

**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

Mark Palmer,)	
)	
)	Supreme Court Nos.
Petitioner/Appellant,)	20110344 (McHenry Co. No. 00-K-00033)
)	20110346 (McHenry Co. No. 00-K-00034)
)	20110347 (McHenry Co. No. 00-K-00035)
)	20110348 (McHenry Co. No. 00-K-00036)
-vs-)	
)	
State of North Dakota,)	APPELLANT’S BRIEF
)	
Respondent/Appellee.)	

BRIEF OF APPELLANT

APPEAL FROM MEMORANDUM OPINION DENYING RULE 60(B)(1) RELIEF
DATED OCTOBER 5, 2011
MCHENRY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE JOHN C. MCCLINTOCK, JR., PRESIDING

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STATEMENT OF THE ISSUES

[¶1] Whether the trial court abused its discretion in denying the Petitioner’s Motion for Relief (hereinafter “Palmer”) from Judgment pursuant to Rule 60, NDRCivP, wherein the attorney for the Petitioner failed to enter a response to the State’s Motion to Dismiss and failed move the trial court for a continuance or extension of time after being appointed upon a *pro se* Application for Post-Conviction Relief; the trial court entered a Memorandum Opinion and Order Denying Petitioner’s Application for Post-Conviction Relief; and the Petitioner’s attorney claimed mistake, inadvertence, and/or excusable neglect for such failure because the attorney’s spouse was diagnosed with advanced liver cancer and died during the time period contemporaneous to the said failures, creating “extreme duress” for the attorney and causing her to believe she had taken those actions, when in fact she had not.

STATEMENT OF THE CASE

[¶ 2] **A. Nature of the case, course of the proceedings, and disposition in the trial court.**

[¶3] This is an appeal from a Memorandum Opinion, dated October 5, 2011, denying the motion of the Palmer’s attorney for relief from the underlying judgment or order of the trial court denying Palmer’s Application for Post-Conviction Relief, which was dated May 16, 2011. Palmer was originally convicted on May 3, 2001, of four (4) counts of Gross Sexual Imposition, Class B Felonies, and was sentenced to ten (10) years imprisonment on each count with seven (7) years suspended on each count, to be served

consecutively, with five (5) years of supervised probation following incarceration; fines, fees, and restitution in the amount of \$741.14; and with credit of seventy-eight (78) days for time previously served. Palmer appealed his conviction, and his conviction was affirmed. State v. Palmer, 2002 ND 5, 638 N.W.2d 18. On February 2, 2011, Palmer, acting *pro se*, filed an Application for Post-Conviction Relief, alleging six grounds: (1) the sentences were not authorized by law and constitute double jeopardy; (2) evidence favorable to the Petitioner about the accuser's past behavior was withheld by the prosecutor; (3) evidence favorable to the Petitioner from police, medical, school, and other records was withheld by the prosecutor; (4) ineffective assistance of counsel by failing to address judicial misconduct and prosecutorial misconduct; (5) ineffective assistance of counsel on appeal because of a personal relationship with the prosecutor; and (6) the conditions of the sentences were in violation of the United States Constitution. An attorney was appointed to represent Palmer in the post-conviction relief proceedings on February 16, 2011. On March 1, 2011, the State responded to the application by filing a Motion to Dismiss. Counsel did not respond to the State's Motion, and a Memorandum Opinion and Order Denying Petitioner's Application for Post-Conviction Relief was entered on May 16, 2011, denying Petitioner's application on all grounds. On May 23, 2011, counsel filed a Motion for Relief Per NDRCivP, 60, seeking relief from the said Memorandum Opinion and Order. This Motion for Relief was denied in a Memorandum Opinion, dated October 5, 2011. Palmer filed a timely Notice of Appeal from the said Memorandum Opinion.

STATEMENT OF THE FACTS

[¶4] Palmer was originally convicted in 2001 upon four (4) charges of Gross Sexual Imposition involving the same minor female on a single occasion following a jury trial. The separate charges arose out of allegations of different types of sexual contact occurring during that single occasion. Palmer appealed his conviction, which was affirmed by this Court. Id. On February 2, 2011, Palmer, acting *pro se*, filed an Application for Post-Conviction Relief, alleging six grounds: (1) the sentences were not authorized by law and constitute double jeopardy; (2) evidence favorable to the Petitioner about the accuser's past behavior was withheld by the prosecutor; (3) evidence favorable to the Petitioner from police, medical, school, and other records was withheld by the prosecutor; (4) ineffective assistance of counsel by failing to address judicial misconduct and prosecutorial misconduct; (5) ineffective assistance of counsel on appeal because of a personal relationship with the prosecutor; and (6) the conditions of the sentences were in violation of the United States Constitution. An attorney was appointed to represent Palmer in the post-conviction relief. Although the attorney met with Palmer and made appropriate inquiries in terms of follow up, research, and investigation, she was distracted by the fact that more or less contemporaneously with this appointment, her husband was diagnosed with advanced liver cancer in January, 2011. On March 1, 2011, the State filed a Motion to Dismiss the petition. Palmer's attorney failed to file either a response to the State's Motion or to file a motion for an extension of time to allow her adequate time to prepare. The attorney's spouse passed away on March 5, 2011, and his funeral was held on March 12. The trial court issued a Memorandum Opinion and Order Denying Petitioner's Application for Post-Conviction Relief was entered on May 16, 2011,

denying Petitioner's application on all grounds. On May 23, 2011, counsel filed a Motion for Relief Per NDR CivP, 60, seeking relief from the said Memorandum Opinion and Order. This Motion for Relief was denied in a Memorandum Opinion, dated October 5, 2011.

[¶5] Palmer properly filed a Notice of Appeal on December 1, 2011.

LAW AND ARGUMENT

[¶6] A. Jurisdiction

[¶7] Appeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, NDCC, which provide as follows:

An appeal to the supreme court provided for in this chapter may be taken as a matter of right.

NDCC Section 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.

NDCC Section 29-28-06. State v. Lewis, 291 N.W.2d 735 (N.D. 1980). The Defendant's right to an appeal was reiterated in State v. Vondal, 1998 ND 188, 585 N.W.2d 129.

[¶8] B. Standard of Review

[¶9] The standard of review in regard to the first issue is whether the trial court abused

its discretion in denying Palmer’s Motion for Relief pursuant to Rule 60(b)(1),
NDR CivP.

A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law.

State v. Berlin, 1999 ND App 1, [6] 588 NW2d 866; State v. Berlin, 2000 ND 13, [14], 604 N.W.2d 347 (ND 2000), citing State v. Shepherd, 554 N.W.2d 821, 823 (1996).

[¶10] Whether the trial court abused its discretion in denying the Petitioner’s Motion for Relief (hereinafter “Palmer”) from Judgment pursuant to Rule 60(b)(1), NDR CivP, wherein the Petitioner’s counsel failed to enter a response to the State’s Motion to Dismiss and failed move the trial court for a continuance or extension of time after being appointed upon a *pro se* Application for Post-Conviction Relief; the trial court entered a Memorandum Opinion and Order Denying Petitioner’s Application for Post-Conviction Relief; and the Petitioner’s attorney claimed mistake, inadvertence, and/or excusable neglect for such failure because the attorney’s spouse was diagnosed with advanced liver cancer and died during the time period contemporaneous to the said failures, creating “extreme duress” for the attorney and causing her to believe she had taken those actions, when in fact she had not, which would constitute good cause.

[¶ 11] Post-conviction relief is a civil proceeding afforded under the provisions of Chapter 29-32.1 of the North Dakota Century Code, to which the North Dakota Rules of Civil Procedure apply.

“Post-conviction relief proceedings are civil in nature and governed by the North

Dakota Rules of Civil Procedure." (Citations omitted.) This Court reviews a summary denial of an application for post-conviction relief similar to an appeal from a summary judgment. (Citations omitted.) [Quotations within original.]

Delvo v. State, 2010 ND 78, 782 N.W.2d 72, ¶10.

[¶ 12] The grounds for a motion to set aside a final judgment, order, or proceeding are limited to certain circumstances:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Rule 60(b)(1), NDR CivP.

[¶ 13] In her motion, Palmer's attorney stated she had met with Palmer; initiated a research project through the Central Legal Research program at the University of North Dakota Law School; and apparently engaged in representation on Palmer's application for post-conviction relief. She also stated therein she was distracted by the fact that more or less contemporaneously with this appointment, her husband was diagnosed with advanced liver cancer in January, 2011, and he passed away on March 5, with his funeral on March 12. She acknowledged she failed to respond to the State's Motion to Dismiss or to move the trial court for an extension of time. *See* Motion for Relief Per NDR CivR, 60. Counsel argued in her Motion for Relief Per NDR CivP, 60, that she had committed mistake or inadvertence, although it might appear that the terms which she used to

describe her mistake or inadvertence also included excusable neglect.

[¶ 14] In order to show excusable neglect, a party must show that unique or extraordinary circumstances caused the delay in filing the notice of appeal. State v. Fischer, 2007 ND 22, ¶ 8, 727 N.W.2d 750. This Court summarized the excusable neglect standard as follows:

Excusable neglect is a fluid concept, encompassing "both simple, faultless omissions to act and, more commonly, omissions caused by carelessness." Accord Pioneer Inv. Servs. Co. v. Brunswick Assocs. LP, 507 U.S. 380, 388 (1993) (discussing "excusable neglect" concept); Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 403 (8th Cir. 2000). The Eighth Circuit has interpreted "excusable neglect" to mean a "good faith and some reasonable basis for noncompliance with the rules." Ivy v. Kimbrough, 115 F.3d 550, 552 (8th Cir. 1997) (quoting Adams v. Allied Signal Gen. Aviation Avionics, 74 F.3d 882, 887 (8th Cir.1996)). In most instances, ignorance of the rules, or mistakes construing the rules, are insufficient to establish excusable neglect. Ceridian Corp., at 403. However, the rules do provide some flexibility for a court "to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." See Pioneer, at 388.

Leftbear v. State, 2007 ND 14, ¶ 9, 727 N.W.2d 252. Leftbear contended that since he was acting as his own attorney and had failed to file a motion for an extension of time or had failed to timely file a notice of appeal from his criminal judgment, he should be excused from his own neglect because he did not have appointed counsel to advise him and because he lacked the requisite knowledge or education.

[¶ 15] Normally, excusable neglect cannot be based on the fact that an error is attributable to counsel rather than to the represented party and that "clients must be held accountable for the acts and omissions of their attorneys." Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395-396 (1993). Courts have refused to recognize excusable neglect when the failure to file an appeal in a timely manner is due to palpable oversight, administrative or clerical errors by the attorney or the attorney's

staff, or if the error is a result of an attorney's busy schedule.” United States v. Gibson, 832 F.Supp. 324, 327 (D. Kan. 1993).

[¶ 16] The governing legal standard for excusable-neglect determinations is a balancing of five principal factors: (1) the danger of prejudice to the nonmoving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, (4) whether the delay was within the reasonable control of the moving party, and (5) whether the late-filing party acted in good faith. Pioneer at 395. For determination of whether a movant has shown excusable neglect, the “four Pioneer factors do not carry equal weight; the excuse given for the late filing must have the greatest import.” United States v. Torres, 372 F.3d 1159, 1163 (10th Cir. 2004).

[¶ 17] In US Bank Nat. Ass'n v. Arnold, the defendant failed to file an answer, and default judgment was entered. Id., 2001 ND 130, ¶¶ 6-7, 631 N.W.2d 150. The defendant claimed this failure was due to excusable neglect, specifically the fact that he was overworked and depressed due to his wife's cancer diagnosis, son's suicide, brother's terminal cancer diagnosis, and his own heart attack. Id. at ¶ 7. The district court denied the motion to vacate, and this Court affirmed, reasoning that the defendant failed to present medical evidence about his depression or clearly illustrate how his depression affected his actions in dealing with the litigation. According to the Court, the mere laundry list of unfortunate life circumstances was insufficient to establish excusable neglect. Id. at ¶ 25.

[¶ 18] However, this Court has also indicated there is a difference between “excusable neglect” provision of Rule 60, NDR CivP and the “good cause” provision of N.D.R.App.P. 4(b)(4):

However, we have never addressed the "good cause" standard, which is an alternate basis for granting an extension of time under the plain language of the rule. See N.D.R.App.P. 4(b)(4). Because N.D.R.App.P. 4 is derived from Rule 4 of the Federal Rules of Appellate Procedure, we may look to the interpretation of "good cause" under the federal rule as a guide. See *Hagert v. Hatton Commodities*, 421 N.W.2d 473, 475 (N.D. 1988). Although no federal court has explicitly defined the meaning of good cause under Rule 4, the good cause standard is generally seen as more lenient than the excusable neglect standard. See 20 James Wm. Moore et al., *Moore's Federal Practice* ¶ 304.14[2][b] (3d ed. 2006); 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3950.3 (3d ed. 1999). The most helpful discussion of the good cause standard is found in the Advisory Committee Notes to Rule 4, F.R.App.P. The Advisory Committee states:

The good cause and excusable neglect standards have "different domains." *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault—excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline. Advisory Committee Notes, 2002 Amendments, F.R.App.P. 4.

State v. Fischer, 2007 ND 22 ¶ 9.

[¶ 19] Here, the danger of prejudice to the moving party, the State, is minimal in the event this case is reversed and remanded, as the trial court still would have the ability to rule on the State's Motion to Dismiss. The only difference would be that Palmer would be allowed to enter a response to the State's Motion.

[¶ 20] Counsel should have entered either a response to the State’s Motion to Dismiss, or in the alternative should have filed a motion for extension of time. However, the length of the delay from the time that the trial court’s Memorandum Opinion and Order was entered, on May 16, 2011, until Palmer’s counsel entered her Motion for Relief Per NDR CivP, 60 on May 23 was minimal. Further, the trial court did not rule on the Motion for Relief until October 5, 2011, approximately five months after the motion was filed.

[¶ 21] The reason for the delay fell upon counsel and her personal situation with her spouse and the attendant, presumably emotional distress or “duress” of counsel under these circumstances. It is apparent counsel was still actively working on Palmer’s case and was still receiving information from UND’s Central Legal Research program up to and after the trial court entered its order. However—and it is important to note—the reason for the delay was not occasioned by Palmer. It was not intentional on his part, nor was it a mistake or inadvertent on his part.

[¶ 22] While the reason for delay was within the control of Palmer’s attorney, but it was not within his control or ability to control.

[¶ 23] The late filing party was acting in good faith, as indicated by Palmer’s counsel’s actions and statements in her motion.

[¶ 24] Palmer’s counsel should have argued not only relief under Rule 60(b)(1), but also should have argued under Rule 60(b)(6) for “any other reason that justifies relief.”

Actually, counsel argued in her Motion for Relief Per NDR CivP, 60, that:

This attorney is requesting relief under the North Dakota Rules of Civil Procedure at Rule 60. I believe what most closely resembles my actions would be Rule 60(b)(1) which allows for grounds for relief from a final judgment, order or proceeding for mistake or inadvertence.

I was mistaken in not requesting the Court for more time to receive documents, read those documents, correspond and meet with the Petitioner as well as research and subsequently wait for others to assist in researching these issues. I inadvertently believed that I had filed a request for additional time and in believing so acted in accordance with that belief.

Thus, although counsel argued specifically for mistake and inadvertence, it is obvious she is also indicating that her failure to file either a response or a motion for an extension of time was also indicative of excusable neglect. The specific grounds cited by counsel, specifically the diagnosis of cancer in her spouse and his death in less than three months from the diagnosis, were held to be insufficient in US Bank. Although that case may be distinguished from the instant case in that US Bank was a civil case and the moving party was self-represented, the factual situation cited by Palmer's counsel indicate that it was her personal situation which occasioned her failures and not any causal fault by Palmer. The trial court abused its discretion by only dismissing the Petition under Rule 60(b)(1), NDR CivP, even though the Motion for Relief Per NDR CivP, 60, was made under the entire rule, and not just a portion thereof. Although Palmer's counsel cited the entire rule, she only argued portions of it, and inarticulately so, in that the concept of a missed filing deadline would generally fit more squarely under excusable neglect, although mistake and inadvertence could be argued as similar concepts. However, the entire Rule 60 encompasses an overall, catch-all reason, which is "any other reason that justifies relief." Here, the trial court abused its discretion by only denying the Motion for Relief Per NDR CivP, 60 pursuant to Rule 60(b)(1) and not addressing the broader context within the rule which was alluded to by Palmer's counsel.

CONCLUSION

[¶25] The Memorandum Opinion, denying Palmer's counsel's Motion for Relief Per NDRCivP, 60, should be reversed and remanded.

Dated this 30th day of January, 2012.



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