

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

The State of North Dakota,)	Supreme Court No. 20060153
)	
Plaintiff/Appellee,)	
)	Morton County No. 30-04-k-1344
V.)	
)	
Paul Arthur Fischer,)	
)	
Defendant/Appellant)	

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 10 2006

STATE OF NORTH DAKOTA

BRIEF FOR THE DEFENDANT/APPELLANT
PAUL ARTHUR FISCHER

Appeal Taken From Order Denying Motion
For Extension Of Time For Notice Of
Appeal And Quashing The Notice Of
Appeal Dated April 28, 2006

Morton County District Court
South Central Judicial District
The Honorable Robert O. Wefald, Presiding

Submitted By:
Defendant/Appellant, Pro Se
Paul Arthur Fischer
JRCC #30348
2521 Circle Drive
Jamestown ND 58401

COPY

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Issues for Review

1. Did the trial court err in denying the defendant's motion for extension of time for notice of appeal and quashing the notice of appeal dated April 28, 2006.
2. Is the clerk of district court negligent in not filing defendant's notice of appeal into the record of actions.
3. Is the Assistant State's Attorney in error by failure to forward the defendant's notice to the clerk of district court.
4. By the merits of this case, was timely service of the notice upon adverse counsel sufficient to initiate the defendant's appeal.

Statement of the case

¶ 1 This is an appeal arising from the Order Denying Motion For Extension Of Time From Notice Of Appeal And Quashing The Notice Of Appeal Dated April 28, 2006. Paul Arthur Fischer, Defendant and Appellant, acting pro se (hereafter referred to as "Fischer") noticed this appeal from the afore mentioned order dated may 5, 2006, denying his formal request to grant in good faith, a thirty day (30) continuous to explore the mishap of his timely notice of appeal of his conviction and sentencing and pursuant to N.D.R. App. P. 4 (b) (4) file a second Notice Of Appeal.

Statement of Facts

¶ 2 On November 30, 2004, Fischer was arrested and jailed. A complaint was filed in Morton County, Criminal Case number 30-04-k-1344, charging him with manufacture of a controlled substance, possession with intent to deliver, possession of drug paraphernalia and criminal trespass. (See clerk's register of actions # 1 within the appendix for the brief (hereafter referred to as "appendix") PP. 1-3 and the complaint, appendix pp.4-5)

¶ 3 His bond, Set at \$50,000.00 when he made his initial appearance and later reduced to \$20,000.00 was never met and Fischer remained in custody at the Morton County Jail in Mandan, North Dakota for a total of 15 months and 4 days awaiting trial and then sentencing. He was convicted by jury on February 23, 2006 and sentenced by Judge Robert O. Wefald on March 3, 2006 to 20 years with 11 years

suspended for 5 years upon completion of serving 9 years (See register of actions #'s 84-85 and Judgment, appendix pp.6-11)

¶ 4 Fischer was transported to the North Dakota State Penitentiary where on march 28, 2006, he deposited into the outgoing mailbox from the Overflow Unit, one copy of his notice of appeal and order for transcripts to the Assistant State's Attorney, Brian D. Grosinger (hereafter referred to as "S.A.") who prosecuted his case and one copy to the clerk of court of the county in the district from which he was charged. The copy sent to the court clerk also contained the only certificate of service that was available to include due to an obstacle between Fischer and his case manager, Darin Ferderer, who was also the notary public whose seal is affixed. These documents were never logged into the clerk of court's register of actions.

¶ 5 Fischer, under the assumption that all was well with his appeal process, sent from N.D.S.P. a notice of amended order for transcripts and the stipulation to amended order for the transcripts dated April 17, 2006, 20 days later. (See register of actions # 91-94 and appendix pp. 12-13)

¶ 6 On April 21, 2006, S.A. filed a motion to quash the order for transcripts claiming that he believed there was no appeal noticed, nor filed with the clerk of court. S.A. did however, acknowledge notice upon the State's attorney of case but maintained that service of notice upon S.A. was not sufficient to initiate the appeal

process. (See register of actions # 95 and appendix pp 14-15) This motion contained a "Notice of Motion" pursuant to the provisions of Rule 3.2, of the North Dakota rules of Court, addressing Fischer¹.

¶ 7 Three days later on April 24, 2006, the trial court issued an order denying the request for transcripts. (See register of actions #96 and appendix p.16)² This was the first information Fischer received indicating that his original appeal notice of March 28, 2006 had not been filed with the clerk of court.

¶ 8 Upon this finding, Fischer filed a second notice of appeal dated April 28, 2006, in conjunction with his motion for extension of time for notice of appeal. (hereafter referred to as motion for time...) In this motion, Fischer made claim of properly noticing the clerk of court and that he included notice upon S.A. as a courtesy. He asked the trial court to accept his second notice and to grant him 30 additional days to investigate and produce proof that he did in fact place the documents into two separate envelopes, labeling one to each of the two parties mentioned, at the same address, 210 2nd street N.W. Mandan N.D. (see register of actions # 97-98 and appendix pp 17-22).

¹ N.D. Rule 3.2(a) allows for 10 days after service of a notice accompanying motion in which to file an answer brief by the opposing party.

² Trial courts order to quash order for transcripts is noticed for appeal in the supreme court # 20060140 stayed pending the outcome of case # 20060153

¶ 9 Within S.A.'s resistance to Fischer's motion for time, S.A. brings to light the defendant's prior appeal noticed before the trial, i.e. his rule 48(b). Again affirming that Fischer served upon S.A. a notice of appeal and order for transcripts dated March 28, 2006 (the original notice) claiming however, that there is no evidence that it was filed with the clerk of court for Morton County. S.A. also affirmed service of Fischer's motion for time..., along with the new notice of appeal (the second notice) dated April 28, 2006, presuming that this had been received and filed with the court.

¶ 10 Fischer filed this motion pursuant to rule 4(b) (4) of the N.D.R.App.P. S.A. argues that the rule requires that the defendant requesting the extension of time must affirmatively show the evidence for which the court would make the finding. Arguing further that Fischer has requested no hearing or provided any other method such an attempt was made claiming the court has no basis for a finding of good cause. (See register of actions #'s 99-100 and appendix 23-26)

¶ 11 On May 5, 2006 the trial court drafted its order denying Fischer's motion. The declaration of this decision is simply stated " The Court having considered the matter, hereby DENIES the defendant's Motion for Extension of Time For Notice of Appeal and QUASHES the Notice of Appeal dated April 28, 2006 and filed on May 2, 2006." (the second notice). Hence, the appeal at hand. (see register of actions #105 and appendix p.27) *see also appendix pp. 28-29, "Notice"*.

ARGUMENTS

[1] Did the trial court err in denying the Defendant's motion for extension of time... subsequently quashing the notice of appeal dated April 28, 2006?

Fischer raises the question whether the trial court was in err in denying his request for a thirty day continuous (See Motion for Time..., appendix p. 19, par 5, "Therefore" and Order Denying Motion..., appendix p.27) providing for a fair opportunity to show that he did in fact properly notice both the clerk of court as provided by Rule 3 (a) (1) and Rule 4 (b) (1) (A) and only as a courtesy, the Assistant State's Attorney (referred to as " the State"). (See appendix p. 19, par 4, "Whereas." See also Statement of Facts p. 3, par. 4)

Fischer motioned for time pursuant to N.D.R.App.P. 4 (b) (4) "upon a finding of excusable neglect or good cause." At the time of his drafting of this motion, Fischer was facing the final days allowed by court rules to file notice within an extension (the notice dated April 28) and he did so as soon as he was able upon discovery of the original notice dilemma. (See State's Motion to Quash Order for Transcripts, appendix p. 14, par. 1, "Motion." See also Statement of Facts p. 3, par. 6)

Fischer drafted his motion for time... relying on the theory and expectation that prison records and affidavits. along with the legal mail tracking records within the prison would suffice in providing proof that he timely noticed the clerk of court via the penitentiary mail system. "A pro se petitioners notice of appeal is -filed- at the moment of delivery to prison authorities for forwarding to the district court." F.R.App.P. 4 (a) (1)

28 U.S.C.A.; 28 U.S.C.A. § 2254. See also *Huston V. Lack*, 487 US 266 101 L.Ed. 2245 (1988)

“Unlike other litigants pro se prisoners cannot personally travel to the court house to see that their notice is stamped –filed- or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk’s process for stamping incoming papers but only the pro se prisoner is forced to do so by his situation.” *Fallen V. United States*, 378 U.S. 139, 84 S.Ct. 1689, 12 L. Ed 2d. 760 (1964)

“Unskilled in law, unaided by counsel, unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access – the prison authorities – and the only information he will likely have is the date he delivered the notice to these prison authorities and the date ultimately stamped on his notice.” *Fallen V. United States*, 378 U.S. at 144, 84 S.Ct at 1692-1693

“The time for appeal is mandatory and jurisdictional and an appeal not filed within the specified time must be dismissed unless it can be shown that the failure to file was excusable neglect, or at the time was extended by the trial court.” *State V. Metzinger*, 244 N.W. 2d 215 (ND 1976), *City of Minot V. Lunt*, 268 N.W.2d 482 (ND 1978)
(Emphasis added)

Believing that the court would consider that the object of exercise of appellate jurisdiction is to assure ultimate justice as far as possible to parties concerned and that the right to appeal is remedial and favored in the law, and in his untrained capacity, Fischer took the literal approach to the wording of Rule 4 (b) (4) of the N.D.R.App.P. In as much,

the rule for extension of time clearly States “upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. This rule applies to post conviction relief proceedings and the time limit for filing a notice of appeal may be extended in situations involving excusable neglect.” *McMorrow V. State*, 516 N.W.2d 282 (ND 1994) See also Fed. R. of App. P. 4.

The State argues that the Defendant requesting the extension of time must affirmatively show the evidence for which the court would make the finding. The State argues that there needs to be something more than unsupported Statement in a motion to prompt the court to exercise its discretion. (See State’s Resistance Motion, appendix p. 25, under Issue of Extension..., par. 1-2) Federal courts have determined that in order to establish excusable neglect, a party must show that the failure to file a timely notice of appeal was caused by unique or extra ordinary circumstances, *Hagert V. Hatton Commodities Inc.*, 421 N.W. 2d 473 (ND 1988). The State argues that Fischer has provided no affidavit, no exhibit, not any other form of documentation to show that it would be reasonable to believe he attempted to file the notice with the court. Further, that Fischer has requested no hearing or any other method of proving such an attempt was made. (See State’s Resistance Motion, appendix p. 25, under Issue of Extension..., par. 3)

In this Fischer concedes. However, his motion itself is requesting a 30 day extension to refile his notice of appeal pursuant to N.D.R.App.P. 4 (b) (4). (See Motion For Time..., appendix p. 17, “Motion”) The brief in support has a very accurate description of events including claim of evidence in support, “given the opportunity”.

(See appendix pp. 17-19) And finally, a respectful request for a 30 day continuous to explore the mishap and make right the wrong that has occurred in this instance. (See Motion for Time..., appendix p. 19, final par. "Therefore") It is possible that one may construe Fischer's motion as the State has because it is poorly written. Fischer holds, however, as a pro se author of the motion, that a careful reading along with the Assistant State's Attorney's personal understanding of the pro se defendant's position on the matter and intent, the request for time is very clear.

Fischer contends that the State has known from the time of his sentencing hearing that he informed the Court of his intention to appeal in rebuttal to the State's claim that Fischer showed no remorse. That any adverse actions to hinder or delay this appeal process is a miscarriage of the authority of his position. Fischer has demonstrated previously that he knows the process of noticing an appeal by the very admissions of the State that: [1] "The Defendant noticed an appeal once before, prior to trial and unsuccessfully because the case had not come to judgment."¹ This would show that the defendant knows by experience the policy of noticing an appeal. [2] "The Defendant served upon the State a Notice of Appeal and Order For Transcripts dated March 28, 2006." This showing that adverse counsel was made aware of notice. [3] "The State recognizes that things get lost in the mail." [4] "The State also recognizes that there is precedent that allows the court to exercise discretion in favor of a pro se Defendant." (See State's Resistance to Motion For Extension of Time..., appendix p. 24)

¹ Fischer submitted his Rule 48 (b) Motion to Dismiss prior to trial while representing himself pro se. The trial court denied it and Fischer noticed the Supreme court by way of the Clerk of District Court as provided by the N.D.R.App.P.. That action was deemed not appealable by the Defendant under N.D.C.C. § 29-28-06; however, it is reviewable from the entry of the final judgment under N.D.R.App.P. 35 (b) (2). Therefore, the appeal was ordered dismissed at the direction of the Honorable Gerald W. VandeWalle, Chief Justice. Entered February 2, 2006.

“A trial courts determination of a motion for an extension of time based upon excusable neglect will not be set aside on appeal absent an abuse of discretion.” K And K Implement V. First National Bank, 501 N.W.2d 734 (ND1993) And in this case, Fischer did not read the language of Rule 4 (b) (4) with the same understanding as the State. He found no clarification within the rule demanding that all evidence must accompany the motion to extend time, but rather understood the rule as yet one more step in a long process in evidencing one’s case. Had Fischer waited to motion for time... until he was able to gather all his evidence in support, “time” as prescribed by the rule would have expired. Fischer motioned for extension of time to preserve his right of appeal process to the best of his knowledge.

The Fischer case is similar in concept to Dehn V. Ottetail Power and must be held to the same potential for excusable neglect. In that case, the court held that “Appellants who served adverse counsel with notice of appeal from orders within 60 days of filing of orders but who failed to file notice of appeal until 62 days after filing orders, could seek an extension of time for appeal on ground of excusable neglect, though appellants failed to move for such an extension within 90 days of filing orders.” N.D.R.App.P. Rule 4 (a), Dehn V. Ottetail Power Co., 248 N.W. 2d 851 (ND 1976)

In Fischer, unlike Dehn V. Ottetail, the defendant did move for an extension within the time limitations set forth in Rule 4 (b) (4). Fischer holds that, even unable to present the fruits of his investigation of the missing notice addressed to the clerk of the district court or any documentation and affidavit of the notary public who personally examined his notices, there is still sufficient evidence found within the two opposing motions to grant an extension of time.

Therefore the trial court did indeed err in denying the Fischer's motion for extension of time...., subsequently quashing the notice dated April 28, 2006. The State had been noticed within the 30 day time limit prescribed by the rule and described in Dehn V. Ottertail Power Co. and that the State could have moved to dismiss the notice after evidence was heard.

[2] Is the clerk of district court negligent in not filing defendant's notice of appeal into the record of actions?

This is a question that must be answered by the Assistant State's Attorney, Brian D. Grosinger himself. A question Mr. Grosinger must answer by the oath of his office, is whether indeed he did accept not one, but two copies of the notice and order dated March 28, 2006. One of them, and only one, containing an Attorney's Certificate of Service. That certificate of service, addressing the representatives of the office of Morton County State's Attorney at 210 2nd Avenue N.W. in Mandan ND 58554. The very same address as the clerk of court, the same building and just a short distance down a strait hallway. The envelope that contained the certificate of service was addressed to the clerk of court for filing. (See Statement of Facts, par. 4) The notice the State produced for record via Attorney Thomas J. Glass² would show that either he received this letter that was intended for the court clerk from the Postal Service or that the office of the clerk of court mistakenly forwarded it to him without filing it in the register of actions. Non the less, the

² Attorney Thomas J. Glass had been a court appointed counsel that was directed by the trial Judge to remain as legal advisor for Fischer upon the court's granting of pro se representation statues.

notice is stamped "Received" on the day March 30, 2006. (See letter of Thomas J. Glass, Notice of Appeal, Order for Transcripts and Attorney's Certificate of Service, appendix pp. 30-33)

"The clerk of court operates from guidelines of a manual that when applied, will prevent the certifying of questionable court records. The significance of properly noting on each document, the pertinent filing information and the need to absolutely prohibit anyone from altering or attempting to alter a filed document, is of the greatest priority among the tasks of the clerk of court as well as the attorneys of the state." State V. Lestmeister, 293 N.W. 2d 875 (ND 1980). In 21 C.J.S. Courts § 225-227, we find articulated, the vital reasons for exactness, truth and care in court record keeping. See also 20 AM Jur. 2d, Courts § 51-63.

Fischer brings this point to view based upon the following omissions and misfiling of documents within the court clerk's register of actions in this case:

(1) Defendant's Petition to Access Court as Scheduled. This document was stamped "Filed in District Court." It was used in Fischer's Rule 48 (b) Motion to Dismiss of November 17, 2005. It is not posted anywhere in the register of actions. (See Petition to Access..., appendix p. 34).

(2) Another discrepancy is the Order Authorizing Payment of Witness Fees. Adjudicated February 24, 2006, it was not filed until March 28, 2006. The date Fischer's original notice was drafted which raises a question of accuracy. (See Order..., appendix p. 35).

(3) Correspondence from the court reporter to the clerk of court in reference to the case file is not listed in the register of actions. (See letter, appendix p. 36) This type of

correspondence may not necessarily need to be filed in the register of actions, however the following must be as it is argument out of the scope of the rules.

(4) Also not listed is correspondence from Judge Wefald to Penny Miller arguing on behalf of the State regarding Fischer's appeal of his Motion to Dismiss referred to in the State's Resistance. (See letter, appendix p. 37 and State's Resistance to Motion..., appendix p. 24, "Background")

These omissions and delayed filings are discrepancies in the court clerk's register of actions that show the possibility exists that the notice addressed to the clerk of court was forwarded unregistered, to the State's Attorneys office. Only Mr. Grosinger can answer as to the number of notices he received dated March 28, 2006, and only the envelopes they arrived in will show the intended addressee.

[3] Is the Assistant State's Attorney in err by failure to forward the defendant's notice to the district court?

Fischer understands the State's position to be a person upon being admitted to the bar of North Dakota who is required to take the oath prescribed by N.D.C.C. 27-11-20. *Menz V. Coyle*, 117 N.W. 2d 290 and that in taking the oath he is considered an officer of the court, N.D.C.C. 27-13-01 (3) and that the appointment, oath and duties for an Assistant State's Attorney fall under the State's Attorney's duties and official bond. N.D.C.C. 11-16-02 and that it is his obligation to pass on sufficiency of evidence as a quasi judicial officer of the court. *Kittler V. Kelsch* 56 ND 227. In the State's Motion to Quash Order for Transcripts and State's Resistance to Motion for Time..., the State

indicates he doesn't believe the defendant noticed the clerk of court, yet he did no more about the situation than to delay and hinder the appeal process. In addition, if in fact the State did receive two notices dated March 28, 2006 and didn't believe the clerk was noticed, one may consider that a mishap has occurred. Also the addresses on the exterior of the envelopes received would be indication.

Therefore, yes the Assistant State's Attorney is in err by failure to forward the defendants notice to the district court as a quasi judicial officer of the court or in alternative, return it to Fischer after he had stamped it "Received" with his finding that notice was not filed with the clerk.

[4] By the merits of this case, was timely service of the notice upon the adverse counsel sufficient to initiate the defendant's appeal?

State V. Fischer must be held by the previously stated case of Dehn V. Ottetail Power Co. in that he should be granted the extension of time. He noticed at least the adverse counsel i.e. the State. He also motioned for an extension of time within the limits of the rule. But there are more similarities in State V. Lewis and State V. Halborn.

In "Lewis" The Supreme Court, Vande Walls, J., held that: (1) under peculiar facts of case, defendant's notice of appeal filed with the District Judge and simultaneously served upon State's Attorney within 10 days after judgment was sufficient to give the supreme court jurisdiction over the appear even though rule required filing of notice of appeal with district court clerk. State V. Lewis, 300 N.W. 2d, 206 (ND 1980).

In Halbom the court held that: (1) Rules 3 (a) and 4 (b) of the N.D.R.App.P., are similar to the corresponding federal rules of appellate procedure and require a notice of appeal to be filed with the clerk of the trial court within 10 days of the judgment – or order appealed from. (These rules have been amended to read 30 days in which to file notice of appeal). When our rules fallow their federal counterpart we may look to federal practice and authority to construe our rules. Explanatory Note to rule 1, N.D.R.App.P., State V Manke 328 N.W. 2d 799 (ND 1982)

(2) The Explanatory Note to rule 3, F.R.App. P., indicates that although the time for filing a notice of appeal is mandatory and jurisdictional, the federal appellate rules confirmed prior caselaw which dispensed with literal compliance with the requirement of filing a motion of appeal with the clerk of the trial court if the notice was timely filed with an acceptable court official citing Halfen V. United States, 324 F2d 52 (10th Cir. 1963) [pro se appellant's notice of appeal mailed to and received by Trial Judge within time limits for filing notice of appeal held sufficient] and Rickey V. Wilkins, 335 F.2d 1 (2nd Cir. 1964) [pro se prisoner's notice of appeal filed in court of appeals held sufficient] See Huston V. Lack, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed 2d 245 (1988) [citing Halfen for the proposition that Rule 3 and 4 F.R.App. P., do not compel the conclusion that in all cases, receipt by the clerk of the trial court is the moment of filing a notice of appeal and holding that a pro se prisoner's notice of appeal is deemed filed at the moment of delivery to prison authorities for forwarding to the District Court]. See also 9 Moore's Federal Practice ¶ 203.09 (1992). In this case Halbom's notice of appeal was "received" by the trial judge on May 20, 1992. The trial judges receipt of the notice of appeal within

ten days of the May 11, 1992 judgment revoking Halbom's suspended sentence is sufficient to confer appellate jurisdiction, and Halbom's appeal is timely.

In Fischer, the State has not alleged the appeal to be frivolous, but has affirmed service of notice upon the state in a timely fashion along with defendant's order for transcripts. That as an officer of the court knowledgeable to some degree in the history of North Dakota case law should have done more to prevent the hindrance of valuable court time and handled this case in a manner that would more likely serve fair justice.

Therefore Fischer holds that the merits of this case and in timely service of his notice of appeal upon adverse counsel, The State's Attorney's Office is sufficient to initiate his appeal.

Dated this 10 day of August, 2006

Respectfully Submitted,


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IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

The State of North Dakota,)
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 Plaintiff/Appellee.)
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 V.)
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 Paul Arthur Fisher,)
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 Defendant/Appellant.)

Supreme Court No. 20060153
Morton County No. 30-04-k-1344

AFFIDAVIT OF SERVICE

Paul Fischer, Defendant/ Appellant, pro se upon my oath deposes and says that I am a citizen of the United States, and that I am over the age of Twenty-one. On August 10 2006. I served a true and correct copy of the Brief for the Appellant upon the Plaintiff/Appellee, the state of North Dakota by personally delivering the same to the officials of my incarceration at James River Correctional Center in Jamestown, N.D. for deposit with the U.S. mail Service.


Paul A. Fisher, Pro Se
2521 Circle Dr.
Jamestown ND, 58401

Subscribed and sworn before me on August 10 2006.

"see original"

NOTARY PUBLIC
STATE OF NORTH DAKOTA

(SEAL)