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 IN THE SUPREME COURT OF NORTH DAKOTA
 

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State of North Dakota,	)	<b>Supreme Court File No.</b>
	)	<b>20200295</b>
	)	
Plaintiff and Appellee,	)	<b>Grand Forks County No.</b>
	)	<b>18-2017-CR-02659</b>
	)	
v.	)	
	)	
Randy Scott Jensen,	)	<b>APPELLANT'S BRIEF</b>
	)	
Defendant and Appellant.	)	

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**Appeal from the Order Denying Dismissal entered October 28,  
2020 in Grand Forks County district court, northeast central  
judicial district, North Dakota, the Honorable John A. Thelen  
presiding**

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**APPELLANT'S BRIEF  
ORAL ARGUMENT REQUESTED**

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

## JURISDICTION

[¶ 1] The Defendant, Randy Jensen, timely appealed the district court's Order denying his motion to dismiss, pursuant to N.D.Crim.P. Rule 48. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

[¶ 2] The Court must have jurisdiction to consider the merits of an appeal. *City of Grand Forks v. Lamb*, 2005 ND 103, ¶ 5, 697 N.W.2d 362; *Choice Fin. Grp. v. Schellpfeffer*, 2005 ND 90, ¶ 6, 696 N.W.2d 504. “The right to appeal is jurisdictional.” *Jordet v. Jordet*, 2015 ND 73, ¶ 12, 861 N.W.2d 154; *see also Lamb*, at ¶ 5, *State v. Steen*, 2003 ND 116, ¶ 5, 665 N.W.2d 688; *State v. Gwyther*, 1999 ND 15, ¶ 17, 589 N.W.2d 575. This Court has consistently held the right to appeal in this state is “purely statutory” or is “solely” provided by statute. *In re K.J.*, 2010 ND 46, ¶ 14, 779 N.W.2d 635;

*City of Grand Forks v. Riemers*, 2008 ND 153, ¶ 5, 755 N.W.2d 99. “There is no federal or state constitutional right to an appeal.” *Riemers*, at ¶ 5; see also *K.J.*, at ¶ 14. However, “[s]tatutes conferring the right to appeal must be liberally construed to maintain the right to appeal,” *State v. Peterson*, 334 N.W.2d 483, 484 (N.D. 1983).

[¶ 3] Mr. Jensen filed a motion to dismiss his complaint, on October 23, 2020. He had a bench trial on August 7<sup>th</sup> and 8<sup>th</sup> of 2018. Mr. Jensen’s appeal is based on an order effecting his substantial right. His motion was brought to the court as a Rule 48(b)(4) dismissal. He made the motion based on an unnecessary delay in bringing him to trial. Mr. Jensen had also earlier raised a claim of ineffective assistance of counsel made as a post-conviction relief petition on February 6, 2019 wherein that claim and the failure to request a dismissal based on a speedy trial violation was alleged. *See* 18-2019-CV-318 Index #1. The application was subsequently withdrawn on July 7, 2019.

[¶ 4] N.D.C.C. § 29-32.1 controls post-conviction relief matters and their appeal.

“The court, on its own motion, may enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state. The court also may summarily deny a second or successive application for similar relief on behalf of the same applicant.”

N.D.C.C. § 29-32.1-09

“A final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.”

N.D.C.C. § 29-32.1-14. If Mr. Jensen had filed and titled this motion as a post-conviction application, it would be appealable under 29-32.1-14. This Court in *State v. Gress* treated Gress’s motion in the criminal case, based on a criminal procedural rule, as a second application for post-conviction relief. However, the motion was not titled as an application for post-conviction relief. *State v. Gress*, 2011 ND 233, ¶ 6; 807 N.W.2d 567 (N.D. 2011). *McClary* further explained that relief under the rules of criminal procedure and the uniform post-conviction procedures have similar purposes and remedies. *See State v. McClary*, 2016 ND 31, ¶ 7, 876 N.W.2d 29 (N.D. 2016). And most recently, this Court in *Atkins* held,

“A plain reading of...the Uniform Postconviction Procedure Act is to be used exclusively in place of other remedies collaterally challenging the judgment of conviction.”

*State v. Atkins*, 2019 ND 145, ¶ 11, 928 N.W.2d 441 (N.D. 2019).

[¶ 5] This Court’s clear guidance, regardless of how a defendant addresses their collateral challenge, is that the uniform post-conviction procedures control in this situation. Additionally, in this case Mr. Jensen’s original motion specifically cites to the uniform post-conviction proceedings statute. *See* Docket ID #176, p. 2. Therefore, this Court has jurisdiction under N.D.C.C. § 29-32.1-14 and as an order made after judgment affecting a substantial right of Mr. Jensen, pursuant to N.D.C.C. § 29-28-06.

## STATEMENT OF THE ISSUES

[¶ 6] I. Whether the District Court erred by denying Mr. Jensen's motion to dismiss.

## STATEMENT OF CASE

[¶ 7] This case is on direct appeal from northeast central judicial district, Grand Forks County Order Denying Mr. Jensen's motion to dismiss. This case was before the district court in *State v. Jensen*, 18-2017-CR-02659. The initial criminal information was filed with the court on December 27, 2017. Mr. Jensen was charged with possession of methamphetamine, pursuant to N.D.C.C. § 19-03.1-23(8)(a) a class C felony, possession of drug paraphernalia, pursuant to N.D.C.C. § 19-03.4-03(2) a class C felony, and unlawful use of plates, pursuant to N.D.C.C. § 12.1-20-03(2)(a) a class B misdemeanor.

[¶ 8] Mr. Jensen was appointed Attorney Essig and she filed a certificate of representation on January 5, 2018. The contested preliminary hearing was held on January 31, 2018. Mr. Jensen was arraigned and pleaded not guilty at that same appearance. Ms. Essig motioned to withdraw as counsel on March 3, 2018. On April 20, 2018 Mr. Morrison was appointed to represent Mr. Jensen. A bench trial was held on August 7 and 8, 2018. Mr. Jensen was sentenced on October 2, 2018. Mr. Jensen appealed his final conviction and was assigned Mr. Gereszek to represent him on October 15, 2018.



[¶ 9] This Court issued a mandate in *State v. Jensen* on February 8, 2019. Mr. Jensen filed for post-conviction relief on February 6, 2019 and he was assigned Ms. Pierson to represent him on February 26, 2019. The application was subsequently withdrawn on July 7, 2019.

[¶ 10] On August 12, 2019, Mr. Jensen filed a motion to receive credit for time he previously served. The motion was denied and appealed to this Court. The district court's order was reversed and remanded on March 5, 2020, to give Mr. Jensen an opportunity to respond to the State per North Dakota Rule of Court 3.2.

[¶ 11] Mr. Jensen filed a motion to vacate the criminal judgment on September 17, 2020. The motion was denied by the court. It was also improperly titled under Criminal Procedure Rule 18 by the court clerk, however Mr. Jensen intended it to be a motion to dismiss pursuant to N.D.Crim.P. Rule 48. Mr. Jensen appealed that Order and this Court dismissed it as untimely. On October 23, 2020 Mr. Jensen refiled his motion to vacate under Rule 48, explaining that his prior motion filed September 17, 2020 was misfiled. The district court denied his motion on October 28, 2020 before the State provided a response. Mr. Jensen timely appealed from that denial.

### **STATEMENT OF FACTS**

[¶ 12] On December 27, 2017, a call was placed regarding a suspicious dark passenger car with one occupant. Affidavit of Probable Cause, 18-2017-

CR-2659; Index # 1. When officers arrived, they spoke to Mr. Jensen, and they also saw a glass pipe in the vehicle in plain view. *Id.* Mr. Jensen was arrested in the underlying criminal matter on December 27, 2017. *Id.*

[¶ 13] Mr. Jensen through his attorney, Ms. Essig, requested a speedy trial at his arraignment on January 31, 2018. *See* Index ID #122, *Preliminary Hearing Transcript*, p. 55 ln 7-8. Mr. Jensen in his original motion to dismiss based his motion on a violation of his right to a speedy trial. The district court in dismissing his motion did not provide any factual findings or legal analysis to support their Order.

## **LAW AND ARGUMENT**

### **I. Whether the District Court erred by denying Mr. Jensen’s motion to dismiss.**

#### **Standard of Review**

[¶ 14] North Dakota’s Rule 48 was adapted from the Colorado Rules of Criminal Procedure. *State v. Tweeten*, 2004 ND 90 ¶ 7, 679 N.W.2d 287 (N.D. 2004) This Court has reviewed Colorado cases for guidance and determined the district court’s decision on a motion made pursuant to N.D.Crim.P. Rule 48(b) is reviewed for an abuse of discretion. *State v. Graff*, 484 N.W.2d 855, 858 (N.D. 1992), *See People v. Lichtenstein*, 630 P.2d 70, 72 (Colo. 1981). An abuse of discretion occurs when the district court misinterprets or misapplies the law, or acts in an arbitrary, unreasonable, or capricious manner. *State v. Rende*, 2018 ND 33, ¶ 5, 905 N.W.2d 909 (N.D. 2018).

¶ 15] The district court can dismiss a complaint pursuant to Rule 48(b) at any time if there was an unnecessary delay in bringing a defendant to trial. “The dismissal can occur whenever there has been unnecessary delay, and the court need not decide whether the delay was of such a nature as to deprive the defendant of a constitutional right.” *State v. Erickson*, 241 N.W.2d 854, 859 (N.D. 1976). The district court should not make a decision on a Rule 48(b) motion unless it has had an opportunity to determine issues of bad faith, harassment, or misconduct. *Graff* at 859. In this case, no such opportunity to make those factual determinations occurred.

¶ 16] Not exclusive to motions regarding N.D.Crim.P. Rule 48, the district court has an obligation to make factual findings and explicit legal conclusions. N.D.C.C. § 29-32.1-11(1): “The court shall make explicit findings on material questions of fact and state expressly its conclusions of law relating to each issue presented.” This Court generally remands a case if there are conclusory or missing findings of fact. *See Cody v. State*, 2017 ND 29, ¶ 13, 889 N.W.2d 873; *see also Moen v. State*, 2003 ND 17, ¶ 7, 656 N.W.2d 671. However, the Court may determine the implied reasoning if the record enables it to understand the factual findings made by the trial court and the basis for its conclusions of law. *Cody*, at ¶ 11; *Moen*, at ¶ 7.

¶ 17] In the present case the district court simply wrote “denied” on Mr. Jensen’s renewed motion. The Court did not make any factual findings, nor did it expressly state its conclusions of law relating to the issue of delay

in prosecuting Mr. Jensen. Because of the entirely insufficient order, there is no implication from the record as to why the district court denied Mr. Jensen's motion. That was an abuse of the court's discretion and this Court should reverse the district court's order.

[¶ 18] N.D.Crim.P. Rule 47(d) grants the responding party 20 days to respond to the movant. Additionally, if the Court were treating this as a post-conviction relief action the State (defendant) would have 21 days to answer Mr. Jensen's motion pursuant to N.D.Civ.P. Rule 12(c). The district court abused its discretion by dismissing the motion before allowing the time for a response by the state to expire.

[¶ 19] If the Court reviews the district court's dismissal as one made under the post-conviction procedures act, then the district court may have granted summary disposition sua sponte under N.D.C.C. § 29-32.1-09, before the State responded. The standard of review for a summary denial of post-conviction relief has been well-established:

This Court reviews an appeal from a summary denial of post-conviction relief as it reviews an appeal from a summary judgment. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.

*Koenig v. State*, 2018 ND 59, ¶ 26, 907 N.W.2d 344. "The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of

material fact.” *Owens v. State*, 1998 ND 106, ¶ 13, 578 N.W.2d 542. In this case there were genuine issues of material fact raised by Mr. Jensen. He asserted his request for a speedy trial was made at his arraignment, through his counsel. That claim is supported on the record. His requested remedy was for the district court to vacate and dismiss the case against him. Mr. Jensen asserted that his trial and appellate counsel did not properly represent him. The inference is that he was provided ineffective assistance of counsel and he should be entitled to an evidentiary hearing on the matter. Therefore, the court should not have summarily dismissed his request.

### **CONCLUSION**

[¶ 20] Regardless of the way in which this Court reviews the district court’s denial of Mr. Jensen’s motion an abuse of discretion occurred. To correct this error the district court’s Order denying Mr. Jensen’s motion should be reversed.

[¶ 21] WHEREFORE, Mr. Jensen respectfully requests that the district court’s Order denying his motion be reversed and the case be remanded to allow Mr. Jensen an evidentiary hearing on his claims.

Dated this 16<sup>th</sup> day of December, 2020.

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	)	<b>18-2017-CR-02659</b>
	)	
v.	)	
	)	
	)	
Randy Scott Jensen,	)	CERTIFICATE OF
	)	COMPLIANCE
Defendant and Appellant.	)	

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[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: December 16, 2020.

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	)	
v.	)	
	)	
	)	
Randy Scott Jensen,	)	CERTIFICATE OF
	)	SERVICE
Defendant and Appellant.	)	

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[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief  
Appellant's Appendix  
Certificate of Compliance

And that said copies were served upon:

Carmell Mattison, Asst. State's Attorney, [sasupportstaff@gfcounty.org](mailto:sasupportstaff@gfcounty.org)

by electronically filing said documents via email. Also served upon:

Randy Jensen, c/o GFCCC, 1701 N Washington, Grand Forks, ND 58203

by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: December 16, 2020.

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