

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

* * * * *

THE STATE OF NORTH DAKOTA,)	
)	Supreme Court No. 20060131
Plaintiff and Appellee,)	
)	District Court No. 05-K-01105
vs.)	
)	
Gary Moore,)	
)	
Defendant and Appellant.)	

* * * * *

APPEAL FROM ORDER GRANTING STATE'S MOTION FOR CONTINUANCE
FROM THE DISTRICT COURT
STARK COUNTY, NORTH DAKOTA
SOUTHWEST JUDICIAL DISTRICT
HONORABLE ALLAN L. SCHMALENBERGER

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BRIEF OF APPELLANT

* * * * *

Submitted by:
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TABLE OF AUTHORITIES

CASES:

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State v. Foster, 1997 ND 8, 560 N.W.2d 194 ¶17,18,22

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State v. Murchison, 541 N.W.2d 435, 438 (N.D. 1995)¶18,22,24

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State v. Olsen, 540 N.W.2d 149, 150 (N.D. 1995) ¶16

State v. Ripley, 548 N.W.2d 24, 27 (N.D. 1996) ¶15

State v. Wicks, 68 N.D. 1, 276 N.W. 690 (N.D. 1937) ¶16

STATUTES:

N.D.C.C. § 29-33-03 ¶14,16

STATEMENT OF THE ISSUES

- I. Whether the District Court had jurisdiction to hear this matter?
- II. Whether the district court abused its discretion in finding good cause and allowing the trial to be held outside of the prescribed ninety day statutory time limit in violation of the Uniform Mandatory Disposition of Detainers Act?

STATEMENT OF THE CASE

[¶1] Defendant, Gary Moore (“Moore”) appeals from a decision of the district court, whereby the court determined that the State demonstrated good cause to hold the criminal trial of Moore outside of the ninety day time limit prescribed by the Uniform Mandatory Disposition of Detainers Act, which has been codified in North Dakota as N.D.C.C. ch. 29-33. (App. 27.)

[¶2] On February 16, 2006, a Preliminary Hearing was held before the Honorable Judge Allan L. Schmalenberger. (Transcript of Preliminary Hearing). At the conclusion of this hearing, Judge Schmalenberger orally ordered that the State had shown good cause for an extension of time to bring the matter to trial. (App. 39.) On March 24, 2006, Judge Schmalenberger signed the written order granting an extension of time to bring the matter to trial, which was filed on March 27, 2006. (App. 27.)

[¶3] On April 6, 2006, Moore appeared at the time scheduled for trial and entered a conditional plea, whereby he reserved the right to appeal the previous decision of the Court relating to the finding that the state had shown good cause for an extension of time to bring the matter to trial. (App. 41.)

[¶4] This appeal follows.

STATEMENT OF FACTS

[¶5] On or about September 15, 2005, Moore was served with a Criminal Complaint charging him with burglary, theft of property and criminal mischief while he was incarcerated at the North Dakota State Penitentiary on other grounds. (App. 3.)

[¶6] On November 28, 2005, Moore filed with the district court and served the state's attorney his Request for Disposition of Indictments, Information, or Complaints, and Notice of Place of Imprisonment. (App. 5.)

[¶7] On December 7, 2005 a Notice of Hearing was served upon Moore, whereby an Initial Appearance and Preliminary Hearing had been scheduled for January 9, 2006. (App. 9.) An Order to Transport was signed and delivered to the Stark County Sheriff's office on January 9, 2006. (App. 10.)

[¶8] On January 9, 2006, the date set for the Initial Appearance and Preliminary Hearing, Jim Hope, the Stark County Assistant State's Attorney, requested that a continuance be had because the Defendant was not in Bismarck, but instead was in Jamestown, which was granted. (App. 38.) On January 10, 2006, a Notice of Continuance was served upon Moore, whereby he was given notice that the hearing was rescheduled for February 6, 2006. (App. 11.)

[¶9] On February 6, 2006, Moore appeared before Judge Zane Anderson for his initial appearance. (Trans. of Initial Appearance.) At this time, Moore requested court appointed counsel. Also, at this hearing, Assistant State's Attorney James Hope informed the Court that Moore has filed the mandatory request for detainers. (Trans. of Initial Appearance.) Counsel was appointed on February 7, 2006. (App.14.)

[¶10] On February 16, 2006, a Preliminary hearing was held at the Stark County Courthouse. Moore appeared with counsel, Kevin McCabe and the State appeared through Assistant State's Attorney, James Hope.

[¶11] Following the Preliminary Hearing and the finding of probable cause, the filing of the Information, and Moore entering a not guilty plea, the State addressed the issue of the disposition of detainers and requested a reasonable continuance within which to set the trial of the matter. (App. 38.) The court orally granted the motion. (App.39.)

[¶12] On March 24, 2006, Judge Schmalenberger signed the Order Granting Extension of Time to Bring Case to Trial, which was filed on March 27, 2006. (App. 27.)

[¶13] On April 6, 2006, the date set for trial, Moore appeared and entered a conditional plea, whereby he reserved his right to appeal the March 24, 2006 signed order of the court. (App. 41.).

LAW AND ARGUMENT

I. THIS CASE SHOULD BE DISMISSED BECAUSE IT WAS NOT BROUGHT WITHIN THE NINETY-DAY STATUTORY PERIOD AND THERE WAS NO SIGNED ORDER ALLOWING FOR A CONTINUANCE WITHIN THE PRESCRIBED TIME LIMIT.

[¶14] Pursuant to the Uniform Mandatory Disposition of Detainers Act (“Detainers Act”), which has been codified in North Dakota as N.D.C.C. ch. 29-33, a prisoner has a right to have pending charges against him brought to trial within ninety days of the request. Specifically N.D.C.C. § 29-33-03 states:

Within ninety days after the receipt of the request and certificate by the court and prosecuting official or within such additional time as the court for good cause shown in open court may grant, the prisoner or his counsel being present, the indictment, information, or complaint must be brought to trial; but the parties may stipulate for a continuance or a continuance may be granted on notice to the attorney of record and opportunity for him to be heard. If, after such

a request, the indictment, information, or complaint is not brought to trial within that period, no court of this state any longer has jurisdiction thereof, nor may the untried indictment, information, or complaint be of any further force or effect, and the court shall dismiss it with prejudice.

[¶15] When a felony complaint is filed against an inmate, the trigger for the ninety-day period is when the prosecuting official and the court in which the untried complaint is filed receive the inmate's request for disposition of the detainer. State v. Ripley, 548 N.W.2d 24, 27 (N.D. 1996). Under the Detainers Act, the State [is] obligated to bring the matter to trial, or seek a continuance within ninety days. Id. (Citing, State v. Kania, 341 N.W.2d 361, 365 (N.D. 1983)).

[¶16] In this case it is undisputed that the ninety-day period under N.D.C.C. § 29-33-03 commenced on November 28, 2005. (App. 5.) As such, Moore's trial under the Detainers Act should have been held on or before February 27, 2006. This did not happen. Instead, during the Preliminary Hearing held on February 16, 2006, the State moved the court for a "reasonable continuance within which to set [the] trial of the matter", which the court granted. (App. 38.) However, the court failed to sign a written order on the request until March 24, 2006 and it was not filed until March 27, 2006. (App. 27.) As this Court has previously stated, "[a]bsent a statute or rule to the contrary, a written order of the court is entered and effective when it is signed by the judge." State v. Olsen, 540 N.W.2d 149, 150 (N.D. 1995) (citations omitted). A motion is pending until the court signs a written order disposing of it. Id. (Citing, State v. New, 75 N.D. 433, 28 N.W.2d 522, 523 (N.D. 1946)). Because Judge Schmalenberger only orally granted the motion, but did not sign the Order Granting the Extension of Time to Bring Case to Trial prior to the

February 27, 2006 deadline, the statute is clear in its remedy for this violation and the case should be dismissed with prejudice. Compare New, whereby this court stated, “[a]n oral denial does not constitute an order denying the motion. An order must be in writing. It must be signed by the judge. And the motion is pending until such time as a signed written order granting or denying it is made.” New at 523 (citing State v. Wicks, 68 N.D. 1, 276 N.W. 690).

II. THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE THE STATE DID NOT SHOW GOOD CAUSE FOR THE CONTINUANCE.

Standard of Review

[¶17] “Legal logic dictates sound discretion is the proper standard to be applied on the question whether or not good cause existed for extension or continuance, and that an appellate court will not reverse such decision except in instances where the trial judge abused his discretion. We have repeatedly stated that abuse of discretion is the equivalent of acting unreasonably, arbitrarily or unconscionably.” State v. Foster, 1997 N.D. 8, 560 N.W.2d 194 (citing, State v. Kania at 365).

[¶18] In North Dakota, the Supreme Court, in Foster, and while relying upon Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), enunciated the factors pertinent to determining whether an extension or continuance of a trial is for good cause. Foster at ¶7. Those factors include; the length of the delay; the reason for delay; the defendant’s assertion of his right; and prejudice to the

defendant. Id. Each factor must be weighed, but “no single factor is controlling.” State v. Murchison, 541 N.W.2d 435, 438 (N.D. 1995) (citation omitted).

a. Length of Delay.

[¶19] Gary Moore signed his request for Disposition of Indictments Information, or Complaints, and Notice of Place of Imprisonment on November 21, 2005. (App. 5.) It was served upon the district court and the state’s attorney on November 28, 2005. (App. 8.) As previously stated, Moore’s trial under the Detainers Act should have been held on or before February 27, 2006. But because the State was orally granted an extension, the trial was not held until April 6, 2006, thirty-eight days outside of the prescribed period under the Detainers Act.

b. Reason for the Delay.

[¶20] The only reason given by the State as to good cause for the delay is demonstrated in the following exchange between Assistant State’s Attorney James Hope and the Court:

[¶21] “[A]nd unbeknownst to the Clerk here and unbeknownst to the Clerk in Stutsman County, he was taken to Jamestown, and when our sheriffs went to get him, he wasn’t there, and so he was brought down, I believe, a week or two ago, and he requested counsel, so I believe good cause has been shown, and I would ask for a reasonable continuance within which to set trial of the matter.” (App. 38.)

[¶22] Clearly nothing in the file indicates that Mr. Moore contributed in any way to his trial being delayed. (Cf. Foster and Murchison, whereby the district courts determined that Defendants contributed to their trial being delayed.) The State knew that he was incarcerated at the time that he was served with a criminal

complaint, and it had the duty to make the necessary arrangements to have him transported to Stark County for an initial appearance and any subsequent court proceedings.

c. Defendant's Assertion of His Right.

[¶23] As previously discussed, Moore signed the detainer on November 21, 2005, and it was served upon the state's attorney and the court on November 28, 2005. (App. 5,8.) Moore's attorney objected to the State's oral motion for an extension at the Preliminary Hearing. (App. 39.) Under the circumstances, there is no doubt that Moore asserted his right to be tried before the expiration of the time prescribed by the Detainers Act.

d. Prejudice to the Defendant.

[¶24] As the Murchison Court stated, actual prejudice can take three forms; oppressive pretrial incarceration; anxiety and concern; and an impaired defense. Murchison at 439. Moore concedes that none of these three pertain to him.

[¶25] However, because Moore's trial was delayed through no fault of his own and after he clearly asserted his right under the Detainers Act, and because the State did not show good cause to extend the trial, the District Court abused its discretion by acting unreasonably, arbitrarily or unconscionably.

CONCLUSION

[¶26] Because the District Court lacked jurisdiction to hear this matter and because the District Court abused its discretion by extending the date to hear this matter, Defendant, Gary Moore respectfully requests that this Court reverse the

District Court's decision and dismiss this matter with prejudice.

Dated this 16th day of August, 2006.

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