to credit for time served from May 6, 2004, to the time he was taken back into custody, but this Court is unaware of that exact date. It is up to Duwe to make such computation and prepare a proposed order, with notice to the State regarding its accuracy and form.

IV. ORDER.

IT IS THEREFORE ORDERED that the defendant Jeff A. Duwe's "Motion for Reconsideration of Order Revoking Probation Pursuant to I.C.R. 35" be and the same hereby is **DENIED**.

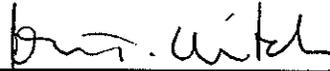
IT IS FURTHER ORDERED that the defendant Jeff A. Duwe's "Motion for Credit for Time Served" is **GRANTED** to the extent Duwe is entitled to credit for time served addition to the Court's prior calculation, from May 6, 2004 to the time he was taken back into custody.

NOTICE OF RIGHT TO APPEAL

YOU 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 2nd day of June, 2006.



John F. Mitchell, District Judge

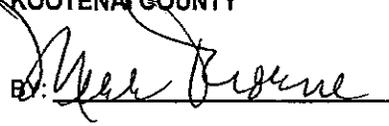
CERTIFICATE OF MAILING

I hereby certify that on the 2 day of June, 2006 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Anne C. Taylor, Christopher D. Schwartz
Prosecuting Attorney

State of Idaho Department of Corrections

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

By: , Deputy