ORIGINAL

20080050

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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| State of North Dakota, | ) | |
| | ) | Supreme Court No.: 20080050 & |
| | ) | 20080090 |
| Plaintiff/Appellee. | ) | |
| | ) | |
| vs. | ) | |
| | ) | District Court No. 07-K-1059 |
| Marty Decoteau, | ) | |
| | ) | |
| Defendant/Appellant. | ) | |
| | ) | |
| James Gillum, | ) | |
| | ) | |
| Appellant. | ) | |



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APPEAL FROM THE DISTRICT COURT OF BURLEIGH COUNTY
SOUTH CENTRAL JUDICIAL DISTRICT
DISTRICT COURT NO. 07-K-1059
THE HONORABLE ROBERT O. WEFALD

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# APPELLANT'S BRIEF

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## STATEMENT OF THE CASE

This action started as a criminal proceeding styled State of North Dakota v. Marty Decoteau (hereinafter referred to as "Decoteau"). Decoteau was charged in Burleigh County District Court with the offense of violation of a domestic violence protection order - 2nd offense. (App. 4) James Gillum (hereinafter referred to as "Gillum"), an acquittance of Decoteau posted his $5,000.00 cash bond. (App.5) The criminal proceeding was terminated by the Court, the Honorable Robert Wefald, granting the State's motion to dismiss. (App. 9)

The Devils Lake Regional Child Support Unit (hereinafter referred to as "Unit") through Mary Berg, Special Assistant Attorney General, then submitted a Motion to Forfeit Bond to Pay Child Support under the captioned case. (App. 11) The Unit's motion was granted by the Honorable Robert Wefald, Judge of the District Court by way of Order dated December 31, 2007. (App.13-14)

The Notices of Appeal and a motion for extension of time to file notice of appeal were filed with the trial Court. The motion for an extension of time was denied. (App. 21)

## STATEMENT OF FACTS

This case began as a criminal case as set forth in the Statement of the Case. The criminal case was terminated on December 17, 2007, when the Court granted the State's December 14th motion to dismiss. (App. 9)

The Unit filed a motion to forfeit Decoteau's bond on December 17, 2007. In doing so, the Unit referenced ***Civil*** Number 07-K-1059 (emphasis added) and changed the caption from the State of North Dakota v. Marty Decoteau to State of North Dakota and Theresa Wilson, individually v. Marty Decoteau. (App.11) The Unit's original motion was served upon the defendant, Marty Decoteau, and "Carey Ann Goetz, Attorney for the Defendant" on December 14, 2007. It was not served on the undersigned, who was the defendant's attorney pursuant to the Notice of Appearance submitted to the trial Court on October 24, 2007. (App. 8) It was not served upon Decoteau's attorney. Counsel for Decoteau did submit a "...Responsive Brief on the part of the Defendant, Marty Decoteau Only" (emphasis added). (Docket No. 27) The Unit also served its reply to Decoteau's responsive brief on Gillum. (App. 15 Docket No. 34).

The Court's Order on Motion to Forfeit Bond to Pay Child Support, the order that is appealed from, was filed on December 31, 2007. (App.11) The Order indicates that a copy was mailed to the Unit's attorney, Decoteau's attorney and the Clerk of Court, but not to Gillum. (App.13-14)

## LAW AND ARGUMENT

### I. NATURE OF THE PROCEEDING

Counsel has been directed by the Court (Clerk's letter of July 16, 2008) to brief whether this is a civil, criminal or special proceeding. Perhaps kerfuffle would be the most appropriate term in describing the nature of this proceeding. It could also be said "the case reaches us in a perplexing procedural posture." Quoting Justice Van de Walle in State v. Zeno, 490 NW2d 707 at 708 (ND 92).

The matter began as a criminal case and apparently continued to have the criminal case number assigned throughout the proceedings in the trial court. However, the criminal case was terminated in all respects when the court entered its order of dismissal. (App. 9) That is a final order. No motion was brought to vacate that order or otherwise reopen the case at least by the charging authority, the Burleigh County States Attorney.

The case can only be described as a civil or special proceeding after the Court's dismissal of the criminal charge.

The Unit, brought its motion to forfeit bond to pay child support without first obtaining leave of Court to intervene pursuant to Rule 24 of the NDRCivP. There is no comparable Rule in the North Dakota Rules of Criminal Procedure for intervention by a stranger to the original criminal action. The Unit also took it upon itself to add Theresa Wilson as a plaintiff.

The Court could view this matter as a special proceeding for certiorari pursuant to NDCC 32-32 and 32-33 although no application has been made in either the trial Court or this Court. This is especially true if the Court determines there is no appeal nor is there any other plain, speedy or adequate remedy or if the exercise of the Court's special authority is necessary in this case to prevent a miscarriage of justice. The trial Court in this matter had no jurisdiction of Gillum nor for that matter did it have jurisdiction of Decoteau once it had dismissed the criminal action.

There is no statutory authority for the trial Court to forfeit the criminal appearance bond after exoneration of the accused for the purpose of application to child support. See NDCC 29-08-28. The trial Court's lacking jurisdiction supports a claim for certiorari. Manikowske v. North Dakota Worker's Compensation Bureau. 373 NW2d 884 (ND 85). Bernhardt v. Dittus, 265 NW2d 684 (ND 78).

## II. THE FILING OF THE NOTICE OF APPEAL WAS TIMELY.

The criminal case was terminated upon the Court granting the Motion to Dismiss on December 17, 2007. (App. 9) The Order of dismissal is a final order and terminates the case in its entirety.

The Unit had no authority to intervene in the criminal case let alone one that had already been dismissed. The Unit's only authority is to pursue child support which is civil in nature further evidencing that this initial criminal action is now a civil action subject to Rule 4(a)(1) of the NDRApp.

The Unit submitted its motion modifying the caption to include Theresa Wilson.

apparently the obligor for child support and referenced it as a civil case. The motion was served by mail upon Decoteau and Gillum, but not Decoteau's attorney. (App.10. 12) The Unit apparently realized that Gillum was an interested party in view of the fact that he posted the bond and that the motion was essentially a new action by serving it on him and Decoteau. (App.10, 12) Otherwise, the serving of the motion upon Decoteau would be a violation of Rule 4.2 of the North Dakota Rules of Professional Conduct. More importantly, however, service on Gillum is insufficient and defective. The State's motion as to Gillum was an initial pleading and therefore personal service pursuant to Rule 4(d)(2) of the North Dakota Rules of Appellate Procedure had to be made on Gillum. The record indicates that service was attempted by ordinary mail. (App.12)

Counsel for Decoteau submitted a "...responsive brief on the part of the defendant, Marty Decoteau only." (Emphasis added) Counsel noted in his response that he could only respond on behalf of Decoteau and not Gillum. Counsel also noted that it was questionable that Gillum could be made a party in a criminal case. The response, which is Document No. 27 in the Register of Actions is not included in the Appendix in that the Rules prohibit the inclusion of trial court briefs.

The Court issued the Order appealed from, the Order on Motion to Forfeit Bond to Pay Child Support, on December 31, 2007. The Order indicates that a copy was mailed to the Unit's attorney. Decoteau's Attorney and the Clerk of Court. (App.13-14) There is no certificate of mailing. There is no showing in the record that the Order was ever served upon Gillum or mailed to him.

The first issue for the Court to determine is whether the matter before the Court,

that being the issue of the forfeiture of the bond to pay child support. is a criminal case or a civil case. It may be necessary and appropriate to address the appellate rights and timeliness of the appeal as to the criminal defendant Marty Decoteau and the person who is surety for his bond. James Gillum differently.

This Court has held on a number of occasions that proof of the actual notice of the entry of the Order or Judgment being appealed from upon the defendant is not required in a criminal case. State v. Lesmeister. 293 NW2d 875 (ND 80); State v. Neigum. 369 NW2d 375 (ND 85) Even then, the Neigum Court observed in footnote 1 that "There is no need in this case to address the problem that might arise where a criminal defendant has no knowledge or notice of a decision, judgment or order." Additionally. Rule 32(a)(3) of the North Dakota Rules of Criminal Procedure require a Court after imposing sentence to advise the defendant of his right to appeal. See also. State v. Bohn. 406 NW2d 677 (ND 87) The Bohn court held that this admonishment is a necessary part of a valid sentence and that the time to appeal does not begin until it has been given. No such admonishment was given in this case if in fact it is a criminal case and therefore the time to appeal as to Decoteau has not begun to run.

The criminal case terminated upon the granting of the Order of the motion to dismiss the criminal charges on December 17. 2007. Additionally, Gillum is not a party to the criminal case. It can hardly be argued by the Unit that this is a criminal case as to him.

Rule 4(a)(1) of the NDRApp provides that a notice of appeal in a civil case must be filed with the Clerk of District Court within 60 days from service of the notice of

entry of judgment or order being appealed. The notice of appeal on behalf of Decoteau was served within that time.

More importantly, however, the Order being appealed from was never served upon Gillum and therefore the time for him to file a notice of appeal did not begin to run at the time it was filed. Failure to give notice of entry of judgment extends the time period to file an appeal under Rule 4(a) NDRAppP. The appellate time period is expressly tied to the service and notice of entry of order. In Re Estate of Kjorbestad, 375 NW2d 106 (ND 85)

The responsibility to serve the notice and commence the period for an appeal is upon counsel for the prevailing party, in this case, the Unit and it does not begin to run until the notice is served. Lang v. Bank of North Dakota, 377 NW2d 505 (ND 85)

When counsel for the prevailing party fails to do so, the running of the time to appeal does not commence until the appealing party had actual knowledge of entry of the order. Thorson v. Thorson, 541 NW2d 692 (ND 96) In this case, there is no evidence that Gillum had knowledge of the entry of order until the notice of appeal was submitted on his behalf.

The Unit may contend that Gillum is not an interested party. However, the record is clear that the bond was posted by him and that it would be subject to return to him when it was exonerated. See NDCC 29-08-28. To contend that he no longer had an interest in the bond funds upon posting would be contrary to the evidence and an unconstitutional application. The right to bond is constitutional. Article 1 Section 11 of the North Dakota Constitution and the 8th Amendment of the United States Constitution.

Divesting third parties who post the bond of their interest in the money would have a chilling effect on the exercise of that right, would be a denial of due process and a denial of equal protection in creating a distinction between those who can afford to post the bond from their own funds and those who are indigent. Additionally, the Unit's act of serving the motion and its responsive brief on Gillum is an admission by the Unit that he was an interested party. (App.15)

Even if the Court were to conclude that the case was a criminal case, such conclusion would only apply to Decoteau, the defendant in that matter and not to Gillum the surety. The Unit could proceed against Gillum only by civil process.

The civil/criminal issue in this case is analogous to that presented in State v. Stokes, 240 NW2d 867 (ND 76). The Stokes' Court acknowledged the difficulty in attempting to distinguish the difference between criminal and civil contempt. The Stokes Court noted that the issue as to the time for appeal "...does not lie in the compliance with Rule 4, but rather in the concept and classification of contempt itself." And that "...neither the label nor the sanction imposed could be used to determine such things as appealability or reviewability." The Court concluded that the distinction between civil and criminal contempt as to whether the contempt is to be classified as civil or criminal is too great and held that the 60 day time to appeal as provided by Rule 4(a) of the NDRApp. applied. The same is true in this case, the distinction between the dismissed criminal case and the attempt to follow on with a forfeiture action is analogist and should allow for the 60 day time to appeal.

## III. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR EXTENSION OF TIME TO FILE APPEAL

A motion for extension of time based upon excusable neglect is subject to the trial Court's discretion and the decision will be set aside only if that Court has abused its discretion. An abuse of discretion occurs when the trial Court acts in an arbitrary, unreasonable and unconstitutional manner. Routledge v. Routledge, 377 NW2d 542 (ND 85) Gillum, as noted, was never served with the Court's Order.

In this case, the trial court abused its discretion in denying the motion in view of the extraordinary facts and circumstances in this case like those presented in the Bohn case are "...even more peculiar and compelling than in Lewis." See Bohn at 71 quoting State v. Lewis , 300 NW2d 206 (ND 80)

The Clerk's letter of April 18, 2008 stated that the Unit's responsive brief addressing the issue of the trial Court's denial of an extension of time for filing notice of appeal was due June 2, 2008. The Unit ignored that letter as well as the Clerk's subsequent letters of May 14th and June 26th as to this issue.

## IV. THE TRIAL COURT ERRED IN GRANTING THE UNIT'S MOTION TO FORFEIT BOND TO PAY CHILD SUPPORT.

Both the Unit and the trial Court have acted cavalierly in its treatment of Decoteau and especially Gillum, the bond surety. The Unit and the trial Court both have overlooked or ignored the fact that the defendant, Decoteau, was not convicted. (Emphasis added)

The position of the Child Support Office is unconstitutional and in violation of 5th, 6th, and 8th Amendments of the United States Constitution and Article 1 Sections 9, 11, 12 and 16 of the North Dakota Constitution.

The right to bond is a constitutional right pursuant to the 5th, 6th and 8th Amendments to the United States Constitution, and Article 1 Sections 9, 11, 12 and 16 of the North Dakota Constitution. The constitutional right is implemented by Rule 46 of the North Dakota Rules of Criminal Procedure and NDCC 29-08-28. The purpose of the bond is to guarantee the defendant's appearance at further proceedings. NDCrimP Rule 46. NDCC 29-08-01.

Rule 46(f) sets forth the conditions, circumstances, and procedures for bail forfeiture.

Rule 46(g) states that the Court must exonerate the surety and release any bail when a bond condition has been satisfied. (Emphasis added)

The Court in its bond order (App.5) provided for a bond of $5,000.00 cash only, not allowing for a corporate surety bond. (Emphasis Added)

The bond envelope (App.6-7) stated that the bond was posted by James Gillum of 4090 County Highway 88, Glen Ulin, North Dakota. The envelope further provided:

> "I understand the bond is posted to guarantee the attendance of the defendant at all scheduled Court appearances and that ***in the case of a conviction*** the bond may be applied to any fines, fees, costs, restitution, ***accrued child support***, or refunded to the defendant if exonerated. (Emphasis added)
>
> Unless ordered by the court to be applied to any fines, fees, costs, restitution or accrued child support, I request that the bond money be returned to the person posting it.

> I agree if the clerk attempts to refund the bond and it is not deliverable to the person posting the bond at the listed address, the bond may be refunded to the defendant or used to pay the defendant's fines, fees, costs, restitution, and accrued child support, if any."

Decoteau and Gillum both signed the envelope.

There is no statutory provision or rule of criminal procedure that allows the bond posted by another to be applied to the defendant's child support obligation. The quoted provision on the bond envelope pertaining to child support is contrary to NDCC 29-08-28. There is nothing in the record to establish the source of the bond envelope and its effect as a matter of law. It is also essentially a contract of adhesion. There is a note that the bond envelope is "Approved by Counsel of Presiding Judges 09/07/01". NDCC 29-08-28 is also in conflict with Rule 46 of the North Dakota Rules of Criminal Procedure.

Additionally, in this case, the Court did not provide for any alternatives to a cash bond such as a corporate surety. Certainly it would not be suggested that corporate surety bonds could be applied to costs or other obligations of the defendant.

The defendant complied with all conditions of his bond order and the charge was dismissed. The Unit contended in the trial Court that the defendant had violated the conditions of his release by failing to pay his court ordered child support. That was not a condition of his release. Therefore, the Court must exonerate the bond and return it to the person who posted it pursuant to Rule 46, NDCC 29-08-28 and the very terms of the bond envelope, "in the case of a conviction".

The Unit argued that somehow the language:

> "Unless ordered by the court to be applied to any fines, fees, costs, restitution, or accrued child support, I request that the bond money be returned to the person posting it."

gives notice to the person posting the bond that the bond may not be returned to them. It certainly does not suggest that the bond would be returned to the child support unit, the defendant or anyone other than "the person posting it". Additionally. NDCC 29-08-28 specifies that the person, the third party posting the bail, may direct. subject to further order of the Judge, that the deposited monies be released to that person upon final disposition of the case. The bond envelope contained the same provision and both Gillum and Decoteau executed the directive that it be returned to the person posting the bond.

The effect of a cash only bond subject to forfeiture for reasons other than a failure to appear would tend to create a class distinction between those defendants who are able to post the bond from their own resources and those who are indigent and have to look to others. Applying the appearance bond to fines and costs would be of no particular concern to the defendant who has posted the bond from his own resources. However, the indigent defendant who has to rely on the benevolence of others will most likely remain in custody if the surety is told that the bond funds would be subjected to forfeiture even when the defendant appears and even if he is exonerated of the charges.

NDCC 29-08-28 is unconstitutional in that it violates the criminal defendant's rights to bond pursuant to the 8th Amendment of the United States Constitution and Article 1 Section 11 of the North Dakota Constitution, by having a chilling effect on the

same in a general sense and also in this specific case due to the bond being limited to cash only. It also violates the rights of the third party who has posted it pursuant to the due process of law pursuant to the 5th and 14th Amendments of the United States Constitution. It is also an unconstitutional taking of property of the surety without compensation in violation of the 14th Amendment to the United States Constitution and Article 1 Section 16 of the North Dakota Constitution.

## CONCLUSION

The trial Court order forfeiting the bond for child support purposes must be vacated and the matter remanded to the trial Court directing that the bond be returned to James Gillum, the surety.

Respectfully Submitted this 24th day of September, 2008.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Appellant's Brief and Appendix was, on the 24th day of September, 2008 mailed to:

| | |
|---|---|
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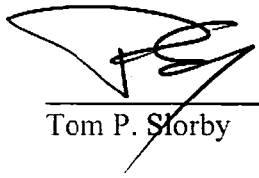

Tom P. Slorby