

FILED _____

AT _____ O'clock _____ M
CLERK OF THE 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.)
)
 JOSEPH L. REESER,)
)
 Defendant.)
)
)

Case No. **MCR 01-14159**
MCR 01-16766
MCR 01-17569
MCR 01-19552

**MEMORANDUM OPINION AND
ORDER ON APPEALS**

Reeser appeals the Decision of Honorable Benjamin R. Simpson, the October 21, 2003 "Order After Hearing on Probation Violation/Contempt". Affirmed.

Henry D. Madsen, Deputy Prosecuting Attorney, for the State,
Joel Hazel, City Attorney for Post Falls, for the State.
John E. Redal, Attorney at Law, Coeur d'Alene, for Reeser.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 25, 2002, Reeser was sentenced to 365 days in jail in CR 2001 16766 for the crime of Domestic Violence, Violation of a Protection Order, all of which was suspended and he was placed on two years supervised probation. On that same date, a similar sentence was imposed upon Reeser in CR 2001 17569 for the misdemeanor crime of Resisting or Obstructing an Officer, a similar sentence was imposed upon Reeser in CR 2001 14159 for the misdemeanor crime of Malicious Injury to Property, and a similar sentence was imposed in CRF 2001 19552 for the misdemeanor crime of Domestic Violence, Violation of a Protection Order.

On October 21, 2003 Judge Simpson entered his "Order After Hearing on Probation Violation/Contempt" (identical order in all four cases), in which Judge Simpson ordered Reeser immediately be incarcerated in the Kootenai County jail for 351 days as a result of his admission to his probation violations. Judge Simpson found Reeser knowingly and willfully violated his probation by absconding, non-payment of supervision fees and having no valid evaluation. Probation was terminated and bond was exonerated.

On October 29, 2003, Reeser filed his Notice of Appeal in each case. While the Notice of Appeal is distinct for each of the four cases, the ground stated in each case is identical. Reeser makes it clear in his Notices of Appeal that he is "...appealing the sentence entered the 21st day of October, 2003." In the very next paragraph the ground is again repeated: "The defended [sic] is taking this appeal from the magistrates division of district court and the honorable Judge Simpson's sentence imposed in the above matter." Finally, Reeser states: "The said appeal is being taken from the Judges sentence entered upon a probation violation on the 21st day of October, 2003." On October 31, 2003, Judge

Simpson signed an Order for Stay on Appeal in each case, which set an appeal bond in each case at \$1,000.00. Said Order was filed and bond was posted on November 3, 2003.

The transcript was lodged and on January 12, 2004 the Notice of Settling Transcript on Appeal was filed. The Notice of Settling Transcript on Appeal set forth the Appellant's Brief must be filed by February 16, 2004 (they were timely filed on February 12, 2004), and Respondent's brief must be filed by March 15, 2004. No brief by the respondent was submitted in CR 01-17569, which was prosecuted by the Post Falls City Prosecutor, Joel Ryan. On January 21, 2005, the Kootenai County Prosecuting Attorney submitted identical briefs in the remaining three cases, CR 01-14159, CR 01-16766 and CR 01-19552. Those briefs are more than ten months late pursuant to the Notice of Settling Transcript on Appeal. As such, they are not considered.

Perhaps because response briefs were not filed in a timely fashion, these appeals were not brought to the Court's attention until December 2004. Accordingly, these appeals are at issue.

II. ANALYSIS.

Reeser's Notices of Appeal in each case focuses upon the **sentences** but ignores the fact that sentences were imposed in all four matters on February 22, 2002. As stated by Reeser in each case: "The issue on appeal is whether or not the sentence imposed by the court was unduly excessive, an abuse of discretion, and cruel and unusual punishment."

Under I.C.R. 54.3, Reeser had forty-two (42) days from the date evidenced by the filing stamp of the clerk of the court on the judgment, order or decree appealed. Thus, Reeser did not timely appeal from the sentence imposed February 22, 2002.

The recent Idaho Court of Appeals case, *State v. Jensen*, clearly sets out the law to answer the present question.

Appeals from any judgment, order, or decree must be made within forty-two days of the date evidenced by the filing stamp of the clerk of the court. Idaho Appellate Rule 14(a). This time requirement is jurisdictional, and an appeal taken after expiration of the filing period must be dismissed. *State v. Sapp*, 124 Idaho 17, 19, 855 P.2d 478, 480 (Ct.App.1993); *State v. Swan*, 113 Idaho 859, 861, 748 P.2d 1389, 1391 (Ct.App.1988); *State v. Tucker*, 103 Idaho 885, 888, 655 P.2d 92, 95 (Ct.App.1982).

In this case, the judgment of conviction was entered on April 25, 2000, and the magistrate revoked Jensen's probation on June 29, 2001. Jensen filed his notice of appeal on July 17, 2001, which was timely from the order revoking probation but not from the judgment of conviction. If Jensen's sentences violate double jeopardy protections, this violation occurred upon entry of his judgment of conviction and sentences, and the appeal could have been taken at that time. A probationary period does not extend the time in which a defendant may appeal from the judgment of conviction and sentence. *State v. Fox*, 122 Idaho 550, 551, 835 P.2d 1361, 1362 (Ct.App.1992); *Tucker*, 103 Idaho at 888, 655 P.2d at 95.

State V. Jensen, 138 Idaho 941, 944, 71 P.3d 1088, 1091 (Ct. App. 2003). Just as any double jeopardy violation in *Jensen* took place upon entry of his judgment and conviction and sentences, one would think that any “unduly excessive” sentence any “abuse of discretion” and any “cruel and unusual punishment” occurred upon entry of his judgment and conviction and sentences. **However**, *Jensen* goes on to state:

The present circumstance must be distinguished from one in which only the *length* of a sentence is challenged on appeal from an order revoking probation. The Idaho appellate courts have jurisdiction, on appeal from an order revoking probation, to entertain a claim that a sentence is excessive. This is so because, by terms of Idaho Criminal Rule 35, whenever a trial court revokes probation it has authority to sua sponte reduce the sentence that was originally pronounced. It is consequently permissible for appellants to present as an issue whether the trial court abused its discretion in failing to reduce a sentence upon the revocation of probation. That type of appeal is a challenge to a *new* decision (explicit or implicit) made by the district court upon revocation of probation. Accordingly, we have made it clear in such appeals that an appellate court will not consider whether the sentence was excessive *when originally pronounced* in the judgment of conviction and that our review is limited to whether the sentence was excessive in light of the circumstances existing when the court revoked probation.

138 Idaho at 944, 71 P.3d at 1091. (italics in original).

As mentioned above, Reeser's Notices of Appeal state he is "...appealing the sentence entered the 21st day of October, 2003" and "The said appeal is being taken from the Judges sentence entered upon a probation violation on the 21st day of October, 2003." In light of *Jensen*, Reeser could have more accurately stated his appeal was based upon the magistrate's abuse of discretion in failing to reduce the sentence upon the revocation of probation and whether such sentence was excessive in light of the circumstances existing when the court revoked probation. That is how this Court views the issue upon appeal.

This Court has read the transcript of the October 21, 2003 Order to Show Cause Hearing in the probation violations in these four cases. This Court is convinced that Judge Simpson acted well within the bounds of his discretion in not reducing the sentence originally imposed, and that the sentence was not at all excessive in light of the circumstances existing at the time he revoked Reeser's probation on October 21, 2003. Reeser admitted absconding from probation, admitted not paying his court fees, admitted failing to obtain an domestic violence evaluation by a certified evaluator (Tr. p. 5, Ll. 2-18), admitted he failed to show proof of employment and admitted he failed to pay his probation fees. Tr. p. 6, Ll. 1-20. Not only did Reeser show no remorse for what he had done, Reeser blamed his public defender for much of his own problems. Tr. p. 14, L. 9 – p. 15, L. 3; p. 16, L. 7 – p. 17, L. 2. Reeser admitted to Judge Simpson that he was running and actively hiding from supervision. Tr. p. 18, Ll. 15-18. Reeser admitted to Judge Simpson he had violated the no contact order. Tr. p. 18, Ll. 18-24. Judge Simpson found Reeser to be in denial (Tr. p. 18, L. 23 – p. 19, L. 2), found Reeser to not be credible (Tr. p. 22, Ll. 5-6) and blaming others for his situation. Tr. p. 22, Ll. 6-7. Judge Simpson ordered Reeser serve 351 days remaining on his one year sentence, and even though Reeser's attorney thought the sentences ran consecutively, Judge Simpson pointed out since he did not write "consecutive" on the judgments, the sentences would be imposed concurrently (Tr. p. 22, Ll.18-19), but Judge Simpson expressed regrets that he did not sentence consecutively stating: "...because of any case I've seen come though my court in a domestic violence setting cries out for a long sentence this is it." Tr. p. 22, Ll. 19-22.

This Court finds Judge Simpson acted well within the bounds of his discretion in not reducing the sentence originally imposed, and that the sentence was not at all excessive in light of the circumstances existing at the time he revoked Reeser's probation on October 21, 2003. Reeser has avoided service of his jail sentence over the last sixteen months while this appeal was pending.

Under I.C.R. 54.16 appellate argument "may" be heard, that is, oral argument is not mandatory. Furthermore, the Post Falls City attorney has failed to file a brief, and the Kootenai County prosecutor has failed to timely file a brief, so there is really nothing for the Appellant to address by way of oral argument.

ORDER

IT IS ORDERED that the decisions of Judge Simpson in each case are

AFFIRMED, and since a stay was entered in each case, all four cases are **REMANDED** to Judge Simpson for any further action necessary.

Dated this 1st day of February, 2005.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 2005 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Henry Madsen
Joel Hazel

John Redal

Judge Luster
Judge Verby
Judge Gibler
Judge Hosack

Judge Marano
Judge Wayman
Judge Watson
Judge Burton
Judge Simpson
Judge Friedlander

By _____
Merri Thorne, Secretary