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MAY 13 2008

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

James Gillum, Appellant

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

APPELLANT'S BRIEF AS TO TIMELINESS OF THE FILING OF THE NOTICE OF APPEAL

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STATUTES:

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ISSUES PRESENTED

I. Was the Filing of the Notice of Appeal timely?

II. Did the Trial Court Err in Denying the Motion for Extension of Time to File Notice of Appeal?

STATEMENT OF THE CASE

This matter began as a criminal case wherein the Defendant, Jeffrey Marty Decoteau (hereinafter referred to as "Decoteau") was charged by the Burleigh County States Attorney with the offense of violation of a domestic violence protection order - 2nd offense. (App.3)

The State's Attorney moved to dismiss the charge on December 14, 2007 and the motion was granted by the Court, the Honorable Robert Wefald on December 17, 2007 (App.6) thus ending the criminal case.

The Devils Lake Regional Child Support Enforcement Unit (hereinafter referred to as "Unit"), submitted a motion to forfeit Decoteau's bond to pay child support. The motion was filed on December 17, 2007. (App.8) The bond was posted by James Gillum (hereinafter referred to as "Gillum"). (App.4-5) The Unit's motion was granted by Judge Wefald by way of Order on December 31, 2007. (App.10-11)

Counsel for Decoteau filed a Notice of Appeal on behalf of Decoteau on February 11, 2008. (App.14) A second Notice of Appeal on behalf of Gillum as well as a Motion and Brief for Extension of Time to File the Notice of Appeal was filed on March 18, 2008. (App.15-16, 17) The trial Court denied the motion for an extension of time to file the Notice of Appeal. (App.18) A third Notice of Appeal on behalf of both Decoteau and Gillum appealing the Order Denying Extension of Time to File Appeal was filed on April 11, 2008. (App.19)

STATEMENT OF THE 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.6)

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.8) The motion was served upon Decoteau (App. 7) and Gillum (App.9). 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.12, 13, 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.10-11) 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.11)

The Notices of Appeal and a motion for extension of time to file notice of appeal were filed as indicated in the Statement of the Case.

LAW AND ARGUMENT

I. 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.6) 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 upon Decoteau and Gillum, but not Decoteau's attorney. (App. 7, 8, 9) The Unit apparently realized that Gillum was an interested person 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.9, 7) Otherwise, the serving of the motion upon Decoteau would be a violation of Rule 4.2 of the North Dakota Rules of Professional Conduct.

Counsel for Decoteau submitted a "...responsive brief on the part of the defendant, Mary Decoteau only." (Emphasis added) (Docket No.27) 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.11) There is no certificate of mailing. There is no showing in the record that the Order was ever served upon Gillum.

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). 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 inferentially would be subject to return to him when it was exonerated. 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. 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.12)

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.

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

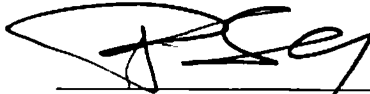
A motion for extension of time based upon excusable neglect is subject to the trial Court's discretion and the decision will be set aside only if that Court has abused its discretion. An abuse of discretion occurs when the trial Court acts in an arbitrary, unreasonable and unconstitutional manner. Routledge v. Routledge, 377 NW2d 542 (ND 85)

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)

CONCLUSION

The filing of the notice of appeal under the particular and peculiar circumstances of this case was timely as to both Decoteau and his surety Gillum.

Respectfully Submitted this 13th day of May, 2008.



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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Appellant's Brief as to Timeliness of the Filing of the Notice of Appeal and Appellant's Appendix was, on the 13th day of May, 2008 mailed to:

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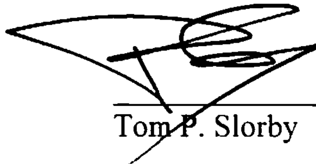

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