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SEP 26 2005

STATE OF NORTH DAKOTA

Defendant-Appellant.

STATE OF NORTH DAKOTA

Supreme Ct. No. 20050216

District Ct. No. 08-02-K-1113

Appeal of Order Denying Motion for New Trial  
Appeal from the District Court  
Burleigh County, North Dakota  
South Central Judicial District  
The Honorable Donald L. Jorgensen, Presiding

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ISSUE PRESENTED FOR REVIEW

The trial court did not err in denying Randall Steen's Motion for a New Trial .

1  
2 ARGUMENT

3 THE TRIAL COURT DID NOT ERR IN DENYING RANDALL  
4 STEEN'S MOTION FOR A NEW TRIAL

5 Under Rule 33, "the court may grant a new trial to that defendant if the  
6 interests of justice so require." N.D.R.Crim.P. 33(a). Before a new trial may  
7 be granted, the "motion . . . must specify the alleged defects and errors with  
8 particularity." Id. Steen failed to properly raise any issues that would  
9 necessitate the granting of a new trial. Steen's motion did not specify the  
10 alleged defects and errors with particularity, as required for compliance with  
11 Rule 33(a) of the North Dakota Rules of Criminal Procedure.

12 Steen acknowledged in his motion to the trial court that his "issues" were  
13 "developed" during his post conviction proceeding wherein he alleged  
14 ineffective assistance of counsel. The trial court's order denying Steen's  
15 motion for post conviction relief was affirmed. See, State v. Steen, 2004 ND  
16 228, 690 N.W.2d 239.

17 The issues raised by Steen in his motion for new trial did not consist of  
18 newly discovered evidence, thus, his motion under Rule 33 is untimely.  
19 Rule 33, N.D.R.Crim.P., governs motions for new trials. Rule 33(c) provides  
20 that motions on grounds other than newly discovered evidence "shall be  
21 made within seven days after verdict or finding of guilt or within such further  
22 time as the court may fix during the seven-day period."

23 In this case, the verdict was rendered on October 2, 2002. Steen had until  
24 October 9, 2002 to file his motion for a new trial. Steen filed a motion for  
25 new trial on May 5, 2005; 2 years, 7 months and three days late. The  
26 explanatory note to Rule 33 N.D.R.Crim.P., states: "Under this Rule, the  
27 court has no power to order a new trial on its own motion, but may act only  
upon a timely motion made by the defendant." A court cannot consider an

1 untimely motion for a new trial, nor can the court extend the time period  
2 except as specifically provided in the rule. State v. Copeland, 448 N.W.2d  
3 611, 614 (N.D.1989).

4 In interpreting the comparable Rule 33, Fed.R.Crim.P., the federal courts  
5 have reached the same conclusion. A trial court cannot order a new trial on  
6 its own motion. U.S. v. Brown, 587 F.2d 187, 189 (5th Cir.1979). Timely  
7 filing of a motion for new trial is jurisdictional. U.S. v. Brown, 742 F.2d 363,  
8 368 (7th Cir.1984); U.S. v. Hazeem, 679 F.2d 770, 774 (9th Cir.), cert.  
9 denied, 459 U.S. 848, 103 S.Ct. 106, 74 L.Ed.2d 95 (1982); U.S. v. Fontanez,  
10 628 F.2d 687, 691 (1st Cir.1980), cert. denied, 450 U.S. 935, 101 S.Ct. 1401,  
11 67 L.Ed.2d 371 (1981). See, James C. Cissell, Federal Criminal Trials §  
12 1301 et seq. (Michie, 3d ed. 1992).

13 Similarly, this Court has held that a timely motion for new trial was  
14 jurisdictional under our former statutory provisions. State v. Gibson, 69 N.D.  
15 70, 81-82, 284 N.W. 209, 214 (1939); State v. McClelland, 72 N.D. 665,  
16 672, 10 N.W.2d 798, 800 (1943); State v. Jager, 91 N.W.2d 337, 339  
17 (N.D.1958).

18 In a parallel situation, this Court has held that it lacks jurisdiction to hear  
19 appeals that are untimely under Rule 4, N.D.R.App.P., and the time periods  
20 can only be extended as provided by the rule. State v. Franck, 495 N.W.2d  
21 60 (N.D.1993); State v. Guthmiller, 497 N.W.2d 407 (N.D.1993); and  
22 DeCoteau v. State, 499 N.W.2d 894 (N.D.1993).

23 Steen's motion for a new trial is clearly untimely.  
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CONCLUSION

Based upon the foregoing, the State of North Dakota respectfully requests that this Court AFFIRM the decision of the trial court.

Dated this 23<sup>rd</sup> day of September, 2005.



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1 IN THE SUPREME COURT  
2 STATE OF NORTH DAKOTA

3 State of North Dakota, ) AFFIDAVIT OF MAILING  
4 Plaintiff-Appellee, )  
5 -vs- ) Supreme Ct. No. 20050216  
6 Randal Steen, )  
7 Defendant-Appellant. ) District Ct. No. 08-02-K-1113  
8 ..... )  
9 STATE OF NORTH DAKOTA )  
10 )ss  
11 COUNTY OF BURLEIGH )

12 Ardyth Volesky, being first duly sworn, depose and say that I am a  
13 United States citizen over 21 years old, and on the date of September 26,  
14 2005, I deposited in a sealed envelope a true copy of the attached:

- 15 1. Brief of Plaintiff-Appellee  
16 2. Affidavit of Mailing

17 in the United States mail at Bismarck, North Dakota, postage prepaid,  
18 addressed to:

19 RANDAL STEEN  
20 C/O NORTH DAKOTA STATE PENITENTIARY  
21 PO BOX 5521  
22 BISMARCK ND 58506-5521

23 which address is the last known address of the addressee.

24 Ardyth Volesky  
Ardyth Volesky

25 Subscribed and sworn to before me this 26th day of September,  
26 2005.

27 Gwen Tardif  
Gwen Tardif, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 5-23-2009

