

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

---

State of North Dakota,

Respondent,

vs.

Brandon Todd Tompkins,

Appellant.

---

**SUPREME COURT NO. 20220270**

Criminal No. 47-2022-CR-00145

---

**APPELLANT’S RULE 9(B) MOTION FOR STAY OF EXECUTION OF  
SENTENCE PENDING APPEAL**

---

Luke T. Heck (#08133)  
**VOGEL LAW FIRM**  
Attorneys for Plaintiff  
218 NP Avenue  
PO Box 1389  
Fargo, ND 58107-1389  
701.237.6983  
Email: lheck@vogellaw.com

¶1 In accordance with Rules 8 and 9 of the North Dakota Rules of Appellate Procedure, and Rule 38 of the North Dakota Rules of Criminal Procedure, Appellants moves this Court for an Order staying execution of the sentence imposed in the above-captioned matter pending resolution of his pending appeal. This Motion is based on the contemporaneously filed brief in support, and all other records in this action.

Respectfully submitted October 11, 2022.

**VOGEL LAW FIRM**

By: /s/ Luke T. Heck

Luke T. Heck (#08133)

218 NP Avenue

PO Box 1389

Fargo, ND 58107-1389

701.237.6983

Email: lheck@vogellaw.com

ATTORNEYS FOR APPELLANT

4912146.1

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

---

State of North Dakota,  Respondent,  vs.  Brandon Todd Tompkins,  Appellant.	<b>SUPREME COURT NO. 20220270</b>  Criminal No. 47-2022-CR-00145
--	--

---

---

**BRIEF IN SUPPORT OF APPELLANT’S RULE 9(B) MOTION FOR STAY  
OF EXECUTION OF SENTENCE PENDING APPEAL**

---

Luke T. Heck (#08133)  
**VOGEL LAW FIRM**  
Attorneys for Plaintiff  
218 NP Avenue  
PO Box 1389  
Fargo, ND 58107-1389  
701.237.6983  
Email: lheck @vogellaw.com

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	3
	<u>Paragraph(s)</u>
Factual Background.....	1
Procedural History.....	4
Law and Argument.....	5
I. Mr. Tompkins appeal is not frivolous.....	6
II. Mr. Tompkins does not appeal for purposes of delay. ....	8
III. Mr. Tompkins does not pose a flight risk. ....	9
IV. Mr. Tompkins does not pose a danger to his community if allowed to remain free pending resolution of his appeal. ....	10
Conclusion.....	12

## TABLE OF AUTHORITIES

### Paragraph(s)

#### Cases

<i>State v. Azure</i> , 241 N.W.2d 699 (N.D. 1976) .....	6
<i>State v. Engel</i> , 259 N.W.2d 293 (N.D. 1977) .....	6
<i>State v. Flohr</i> , 284 N.W.2d 303 (N.D. 1979) .....	6
<i>State v. Lesmeister</i> , 288 N.W.2d 57 (N.D. 1980) .....	6
<i>State v. Olmstead</i> , 242 N.W.2d 644 (N.D. 1976) .....	5, 12
<i>State v. Pulkrabek</i> , 2017 ND 203, 900 N.W.2d 798.....	7
<i>State v. Stevens</i> , 234 N.W.2d 623 (N.D. 1975) .....	6, 8

#### Court Rules

N.D.R. App. P. 8.....	5
N.D.R. App. P. 9.....	5
N.D.R. App. P. 31.....	11
N.D.R. Crim. P. 38 .....	5

#### Other

Black's Law Dictionary (9th ed. 2009).....	6
--	---

## FACTUAL BACKGROUND

[¶1] The State charged Defendant, Brandon Todd Tompkins (“Mr. Tompkins”) with two counts of DWI.<sup>1</sup> As to Count 1, the State alleged Mr. Tompkins violated Section 39-08-01(1)(b) “**and/or**” Section 39-08-01(1)(e) by driving while under the influence of an intoxicating liquor “and/or” refusing the submit to a chemical blood test.<sup>2</sup> As to Count 2, the State alleged Mr. Tompkins violated Section 39-08-01(1)(b) “**and/or**” Section 39-08-01(1)(e) by being in actual physical control of a vehicle while under the influence of an intoxicating liquor “and/or” refusing the submit to a chemical blood test.<sup>3</sup>

[¶2] Over Mr. Tompkins, the district court provided a jury instruction on Count 1, allowing Mr. Tompkins’s conviction if the jury found:

2. The Defendant was under the influence of intoxicating liquor or
3. After the Defendant was directed by a law enforcement officer to submit to a chemical test of the Defendant’s blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or a combination thereof, in the Defendant’s blood, breath, or urine; the Defendant refused to submit to the test.<sup>4</sup>

Similarly, the district court provided a jury instruction on Count 2, allowing Mr. Tompkins’s conviction if the jury found:

- 4) The Defendant was under the influence of intoxicating liquor or

---

<sup>1</sup> See generally Doc. #49.

<sup>2</sup> *Id.* at 1 (emphasis in original).

<sup>3</sup> *Id.* (emphasis in original).

<sup>4</sup> Doc. #55, at 10.

5) The Defendant refused to submit to a chemical test or tests of the Defendant's breath at the direction of law enforcement to determine the alcohol concentration.<sup>5</sup>

¶3 The jury convicted Mr. Tompkins on both counts. Mr. Tompkins then timely appealed to this Court.

### **PROCEDURAL HISTORY**

¶4 Mr. Tompkins moved for a stay with the district court.<sup>6</sup> The district court denied Mr. Tompkins's motion, reasoning:

[Mr.] Tompkins is a proven danger to the community. He has three s [sic] alcohol offenses in two years, with two of the three having victims. [Mr.] Tompkins took a stranger's car in 2020. [Mr.] Tompkins rear ended and totaled a Mustang on HWY 281 in 2020. [Mr.] Tompkins appears to have fallen asleep at the wheel on Hwy 281 in April of 2022. During the 2022 incident, [Mr.] Tompkins' abuse of the law enforcement officer revealed a negative behavioral trait echoing [Mr.] Tompkins' simple assault in JA-2017-CR-00589.<sup>7</sup>

Mr. Tompkins now moves this Court for relief.

### **LAW AND ARGUMENT**

¶5 In accordance with Rule 38 of the North Dakota Rules of Criminal Procedure, a district court may stay execution of a sentence pending appeal.<sup>8</sup> "As a general rule,

---

<sup>5</sup> *Id.* at 12.

<sup>6</sup> *See* Doc. #67.

<sup>7</sup> *See* Doc. #77, ¶ 3.

<sup>8</sup> N.D.R. Crim. P. 38(a); *see also* N.D.R. App. P. 8 ("Rule 38(a) of the North Dakota Rules of Criminal Procedure governs a stay in a criminal case."); *cf. also* N.D.R. App. P. 9(a) ("Any motion for release, modification of the conditions of release, or revocation of release after a notice of appeal from a judgment of conviction has been filed must first be made to the district court before the motion may be made to the supreme court.").

a convicted defendant is entitled to release pending appeal unless it appears that (1) the appeal is frivolous, (2) the appeal is taken for delay, (3) there is reason to believe the defendant might flee, or (4) the defendant poses a danger to others or to the community.”<sup>9</sup>

**I. Mr. Tompkins appeal is not frivolous.**

[¶6] While this Court has opined as to the standard of frivolousness of appeals in other contexts,<sup>10</sup> it has not defined frivolity for purposes of the stay of a criminal sentence.<sup>11</sup> No matter the standard, Mr. Tompkins appeal is not frivolous.<sup>12</sup>

[¶7] As outlined above, the State prosecuted Mr. Tompkins for two alleged violations of Section 39-08-01 of the North Dakota Century Code, and that for each alleged violation, the State charged Mr. Tompkins violated Section 39-08-01(1)(b) “**and/or**” Section 39-08-01(1)(e).<sup>13</sup> To date, this Court has not determined whether 39-08-01(1)(b) and 39-08-01(1)(e) provide alternative methods of DWI, or whether each

---

<sup>9</sup> *State v. Olmstead*, 242 N.W.2d 644, 645-46 (N.D. 1976) (citation and internal quotation omitted).

<sup>10</sup> *See State v. Flohr*, 259 N.W.2d 293, 296 (N.D. 1977) (considering when appeal is frivolous for purposes of awarding attorneys’ fees).

<sup>11</sup> *See, e.g., State v. Lesmeister*, 288 N.W.2d 57, 60 (N.D. 1980) (considering whether the appeal was frivolous without defining a standard); *State v. Engel*, 284 N.W.2d 303, 306 (N.D. 1979) (same); *State v. Azure*, 241 N.W.2d 699, 700 (N.D. 1976) (same); *State v. Stevens*, 234 N.W.2d 623, 626 (N.D. 1975) (same).

<sup>12</sup> *Cf. Black’s Law Dictionary* 113 (9th ed. 2009) (defining “frivolous appeal” as “[a]n appeal having no legal basis, usu[sually] filed for delay to induce a judgment creditor to settle or to avoid payment on a judgment[.]”).

<sup>13</sup> Doc. #49, at 1 (emphasis in original).



subdivision requires independent facts requiring unanimity.<sup>14</sup> Mr. Tompkins respectfully avers it is not frivolous to seek this Court’s ruling whether being under the influence of an intoxicating liquor, and refusing a chemical test request, are distinct acts requiring unanimity amongst jurors. The lack of frivolity in this appeal favors a stay.

**II. Mr. Tompkins does not appeal for purposes of delay.**

[¶8] “[T]he motive of the appellant is relatively unimportant if he in fact has substantial grounds for the appeal.”<sup>15</sup> Nevertheless, Mr. Tompkins also possesses a non-delay purpose for his non-frivolous motion: absent a stay, Mr. Tompkins would complete his sentence prior to resolution of his appeal. The district court sentenced Mr. Tompkins to 30 days jail, first to serve 10 days, credit for 1 day served.<sup>16</sup> Mr. Tompkins is currently scheduled to begin his sentence on October 15, 2022.<sup>17</sup> Absent intervention by this Court, Mr. Tompkins will clearly serve the totality of his incarceration prior to resolution of his appeal. Any potential relief granted by this Court would be hollow if Mr. Tompkins would still have served the entirety of his sentence even if vindicated by this Court. The appropriate purpose for a stay favors the stay.

---

<sup>14</sup> See *State v. Pulkrabek*, 2017 ND 203, 900 N.W.2d 798 (considering whether theft statute merely provided alternative methods of commission of theft so as not to require juror unanimity).

<sup>15</sup> *Stevens*, 234 N.W.2d at 626.

<sup>16</sup> See Doc. #58.

<sup>17</sup> See Doc. #83.

**III. Mr. Tompkins does not pose a flight risk.**

[¶9] Mr. Tompkins remained free on bond in this case, and appeared at all necessary proceedings.<sup>18</sup> Mr. Tompkins also has no history of failing to appear. Mr. Tompkins lack of flight risk favors a stay.

**IV. Mr. Tompkins does not pose a danger to his community if allowed to remain free pending resolution of his appeal.**

[¶10] The sole reason identified by the district court for denying a stay of sentence pending appeal is Mr. Tompkins alleged danger to society he would pose if allowed to remain on release.<sup>19</sup> The district court's cited justifications for refusing Mr. Tompkins release fail. Mr. Tompkins is a misdemeanor offender. The only violent offense he was ever accused—or convicted—of was simple assault half-a-decade ago.<sup>20</sup> During the entire pendency of this case, Mr. Tompkins remained free and law abiding. There is nothing in the record showing that Mr. Tompkins, if allowed to remain free pending appeal, would change his conduct.

[¶11] Additionally, refusing Mr. Tompkins release based on allegedly posing a danger to the community is also pragmatic in this case. The executed portion of Mr. Tompkins sentence is only nine (9) additional days. If Mr. Tompkins posed an imminent danger to his community only avoidable by incarcerating Mr. Tompkins, then the district court's decision to stay the vast majority of Mr. Tompkins sentence conflicts with that

---

<sup>18</sup> See generally Docket.

<sup>19</sup> See Doc. #77, ¶ 3.

<sup>20</sup> JA-2017-CR-00589.

concern. Moreover, because Mr. Tompkins only has nine days remaining to serve—or even if the entirety of the 30-day sentence were somehow executed—Mr. Tompkins would be free during the pendency of this appeal.<sup>21</sup> In other words, execution of the sentence would not keep the community “safe” from Mr. Tompkins as Mr. Tompkins will be free during at least a portion of the pendency of his appeal.

**CONCLUSION**

[¶12] The stay of a defendant’s sentence pending appeal is presumptive.<sup>22</sup> Mr. Tompkins’s appeal is not frivolous. Mr. Tompkins does not appeal for an improper purpose. Mr. Tompkins does not pose a flight risk. Incarceration is not necessary to keep the public safe, and even execution of the sentence would not further that interest in this particular case. Accordingly, Mr. Tompkins respectfully requests that this Court stay execution of his sentence pending resolution of his appeal before this Court.

Respectfully submitted October 11, 2022.

**VOGEL LAW FIRM**

By: /s/ Luke T. Heck  
Luke T. Heck (#08133)  
218 NP Avenue  
PO Box 1389  
Fargo, ND 58107-1389  
701.237.6983  
Email: lheck@vogellaw.com  
ATTORNEYS FOR APPELLANT

4912236.1

---

<sup>21</sup> Cf. N.D.R. App. P. 31(a) (giving an appellant 40 days to file a brief after filing of the transcript, the appellee 40 days to file a brief after service of appellant’s brief, and 14 days for an appellant to serve a reply brief).

<sup>22</sup> See *Olmstead*, 242 N.W.2d at 645-46.

