

IN THE SUPREME COURT OF NORTH DAKOTA

City of Minot,)	Supreme Court File No.
)	20210134
)	
Plaintiff and Appellee,)	Ward County No.
)	51-2021-CR-00625
)	
v.)	Minot Municipal Court No.
)	MI-2021-CR-00194
)	
Lynette Burtch,)	APPELLEE’S BRIEF
)	
Defendant and Appellant.)	

**Appeal from an Order to Dismiss a Municipal Court Appeal
North Central Judicial District
Honorable Gary H. Lee, presiding.**

APPELLEE’S BRIEF

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JURISDICTION

[¶ 1] The City does not believe the North Dakota Supreme Court has jurisdiction to hear this appeal under N.D.C.C. § 29-28-06 and has filed a motion to dismiss this appeal along with this brief. “ ‘Appellate jurisdiction is derived from the constitutional or statutory provisions by which it is created and can be acquired and exercised only in the manner prescribed.’ ” City of Dickinson v. Etienne, 2015 ND 193, ¶ 6, 867 N.W.2d 673 (quoting Holbach v. City of Minot, 2012 ND 117, ¶ 5, 817 N.W.2d 340, quoting City of Bismarck v. Walker, 308 N.W.2d 359, 361 (N.D. 1981)). “There is no constitutional right to an appeal.” City of Williston v. Werkmeister, 2015 ND 172, ¶ 4, 865 N.W.2d 429. Rather, under N.D. Const. art. VI, § 8, a district court’s appellate jurisdiction is either provided by law or by rule of the supreme court. Werkmeister, at ¶ 4. “The right to appeal is a statutory right and, if a right to appeal does not exist, this Court is without jurisdiction to consider the merits and we must dismiss the appeal.” Id.

[¶ 2] Section 40-18-19, N.D.C.C., allows a defendant to appeal from a municipal court a judgment of conviction or order deferring imposition of sentence. (emphasis added). Lynette Burtch (“Burtch”) is appealing from a district court order dismissing her appeal from a municipal court post-judgment order denying her motion to withdraw her guilty plea. (Docket No. 34, 41, App. 27-28, 30). There is no statutory right to appeal from a municipal court’s post-judgment order under N.D.C.C. § 40-18-19 and Burtch’s district court Notice of Appeal not comply with N.D.R.Crim.P. 37. (Docket No. 34, App. 30) Etienne, at ¶ 12; Werkmeister, at ¶ 11. Thus, the City urges this court to hold that it does not have jurisdiction over this matter and grant the City’s motion to dismiss this appeal.

STATEMENT OF THE ISSUE

[¶ 3] Under N.D.C.C. § 29-28-06, N.D.C.C. § 40-18-19, and N.D.R.Crim.P. 37, does the defendant have a right to appeal from a municipal court post-judgment order denying her motion to withdraw her guilty plea.

STATEMENT OF THE CASE

Nature of the Case.

[¶ 4] This is an appeal of an Order to Dismiss issued by the Hon. Gary H. Lee on April 16, 2021 and entered in the North Central Judicial District, (Docket No. 38, App. 23-26) which dismissed Lynette Burtch's appeal from the Order Denying Defendant's Motion to Withdraw Guilty Plea issued by the Hon. Municipal Court Judge Ashley E. Beall, on April 8, 2021 and entered in Minot Municipal Court. (Docket No. 33, App. 19-22).

Course of Proceedings/Disposition of the Court Below

[¶ 5] On April 1, 2021, Burtch, with the assistance of counsel, entered a guilty plea to a municipal criminal charge before the Minot Municipal Court. (Docket No. 3 and 21, App. 5). On April 5, 2021, Burtch filed a motion to withdraw her guilty plea. (Docket No. 23, App. 6). The Minot Municipal Court denied Burtch's motion on April 8, 2021. (Docket No. 33, App. 19-22). Burtch filed a notice of appeal on April 12, 2021, indicating she was appealing "to the Ward County District Court from the Order denying Defendant's motion to withdraw her guilty plea dated April 8, 2021." (Docket No. 34, App. 3). Burtch's request was denied on April 16, 2021, sua sponte, by the Hon. Judge Gary H. Lee, without a hearing and without response from the City. (Docket No. 37, App. 23). On May 5, 2021, Burtch timely filed a notice of appeal to this Court from the district court order dismissing her municipal court appeal for lack of jurisdiction. (Docket No. 41, App. 27-28).

STATEMENT OF THE FACTS

[¶ 6] On March 4, 2021, the City of Minot charged Lynette Burtch (Burtch) with owning an animal in the City that harmed another human or domestic animal (vicious animals) – a violation of Minot City Ordinance Sec. 7-27. (Docket No. 1, App. 3). On May 10, 2021, Attorney Faron Terry filed a notice of appearance on behalf of Burtch. (Docket No. 2, App. 3) An initial appearance was held on March 11, 2021 and Burtch personally appeared before the Minot Municipal Court, with her attorney, and signed a notification of rights and acknowledgement form (rights form). (Docket No. 3, App. 3). Paragraphs 9 and 10 on the rights form specifically note the right to have a trial by a jury in a district court (if timely); the right to an appeal for a trial anew if found guilty; and that if she pleads guilty, there will be no trial of any kind, that she is effectively giving up her right to a trial, to confront witnesses, and the privilege against self-incrimination. Id. at 1.

[¶ 7] Pretrial conferences were held on March 16, 2021 and on March 18, 2021. (App. 3). The matter was scheduled for a court trial on April 1, 2021. Id. Instead of proceeding with a court trial on April 1, 2021, Burtch and her attorney appeared before the Minot Municipal Court, waived her right to a trial, and pled guilty to the charge. (Docket No. 3, App. 3). Burtch signed a guilty plea form, which contained two paragraphs indicating that she was informed of the maximum and mandatory penalties for the charge, that she was waiving the rights listed and acknowledged by her on the rights form, that her plea was voluntary, not the result of force or threats, without any promises, and that she was represented by counsel when she entered her plea. (Docket No. 3, p. 3. App. 3). The Court accepted Burtch's guilty plea and held a sentencing hearing where it accepted argument from the City and Burtch, accepted certified copies of Burtch's prior convictions for

vicious animals, and accepted a statement from the victim in the case. See (Docket Nos. 13-20, App. 3) After considering the information provided, the Municipal Court entered judgment, which included euthanization of the Burtch's animals. (Docket No. 21, App. 5). Euthanization is a condition that the Municipal Court is specifically authorized by to order if it believes it is necessary to ensure the health and safety of others. See Minot City Ordinance 7-30(b)(2).

[¶ 8] On April 5, 2021 Burtch filed a written motion to withdraw her guilty plea. (Docket No. 23, App. 6). The City responded, and on April 8, 2021, the Municipal Court entered a written order denying Burtch's motion to withdraw her plea. (Docket Nos. 27 and 33, App. 11-22).

[¶ 9] Burtch filed a notice of appeal on April 12, 2021. (Docket No. 34, App. 3). In her notice of appeal, Burtch stated that she was appealing "to the Ward County District Court from the Order denying Defendant's motion to withdraw her guilty plea dated April 8, 2021." (emphasis added). See (Docket No. 34). A hearing was scheduled, but the district court issued an order dismissing the appeal on April 16, 2021, before any hearing was held and without receiving any additional filings in the case from the City or Burtch. (Docket Nos. 36-38, App. 3). On May 5, 2021, Burtch filed a notice of appeal, appealing to this Court from the district court order that dismissed her municipal court appeal. (Docket No. 41, App. 27-28).

LAW AND ARGUMENT

[¶ 10] Before considering the merits of this appeal, the City urges this Court to review the motion to dismiss it has filed alongside this response and conclude it does not have jurisdiction over this matter. In sum, under N.D.C.C. § 40-18-19 and N.D.R.Crim.P. 37, Burtch does not have a right to appeal from a municipal court order denying her motion to withdraw her guilty plea. Rather, Burtch can only appeal from the judgment of conviction. See N.D.C.C. § 40-18-19; N.D.R.Crim.P. Rule 37; Werkmeister at ¶ 11; Etienne at ¶ 12. Given Burtch attempted to appeal from a municipal court post-judgment order in a manner that is not prescribed by state law or supreme court rule, the district court correctly concluded that it did not have jurisdiction to hear her appeal. This Court should also conclude that it does not have jurisdiction to hear Burtch’s appeal, and grant the City’s motion to dismiss.

I. Burtch’s statutory right to appeal under N.D.C.C. § 29-28-06 is limited by N.D.C.C. § 40-18-19 and N.D.R.Crim.P. 37.

[¶ 11] Burtch claims this Court has jurisdiction to consider this appeal pursuant to N.D.C.C. § 29-28-06. The district court has appellate jurisdiction “as may be provided by law or by rule of the supreme court.” N.D. Const. art. VI, § 8. There is no constitutional right to appeal – rather the right to an appeal is a statutory right. Holbach v. City of Minot, 2012 ND 117 ¶ 5, 817 N.W.2d 340. If no right to appeal exists, this Court is without jurisdiction to consider the merits and must dismiss the appeal. City of Williston v. Werkmeister, 2015 ND 172, ¶ 4, 865 N.W.2d 429, 431.

[¶ 12] Generally, under N.D. Const. art. VI, § 8, a defendant has the right to appeal from a verdict of guilty, a final judgment of conviction, or the court orders listed under N.D.C.C. § 29-28-06. However, Burtch is appealing from a municipal court order denying her motion

to withdraw her guilty plea, and there are statutes and procedural rules that specifically govern a defendant's appeal from municipal court.

[¶ 13] N.D.C.C. § 40-18-19 provides defendants with the right to appeal a municipal court judgment of conviction or order deferring imposition of sentence to the district court.

(emphasis added). In pertinent part, the statute states:

An appeal may be taken to the district court from a judgment of conviction or order deferring imposition of sentence in a municipal court in accordance with the North Dakota Rules of Criminal Procedure. An appeal is perfected by notice of appeal. A perfected appeal to the district court transfers the action to such district court for trial anew. . .

N.D.C.C. § 40-18-19 (emphasis added).

[¶ 14] Rule 37, N.D.R.Crim.P., provides the procedure for appeals from the municipal court to the district court, and in pertinent part states:

(a) *Filing the Notice of Appeal.*

- (1) An appeal permitted by law as of right from a municipal court to the district court may be taken only by filing a notice of appeal with the municipal court clerk within the time allowed by Rule 37(b).
- (2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is grounds only for the district court to act as it considers appropriate, including dismissing the appeal.

....

(d) *Effect of a Motion on a Notice of Appeal.*

- (1) If a defendant timely makes any of the following motions under the North Dakota Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 30 days after the entry of the order disposing of the last such remaining motion, or within 30 days after the entry of the judgment of conviction, whichever period ends later.
 - (A) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 30 days after the entry of the judgment; or
 - (B) for arrest of judgment under Rule 34.

....

(f) *Content of the Notice of Appeal.* The notice of appeal must:

- (1) specify the party or parties taking the appeal;
- (2) designate the verdict, judgment, order, or part thereof being appealed; and
- (3) name the district court to which the appeal is taken.

....

(j) *Effect and Scope of Appeal.* A perfected appeal to the district court transfers the action for a trial anew. An appeal from a judgment of conviction constitutes an appeal from any verdict of guilty upon which the judgment is rendered.

(k) *Supervision in District Court.* The supervision and control of the proceedings on appeal will be in the district court from the time an appeal is taken except as otherwise provided in these rules. The district court, at any time after an appeal is taken, may:

- (1) hear a motion to dismiss the appeal;
- (2) conduct a trial anew and affirm, reverse, modify, or vacate the municipal court judgment or order;
- (3) correct an illegal sentence or a sentence imposed in an illegal manner; and
- (4) order judgment to be entered in the district court.

(emphasis added).

[¶ 15] The explanatory note to Rule 37 provides the following explanation:

Subdivision (k) was amended, effective March 1, 2020, to provide details on the district court’s scope of review and action upon an appeal. Any correction of an illegal sentence under this provision must be requested within the context of an appeal, not in a postconviction action. An appeal to district court may be returned to municipal court for disposition if the parties agree.

(emphasis added).

[¶ 16] While this Court has applied N.D.C.C. ch. 29-28 to determine jurisdiction in appeals from municipal courts, it must be read together with N.D.C.C. § 40-18-19 and N.D.R.Crim.P. 37. Werkmeister, 865 N.W.2d at ¶ 7. N.D.C.C. § 1-02-07 states that when a general provision in a statute conflicts with a special provision in another statute, the special provision must be construed as an exception to the general provision. “ ‘When statutes relate to the same subject matter, this Court makes every effort to harmonize and

give meaningful effect to each statute.’ ” Werkmeister, at ¶ 7 (quoting State v. Glaser, 2015 ND 31, ¶ 11, 858 N.W.2d 920). With these rules of construction in mind, this Court has held that to the extent that N.D.C.C. § 40-18-19 and Rule 37, N.D.R.Crim.P., conflict with N.D.C.C. § 29-28-06, N.D.C.C. § 40-18-19 and N.D.R.Crim.P. 37 must be construed as an exception to N.D.C.C. § 29-28-06. Werkmeister at ¶ 8.

II. A perfected appeal from a municipal court can only be from a judgment of conviction or order deferring imposition of sentence and would transfer the matter to the district court for a trial anew.

[¶ 17] Burtch argues that N.D.R.Crim.P. 37 allows appeals from municipal courts to district courts, including appeals after post judgment motions. App. Br. at ¶ 5. Rule 37 does allow appeals from municipal courts to district courts – but the appeal can only be taken from the judgment of conviction or order deferring imposition of sentence, and would transfer the matter to the district court for a trial anew.

[¶ 18] This Court has recognized that appeals from municipal courts are not like other appeals. Werkmeister at ¶ 9. An appeal from a municipal court to a district court under N.D.C.C. § 40-18-19 limits that appeal to a trial anew from an appeal from a judgment of conviction or order deferring imposition of sentence. Id. The Rules of Criminal Procedure also limit the form of the appeal from the municipal court to a trial anew. See N.D.R.Crim.P. 37(j) and Werkmeister at ¶ 9. A Municipal Court is not a court of record, thus appeals to the district court should be for a trial anew because there is no record for the district court to review. Id. citing City of Fargo v. Komad, 2006 ND 177, ¶ 11, 720 N.W.2d 619; *see also* Uhden, 513 N.W.2d at 380 (noting city may appeal a pretrial suppression of evidence and dismissal, but it would require a trial anew where the city could present different evidence regarding suppression).

[¶ 19] Burtch argues that N.D.R.Crim.P. 37(k)(3) seems to expand the jurisdiction of the district court. App. Br. at ¶ 7. However, when the Joint Procedure Committee last considered the amendments to N.D.R.Crim.P. 37, the minutes indicate that Chair of the Joint Procedure Committee asked what effect the proposed new language allowing the district court to correct an illegal sentence on appeal would have on the process for correcting an illegal sentence. See Joint Procedure Committee Minutes of April 26, 2019, pages 2-3. A member responded that “. . . [t]hat the Supreme Court has ruled that post-conviction relief is not available in municipal court so the only way to initiate correction of an illegal sentence would be to appeal the municipal court judgment and obtain a trial anew in district court.” Id. See also Holbach v. City of Minot, 2012 ND 117, ¶ 19, 817 N.W.2d 340 (holding that post-conviction relief is not available in municipal courts in North Dakota). Thus, while N.D.R.Crim.P. 37(k) does arguably expand the jurisdiction of the district court’s ability to hear a municipal court appeal – it does not appear as though the committee contemplated the latest amendments to go so far as to afford a district court the jurisdiction to conduct an appellate review of a municipal court post-judgment order.

III. Burtch did not exercise her right to appeal in the manner prescribed by N.D.C.C. § 40-18-19 and N.D.R.Crim.P. 37.

[¶ 20] Burtch’s notice appealing this matter from municipal court to district court indicates that it is appealing a court order on a post-judgment motion. (Docket No. 34). The Court reviewed a similar request in City of Dickinson v. Etienne, where the appellant sought to appeal to the district court from a municipal court post-judgment order denying his motion to vacate his plea. 2015 ND 193, 867 N.W.2d 673. The Court found that Etienne did not have a right to appeal to the district court from the municipal court’s post-judgment order

under N.D.C.C. §40-18-19, and that his post-judgment motions did not extend the time to file an appeal from the criminal judgment. Id. at ¶12.

[¶ 21] Burtch’s notice of appeal claims that the appeal is made “pursuant to N.D.R.Crim Procedure 37(f)(2)” from a municipal court order denying her motion to withdraw her guilty plea. (Docket No. 34). Burtch does not have a right under N.D.C.C. § 40-18-19 or N.D.R.Crim.P. 37 to appeal from a municipal court post-judgment order denying her motion to withdraw her guilty plea. N.D.C.C. § 40-18-19 and N.D.R.Crim.P. 37 limit an appeal from a municipal court conviction to a district court from a judgment of conviction or order deferring imposition of sentence. N.D.C.C. § 40-18-19; Werkmeister at ¶ 9. Burtch did not exercise her right to appeal in the manner prescribed by N.D.C.C. § 40-18-19 and N.D.R.Crim.P. 37 when she indicated in her notice that she was appealing “. . . from the Order denying Defendant’s motion to withdraw her guilty plea dated April 8, 2021.” (Docket No. 34, App. 30).

IV. The district court’s dismissal of Burtch’s appeal was appropriate, because it does not have jurisdiction to hear an appeal of a municipal court order denying a motion to withdraw a guilty plea.

[¶ 22] A challenge to a district court’s subject matter jurisdiction is reviewed de novo when the jurisdictional facts are not in dispute. Schirado v. Foote, 2010 ND 136, ¶ 7, 785 N.W.2d 325. As discussed in the preceding paragraphs, the City’s position is that Burtch does not have a right to appeal, the district court did not have jurisdiction to hear the appeal, and therefore this Court does not have jurisdiction to hear this appeal. N.D.R.Crim.P. 37(a)(2) states that the appellant’s failure to take any step other than timely filing the notice of appeal is grounds for the district court to act as it considers appropriate, including dismissing the appeal – which it did. (Docket No. 38, App. 23-26).

[¶ 23] “Subject matter jurisdiction is the court’s power to hear and determine the general subject involved in the action. . .” Estate of Finstrom, 2020 ND 227, ¶ 30, 950 NW2d 401, citing Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶ 10, 580 N.W.2d 583. In order for subject matter jurisdiction to attach, “. . . the issue to be decided must be properly brought before the district court in the particular proceeding.” Id. Issues involving subject matter jurisdiction cannot be waived, and can be raised sua sponte at any time. Id., citing Garaas v. Cass Cty. Joint Water Res. Dist., 2016 ND 148, ¶ 4, 883 N.W.2d 436. A challenge to a district court’s subject matter jurisdiction is reviewed de novo when the jurisdictional facts are not in dispute. Schirado v. Foote, 2010 ND 136, ¶ 7, 785 N.W.2d 325.

[¶ 24] Under N.D.C.C. § 40-18-19 and N.D.R.Crim.P. Rule 37, to properly bring an appeal to district court from municipal court to correct an illegal sentence, or a sentence imposed in an illegal manner, Burtch would have to timely file an appeal from the judgment of conviction and request a trial anew; or in the event she requested a new trial in municipal court under N.D.R.Crim.P. Rule 33 or for arrest of judgment under Rule 34, she would have 30 days after entry of the order disposing of the last such remaining motion to appeal from the judgment of conviction. N.D.R.Crim.P. Rule 37(d). Regardless of the time frame, the proper appeal to a district court from a municipal court is taken from the judgment of conviction or order deferring imposition of sentence - not from a post judgment order. See N.D.C.C. § 40-18-19; N.D.R.Crim.P. Rule 37; City of Williston v. Werkmeister, 2015 ND 172, ¶ 11, 865 N.W.2d 429; City of Dickinson v. Etienne, 2015 ND 193, ¶ 12, 867 N.W.2d 673. Burtch’s Notice of Appeal from municipal court to district court specifically states it is being taken from the order denying her motion to withdraw her guilty plea. (Docket No. 33, App. 30). Burtch does not have a right to appeal the order she specifies in her notice of

appeal, and given she did not exercise her right to appeal in the manner prescribed by N.D.C.C. § 40-18-19 and N.D.R.Crim.P. 37, the district court did not have jurisdiction to hear the appeal. Therefore, the City again urges this Court to also conclude that it does not have jurisdiction to hear Burtch's appeal, and grant the City's Motion to Dismiss.

CONCLUSION

[¶ 25] Lynette Burtch has failed to establish that the district court or this Court has jurisdiction to hear this appeal. Given the same, the City respectfully asks this Court to deny her request to require the district court to hear the municipal court appeal and grant the City's Motion to Dismiss this appeal.

Dated this 9th day of July, 2021

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v.)	Minot Municipal Court No.
)	MI-2021-CR-00194
)	
Lynette Burtch,)	CERTIFICATE OF
)	COMPLIANCE
Defendant and Appellant.)	

[¶ 26] I, Stefanie Stalheim, Assistant City Attorney, hereby certify that this Appellee’s Brief complies with the page limitation set forth in Rule 32, N.D.App.P., and consists of 18 pages including a Certificate of Service (1 page), and this Certificate of Compliance (1 page).

Dated this 9th day of July, 2021

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Lynette Burtch,)	CERTIFICATE OF SERVICE
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)	
Defendant and Appellant.)	

[¶ 27] I, Stefanie Stalheim, Assistant City Attorney, hereby certify that a true and correct copy of the foregoing **Appellee’s Brief** was served by **E-mail** to the following on 7/9/2021:

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Dated this 9th day of July, 2021

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