

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37815

STATE OF IDAHO,)	2011 Unpublished Opinion No. 502
)	
Plaintiff-Appellant,)	Filed: May 31, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
KEVIN A. AUSTIN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Stephen W. Drescher, District Judge.

Order granting motion to reduce felony conviction to a misdemeanor, reversed.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for appellant.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for respondent.

GRATTON, Chief Judge

The State of Idaho appeals the district court’s order granting Kevin A. Austin’s motion to reduce his felony conviction to a misdemeanor pursuant to Idaho Code § 19-2604(2). We reverse.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Austin pled guilty to a felony charge and the district court imposed a unified sentence of five years with two years determinate, suspended the sentence, and placed Austin on a five-year period of probation. Subsequently, Austin admitted to violating the terms of the probation and the district court revoked his probation, executed the original sentence, and retained jurisdiction for one hundred eighty days. Upon completion of the period of retained jurisdiction, the district court again placed Austin on probation. After Austin was discharged from probation, he moved

the district court to reduce his felony conviction to a misdemeanor pursuant to I.C. § 19-2604(2), which the district court granted. The State appeals.

II.

ANALYSIS

The State contends that the district court lacked authority to reduce Austin's felony conviction to a misdemeanor pursuant to I.C. § 19-2604, because he had not, at all times, complied with the terms and conditions of probation. This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). Idaho Code § 19-2604 provides in relevant part:

(1) If sentence has been imposed but suspended, or if sentence has been withheld, upon application of the defendant and upon satisfactory showing that the defendant has at all times complied with the terms and conditions upon which he was placed on probation, or has successfully completed and graduated from an authorized drug court program or mental health court program and has at all times complied with the terms and conditions of probation during any period of probation that may have been served following such graduation, the court may, if convinced by the showing made that there is no longer cause for continuing the period of probation, and if it be compatible with the public interest, terminate the sentence or set aside the plea of guilty or conviction of the defendant, and finally dismiss the case and discharge the defendant

The language of the statute is clear and unambiguous and requires the defendant's compliance with the terms and conditions of probation "at all times" in order to be eligible for dismissal or reduction of the conviction. It has been clearly held that I.C. § 19-2604, means what it says. "A defendant who has at any time failed to do what he or she was required to do while on probation in a particular case has not at all times complied with the terms and conditions of his or her probation in that case." *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (discussing the "at all times" language in I.C. § 19-2604(2)). *See also State v. Thompson*, 140 Idaho 796, 798-799, 102 P.3d 1115, 1117-1118 (2004); *State v. Griffith*, 140 Idaho 616, 617, 97 P.3d 483, 484 (Ct. App. 2004); *State v. Schumacher*, 131 Idaho 484, 487, 959 P.2d 465, 468 (Ct. App. 1998).

In *Schwartz*, the defendant pled guilty to a felony, was granted a withheld judgment, and placed on probation. Thereafter, Schwartz admitted to violating the terms of the probation and the district court revoked the withheld judgment, imposed sentence, and retained jurisdiction. After the period of retained jurisdiction, the court placed Schwartz on probation. Upon

completion of the second period of probation, Schwartz moved to reduce his felony to a misdemeanor, which was denied. *Schwartz*, 139 Idaho at 361, 79 P.3d at 720. On appeal the Idaho Supreme Court held that, because Schwartz had not been “at all times” compliant with the terms and conditions of probation, including the first period of probation, the district court had correctly concluded that it was without authority under the statute to reduce the conviction. *Id.* at 363-364, 79 P.3d at 722-723.

Austin acknowledges that he is mindful of the holding in *Schwartz*, but asserts that the district court should be affirmed. The district court’s lone finding in granting the motion was “I think the application’s well-founded, and I’m going to grant it.” No basis has been presented, nor have we determined any, to distinguish this case from *Schwartz*. The record reflects that Austin was not at all times compliant with the terms and conditions of his probation and, therefore, was not entitled to relief under I.C. § 19-2604. The district court erred in granting the motion.

III. CONCLUSION

Austin had not at all times been compliant with the terms and conditions of his probation and, consequently, the district court was without authority to reduce his felony conviction to a misdemeanor pursuant to I.C. § 19-2604. Therefore, the district court’s order granting Austin’s motion to reduce his felony conviction to a misdemeanor is reversed.

Judge LANSING and Judge MELANSON **CONCUR.**