

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

| | | |
|--------------------------|---|----------------------------|
| State of North Dakota |) | Supreme Court No. 20200295 |
| |) | |
| Plaintiff and Appellee, |) | Case No. 18-2017-CR-02659 |
| |) | |
| vs. |) | |
| |) | |
| Randy Scott Jensen, |) | |
| |) | |
| Defendant and Appellant. |) | |

APPEAL FROM THE ORDER DENYING DISMISSAL ENTERED OCTOBER 28,
2020 IN GRAND FORKS COUNTY DISTRICT COURT, NORTHEAST JUDICIAL
DISTRICT, NORTH DAKOTA, THE HONORABLE JOHN A. THELEN PRESIDING

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

[¶1] I. Whether the District Court erred in denying Jensen's Rule 48(b)(4) motion.

STATEMENT OF THE CASE

[¶2] The Appellant, Randy Scott Jensen (hereinafter Jensen) directly appeals from the northeast central judicial district, Grand Forks County Order denying Jensen's motion to dismiss pursuant to Rule 48(b)(4). Appellant's Appendix (hereinafter App.) p. 10, Index #189. A criminal information was filed in this case on December 27, 2017 charging Jensen with Possession of Methamphetamine, Unlawful Possession of Drug Paraphernalia, and Unlawful Use of Plates. Appellant's App. p. 5, Index #2. A bench trial was held in State v. Jensen, District Court Case No. 18-2017-CR-02659, on August 7 and 8, 2018. Appellant's App. p. 7. Jensen was found guilty on counts 1, 2, and 3 and was sentenced on October 2, 2018. Appellant's App. p. 8.

[¶3] On October 3, 2018, Jensen filed a notice of appeal to the North Dakota Supreme Court. Appellant's App. p. 8, Index # 113. Upon motion to dismiss filed by Appellant's counsel, this Court issued its decision, Order of Dismissal with Mandate on February 8, 2019. Appellant's App. p. 8, Index # 120. Jensen filed an action for post-conviction relief in Randy Scott Jensen v. State of North Dakota, District Court Case No. 18-2019-CV-00318, on February 6, 2019. Appellee's Appendix (hereinafter App.) p. 3, Index # 1. Jensen withdrew the petition for post-conviction relief on July 7, 2019 and the action was dismissed by the District Court on July 15, 2019. Appellee's App. p. 3-4, Index # 25, #28.

[¶4] On August 12, 2019, Jensen filed a motion in this action requesting additional credit pursuant to Rule 35 of the North Dakota Rules of Criminal Procedure. Appellant's App. p. 9, Index # 132. The District Court subsequently denied Jensen's motion on August 14, 2019 after a brief in opposition was filed by the State. Appellant's

App. p. 9, Index #134, #136. Jensen appealed the order denying his motion directly to this Court on October 24, 2019. Appellant's App. p. 9, Index #143. This Court issued its judgment and opinion in this case on March, 5, 2020 reversing and remanding the case to give Jensen an opportunity to respond to the State's brief in opposition pursuant to North Dakota Rule of Court 3.2. Appellant's App. p. 9, Index #160-161. The District Court filed an Order following the reversal and remand on April 22, 2020 again denying Jensen's motion requesting additional credit. Appellant's App. p. 9, Index #162. Jensen then filed a motion to reconsider the District Court's Order following reversal and remand on May 12, 2020, which was subsequently denied on June 11, 2020. Appellant's App. p. 9-10, Index #167, #171. On August 24, 2020, Jensen filed an appeal with the North Dakota Supreme Court, which was denied as untimely by this Court. Appellant's App. p. 10, Index #172, #174, #181; Appellee's App. p. 58.

[¶5] Jensen filed a Motion to vacate and dismiss on September 17, 2020, pursuant to Rule 48(b)(4), which was mislabeled (most likely a typo) in Odyssey by the clerk as a Rule 18(b)(4) motion. Appellant's App. p. 10, Index #176. The record is devoid of proof of service upon the State. On October 23, 2020, Jensen then sent a letter to the clerk of court requesting that they title his motion a Rule 48(b)(4) motion and refile the motion. Again, the record is devoid of proof of service upon the State. On October 28, 2020 the District Court denied Jensen's Rule 48(b)(4) motion. Appellant's App. p. 10, Index #183-184. Jensen now appeals the Order denying his motion to vacate pursuant to Rule 48(b)(4).

STATEMENT OF FACTS

[¶6] On December 27, 2017, Jensen was arrested. At the time of his arrest, he was on parole serving a sentence in Case No. 18-2016-CR-00489. Index #162. The District Court issued a scheduling order on December 28 setting forth the dates for the preliminary hearing/arraignment, final dispositional conference and trial. Appellant's App. p. 5, Index #5. On January 31, a Preliminary Hearing was held and Jensen was bound over for Arraignment. Appellant's App. p. 5. At this hearing, by and through counsel, Megan Essig, Jensen verbally requested a speedy trial. The trial was currently set for April 24, 2018.

[¶7] On March 19, 2018, Jensen's attorney filed a motion to withdraw as attorney of record. Appellant's App. p. 5, Index #24-26. Jensen filled out another application for court appointed attorney, which was approved by the Court on April 16, 2018. Appellant's App. p. 5, Index #34. The court issued a new scheduling order three days prior on April 13, 2018. Appellant's App. p. 5, Index #30.

[¶8] On April 23, 2018, Jensen's second attorney, Steve Morrison, requested discovery from the State and filed a motion to continue all hearing dates in the scheduling order which would include the trial date of May 30, 2018. Appellant's App. p. 6, Index #36-37. On April 26, the State filed a response with no objection to the request to continue. Appellant's App. p. 6, Index #39. On April 29, Jensen filed a motion to withdraw his motion to continue the hearing dates set forth in the District Court's April 13 scheduling order. Appellant's App. p. 6, Index #41. On May 9, 2019, the court granted the Jensen's motion to withdraw his request for a continuance of the hearing dates. Appellant's App. p. 6, Index #51.

[¶9] On May 10, Jensen filed a Rule 3.2 motion to suppress evidence requesting oral argument. Appellant's App. p. 6, Index #58. Pursuant to Rule 3.2, the State had until May 24 to file a response, with Jensen's reply due by May 29 with oral argument to follow. However, on May 17, respondent verbally stated in court that he was withdrawing the motion to suppress. Appellant's App. p. 6, Index #63. At this hearing, the court advised the parties that a jury trial would commence on August 7 and was first to go because of defendant's speedy trial request. During the time this case was pending, the defendant was serving a sentence on an unrelated conviction until approximately the beginning of July, 2018.

[¶10] A bench trial was held on August 7 and 8, 2018. Appellant's App. p. 7. Jensen was found guilty on counts 1, 2, and 3 and was sentenced on October 2, 2018. Appellant's App. p. 8. Jensen appealed his final conviction and Sam Gereszek was assigned to represent him on October 15, 2018. Appellant's App. p. 8, Index #113, #115. Upon motion to dismiss filed by Appellant's counsel, this Court issued its decision, Order of Dismissal with Mandate on February 8, 2019. Appellant's App. p. 8, Index # 120. Jensen filed an action for post-conviction relief on February 6, 2019. Appellee's Appendix (hereinafter App.) p. 3, Index # 1. Jensen withdrew the petition for post-conviction relief on July 7, 2019 and the action was dismissed by the District Court on July 15, 2019. Appellee's App. p. 3-4, Index # 25, #28.

[¶11] Jensen filed a motion on August 12, 2019 requesting additional credit for time served pursuant to Rule 35 of the N.D.R.Crim.P. which was denied by the District Court. Appellant's App. p. 9, Index #132, #134, #136. Jensen appealed the order and this Court issued its judgment and opinion on March 5, 2020. Appellant's App. p. 9, Index

#160-161. After remand back to the District Court, and after the court again denied Jensen's motion, Jensen then filed a motion to reconsider the District Court's Order on May 12, 2020, which was subsequently denied on June 11, 2020. Appellant's App. p. 9-10, Index #167, #171. On August 24, 2020, Jensen filed an appeal with the North Dakota Supreme Court, which was denied as untimely by this Court. Appellant's App. p. 10, Index #174, #181.

[¶12] Jensen filed a Motion to vacate and dismiss on September 17, 2020, pursuant to Rule 48(b)(4), which was mislabeled (most likely a typo) in Odyssey by the clerk as a Rule 18(b)(4) motion. Appellant's App. p. 10, Index #176. On October 23, 2020 Jensen again filed a motion to pursuant to Rule 48(b)(4) and this motion was then denied on October 28, 2020. Appellant's App. p. 10, Index #183-184. Jensen now appeals the Order denying his motion to vacate pursuant to Rule 48(b)(4).

REQUEST FOR ORAL ARGUMENT

[¶13] Jensen has requested this Court schedule oral argument in this case pursuant to N.D.R.App.P 28(h). In the event oral argument is granted, the State would request the opportunity to argue the merits of the case, as well.

STATEMENT OF JURISDICTION

[¶14] Jensen’s motion to vacate and dismiss pursuant to Rule 48(b)(4) was not served upon the State in accordance with Rule 49, N.D.R.Crim.P. which mandates, in relevant part:

- (a) “A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar document.”
- (b) “Service must be made in the manner provided in N.D.R.Civ.P. 5(b).”
- (c) “A party must file with the clerk of court a copy of any document the party is required to serve. A document must be filed in the manner provided for in a civil action.”
- (d) “Unless excused by the court, a party must file promptly with the clerk of court proof of service of all documents the party is required by law or these rules to serve. The proof must be the same as in a civil action.”

N.D.R.Crim.P. 49. “Except as otherwise provided in these rules...every written motion other than one which may be heard ex parte...*shall* be served upon each of the parties.”

[Emphasis added.] N.D.R.Civ.P. 5(b).

[¶15] Subdivision (b) spells how that service is made, and subdivision (f) states how proof of that service is to be made. The record is devoid of any proof that Jensen’s Rule 48(b)(4) motion was served upon the State. “Rules cannot be applied differently merely because a party not learned in the law is acting pro se.” State v. Gasser, 306 N.W.2d 205, 208 (N.D. 1981). Jensen failed to satisfy the statutory notice requirements for his motion originally filed on September 17, 2020 and re-filed on October 23, 2020. Jensen incorrectly states in brief under “Statement of Case” that the Supreme Court dismissed the September 17, 2020 motion as untimely. This Court dismissed Jensen’s August 24, 2020

appeal, which was forwarded to the Supreme Court on September 14, 2020, as untimely, not the September 17, 2020 motion as reflected in Jensen's brief.

[¶16] Had Jensen properly commenced an action, this Court would still lack jurisdiction to address the merits of this appeal. 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 a new trial; or (5) an order made after judgment affecting any substantial right of the party. N.D.C.C. § 29-28-06. "Nothing in section 29-28-06 authorizes an appeal from a denial of a defendant's motion to dismiss the prosecution against him." State v. Gohl, 477 N.W.2d 205, 207 (N.D. 1991); see also State v. Johnson, 142 N.W.2d 110, 111 (N.D. 1966); see also State v. Rippley, 319 N.W.2d 129, 131 (N.D. 1982). In order for the Supreme Court of North Dakota to consider the merits of a case on appeal, this Court must have jurisdiction. Everett v. State, 2017 ND 93, ¶ 6, N.W.2d 898. In the State of North Dakota, the right of appeal in a criminal case is governed solely by statute. Gohl, at 207. The right to an appeal is neither a state or federal constitutional right. City of Grand Forks v. Riemers, 2008 ND 153, ¶ 5, 755 N.W.2d 99. Without any statutory basis to hear an appeal, this Court must take notice of the lack of jurisdiction and the inability to consider the merits and dismiss the appeal. Id.

[¶17] Jensen argues this Court should construe his Rule 48(b)(4) motion as a request for post-conviction relief. Jensen is familiar with the criminal court system having filed multiple motions in the underlying proceeding. One such motion was a motion to the District Court for post-conviction relief alleging denial of his right to a speedy trial. Randy Scott Jensen v. State of North Dakota, District Court Case No. 18-2019-CV-00318, on February 6, 2019. Appellee's Appendix p. 3, Index # 1. Jensen withdrew the petition for

post-conviction relief on July 7, 2019 after the State filed its answer. The action was dismissed by the District Court on July 15, 2019. Appellee’s App. p. 3-4, Index # 25, #28.

STANDARD OF REVIEW

[¶18] Should this Court find that it does have jurisdiction to consider the merits of the case at hand, the court would review the district’s court decision to dismiss under the abuse of discretion standard. A district court’s decision on whether or not to dismiss, with or without prejudice, a motion made pursuant to North Dakota Rule of Criminal Procedure 48 is reviewed for abuse of discretion. State v. Mohamud, 2019 ND 101, ¶ 5, 925 N.W.2d 396; see also State v. Gwyther, 1999 ND 15, ¶¶ 11-12, 589 N.W.2d 575. A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law. Mohamud, at ¶ 5.

LAW AND ARGUMENT

I. Whether the District Court erred when it denied Jensen’s Rule 48(b)(4) motion.

[¶19] A court “may dismiss an indictment, information or complaint, or order the release of any arrested person if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing an information or complaint against a defendant who has been arrested or for whose arrest a warrant has been issued; (3) filing a uniform complaint and summons as permitted by law; or (4) bringing a defendant to trial.” N.D.R.Crim.P. 48(b).

[¶20] The District Court was familiar with the procedural posture of the case and familiar with arguments made by both sides regarding any unnecessary delay in bringing Jensen to trial. The brief that was submitted in conjunction with the first filing of Jensen’s

Motion to Dismiss and Vacate pursuant to N.D.R.Crim.P. 48(b) on September 16th, 2020 was essentially the same brief submitted to the court in Jensen's first post-conviction relief application in Randy Scott Jensen v. State of North Dakota, District Court Case No. 18-2019-CV-00318, on May 23, 2019 as well as the brief submitted to the District Court in conjunction with the Motion to Reconsider following reversal and remand on May 12, 2020. Appellant's App. pp. 17-22; Appellee's App. pp. 5-16; Appellant's App. p. 10, Index #168, #176; Appellee's App. p. 3, Index #10. At the very least, the briefs made the same or similar argument in all three briefs, and the facts and issues argued all concerned Jensen's speedy trial claim.

[¶21] The record demonstrates that Jensen made a conscious decision to motion for relief pursuant to Rule 48(b)(4), and not a post-conviction action. Argument that this Court, should nevertheless, disregard Jensen's intent and title of the action and analyze the merits of the case under a separate statute in order to avoid a jurisdictional dismissal would lead us down a slippery slope. The District Court Judge and the Appellate Court would have to make assumptions of what they believe was in the mind of another and disregard the relief specifically requested by the applicant.

[¶22] Here, the District Court correctly entered judgment denying Jensen's Rule 48(b) Motion to Dismiss. It is well within the district court's discretion to enter judgment denying a motion when proof of service upon the opposing party did not accompany the motion. Therefore, this Court should summarily dismiss this appeal as no proof of service is part of the record, so no response brief from the State would be expected.

[¶23] Further, Jensen relies on the decision in State ex re. Kopyy v. Graff, 484 N.W.2d 855, 859 (N.D. 1992), and N.D.C.C. § 29-32.1-11(1) for why the District Court

erred in denying Jensen's Rule 48(b) motion because the court did not make factual findings, and Jensen's position is that the court was required to do so in this case. However, Jensen fails to consider important facts in the Graff case and how those differ from the case at hand, and thus effectively misstates the case law. In the Graff case, the prosecutor was the party that motioned the court for a Rule 48 dismissal, not the defendant. Id. at 859. This Court in Graff held and clearly stated that when the state or a prosecutor seeks a dismissal under N.D.R.Crim.P. 48, and the court seeks to deny the State's motion to dismiss without prejudice, there should be an evidentiary hearing to determine issues raised by the defense. Id. The Court continued by stating that if such hearing should occur, then the district court will have the opportunity to make factual determinations of bad faith, harassment, or misconduct as alleged by the defendant, and if such is found, it could support the denial of the State's motion or a dismissal with prejudice. The facts and legal conclusions of the Graff case are drastically different than the case at hand and would not apply here. Here, there is no requirement for the court to "make those factual determinations" as argued by Jensen under the Graff case law or under section 29-32.1-11 of the N.D.C.C.

[¶24] Should the Court consider this motion a subsequent application for post-conviction relief under Chapter 29-32.1 of the N.D.C.C., the Uniform Postconviction Procedure Act, the State takes the position that the District Court had the authority to summarily dismiss the motion under N.D.C.C. § 29-32.1-09. "Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure." Wacht v. State, 2015 ND 154, ¶ 6, 864 N.W.2d 740 (quoting Haag v. State, 2012 ND 241, ¶ 4, 823 N.W.2d 749). Section 29-32.1-09 of the N.D.C.C. states:

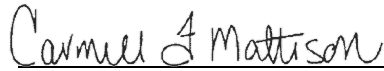
“The court, on its own motion, may enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state. The court also may summarily deny a second or successive application for similar relief on behalf of the same applicant and may summarily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

N.D.C.C. § 29-32.1-09(1); see also Chisholm v. State, 2020 ND 19, ¶ 8, 937 N.W.2d 520.

CONCLUSION

[¶25] WHEREFORE, the State of North Dakota respectfully asks this court to dismiss this appeal due to lack of jurisdiction. Further, should this Court find it does have jurisdiction to consider this case on appeal, the State requests this Court find the District Court did not err in denying Jensen’s motion to dismiss. Therefore, the State of North Dakota respectfully requests that this Court **AFFIRM** the District Court’s Order filed on October 28, 2020, and the criminal judgment in this case.

Dated this 14 day of January 2021.



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Dated this 14 day of January, 2021.

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