

10-26-2012

## State v. Bettwieser Appellant's Brief Dckt. 39106

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO  
Plaintiff, Respondent

)  
) Ada County Docket CR-IN-2010-0030032  
)  
)

vs.

)  
) Supreme Court Docket 39106-2011  
)  
)

MARTIN BETTWIESER  
Defendant, Appellant  

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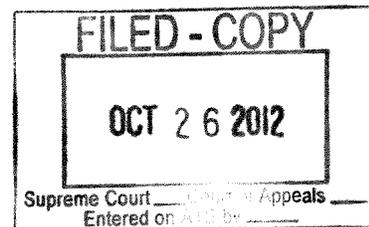
**APPELLANT'S BRIEF**

Appealed from the District Court of the 4<sup>th</sup> Judicial District  
State of Idaho, County of Ada  
District Judge Kathryn A. Stricklen Presiding

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MARTIN BETTWIESER  
APPELLANT PRO-SE  
3862 YORKTOWN WAY  
BOISE, IDAHO 83706

SARA MILLER BOISE CITY  
RESPONDENT  
P.O BOX 500  
150 N. CAPITOL BLVD  
BOISE, IDAHO 83701-0500



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## **1.STATEMENT OF CASE**

### **A. NATURE OF CASE**

This case arose when Bettwieser was pulled over and cited for not wearing a seat belt pursuant to *Idaho Code 49-673*. Subsequently after the issuance of the citation there arose other legal, pre-trial and post trial issues of which are appealed herein and addressed in the Issues on Appeal.

### **B. PROCEDUAL HISTORY**

A uniform citation was issued July 3, 2010 for failure to wear seat belt. A Notice of Hearing was issued and served by mail for a Pre-trial Conference for August 31, 2010 on July 27, 2010.

A Motion and Memorandum to Dismiss was filed on August 27, 2010. Bettwieser appeared at the pre-trial conference on August 31, 2010 and met with Sara Miller. There were discussions and she was rude and purposely mislead Bettwieser and or lied to Bettwieser about the the processes that were to take place and what Bettwieser was entitled to as a pro-se litigant. Bettwieser was told he could not have access to the clerks office and that a Judge was not available for proceedings on that day as a pre-no response to the August 27, 2010 Motion to Dismiss. A copy of the cover page to the Second Motion to Dismiss is in file with hand written notes, considered to be an Order, by Judge Swain with no Certificate of Service nor filing date.

Court trial was held on November 3, 2010. There was a timely Motion to Reconsider filed November 17, 2010. Again the court ruled or issued an order on that motion by hand written comment except this time on the back page of the Motion. There is no evidence of Service.

A Notice of Appeal was filed to the District Court from the Magistrate Court on January 28, 2011. An Estimated Transcript Cost was filed on February 2, 2010. An Order Governing Procedure on Appeal was filed and served on February 11, 2011 and a motion to Amend that Order was file on February18, 2011.

The District Court issued a Conditional Order of Dismissal on April 7, 2011. On April 20, 2011 a

Motion was filed to Vacate that order. On May 13, 2011 the Court ruled on Bettwieser's two previous motions. On May 26, 2011 a Motion to Reconsider from those orders was filed.

On May 31, 2012 the Court issued an Order on Clarification by denying without comment and issued an Order of Dismissal of the Appeal. Bettwieser filed a Motion to Reconsider On June 13, 2011. On July 11, 2011 the District Court denied the Motion to Reconsider, and on August 22, 2011 a Notice of Appeal was filed in the District to the Idaho Supreme court.

This does not conclude the issues or filings in the District Court. On December 3, 2011 an Objection to the Clerks record was filed in District Court. An Order denying the Objection to the Clerks Record was issued by the District on February 21, 2012, and on March 5, 2012 a Motion to Reconsider was filed by Bettwieser. On March 16, 2012 the District Court denied that Motion.

On April 4, 2012 an Objection to the Record on Appeal was filed in the District Court and the Idaho Supreme Court Suspended the briefing until action could be taken by the District Court. The District Court set hearing on the Objection for May 10, 2012 on April 10, 2012.

On April 13, 2012 Bettwieser filed a motion to reschedule and for clarification of the Hearing Notice which had only been set for oral argument. The Court set another hearing date on April 19, 2012 but did not comment nor clarify. Hearing was set and had on June 14, 2012.

On June 26, 2012 Bettwieser filed a Motion to Continue the Hearing because even though the court had allegedly set the hearing as an evidentiary hearing it was really only set for oral argument and was only allowed limited presentation and not able to call a witness, the appeals clerk, that was present.

On June 28, 2012 the District Court ruled on the Objection to the Clerks Record from the hearing and denied the motion of June 26, 2012 and to extend the hearing.

An Amended Notice of Appeal was filed in District Court on October 23, 2012.

This is the record of proceeding from the Magistrates Division and District Court to the Idaho Supreme Court. Bettwieser appeals from the pre and post judgment orders of the Magistrate as well as

from the post judgment orders of the District Court.

### **C. STATEMENT OF FACTS**

1. Bettwieser was detained and issued a citation for failure to where seat belt.
2. Bettwieser is a mail carrier and uses his personal vehicle in that profession and has visible logo on that vehicle as reference to his profession.
3. Bettwieser was denied equal access to the courts by the prosecuting attorney Sara Miller.
4. Bettwieser filed two Motions to Dismiss in the magistrates division that were not responded to by the State.
5. The Magistrates court issued 2 handwritten orders that were put on the Motions that were filed by Bettwieser and without any certificate of Service to Bettwieser. One on October 15, 2010 and one on November 17, 2010.
6. Neither of the hand written orders mention previously gave any reasoning nor legal basis for it's decision nor is there any evidence of service of those orders.
7. Issue on Appeal to the District court were issues of law and from the Clerks record and not from facts of the proceeding of November 3, 2010.
8. A transcript was not ordered by Bettwieser.
9. Many of the magistrates and District Courts decisions were absent any legal reasoning or otherwise.
10. Bettwieser did not receive or was sent an acknowledgment letter of the completion of the clerks record.
11. That District Court has ruled that notification by phone and or and acknowledgment letter "leads to personal service" of the clerks record.
12. The District Courts ruling of March 16, 2012 is absent legal reasoning or basis.
13. There are no objections to any of Bettwieser's filing by the State.

### **2. ISSUES ON APPEAL**

- A. Was the citation properly issued and should the citation been dismissed before trial?
- B. Did Bettwieser, as a pro-se litigant receive equal access to the courts pursuant to the United

States Constitution and /or was unjustly treated and denied that access and receive a proper pre-trial?

C. Are the hand written orders by the Judges in the magistrates division considered legal and or proper orders?

D. Does an appellant need a transcript in the District Court when the District Court is acting in an appellant capacity and he only raises issue of law and no fact to any proceeding that was recorded and should the District Court acting in an appellate capacity present the issues on appeal?

E. Did the District Court abuse it's discretion in it's rulings acting in an appellant capacity?

F. Does notification by phone and or answering machine or an acknowledgment letter of a completion of the clerks record constitute as "personal service" according to law?

G. Is having a separate appeal record by the appeal clerk proper for due process in the appeal which is not part of the court appeal record?

### **3.ARGUEMENTS**

A. Was the citation properly issued and should the citation be dismissed before trial?

#### **STANDARD OF REVIEW.**

Before argument is made, the standard of review is that the Supreme Court can rule independently on issues of the magistrates division from the District Court acting in an appellant capacity.

The record shows Bettwieser was issued a citation under *I.C. 49-673* based on his not wearing a seat belt alone. He is a mail carrier and that he was on duty when he received that citation. (*R. 6-11*). Bettwieser argues that he is entitled to dismissal under two exceptions based on that statute, that it was not properly issued and that he is entitled to the exception under law.

First he is a mail carrier doing the duties of a Mail Carrier. *I.C. 49-673(2)(d)*. Secondly, he was pulled over for not wearing a seat belt. (*R-6-11*) Again *I.C. 49-673 (5)* does not allow enforcement under those circumstances.

Thirdly he is entitled because there was no objection to the Dismissal by the State. In order not to be redundant in citation and argument I submit (*R.14-18*) for argument, authority and citation.

Based on these arguments this court must find that there was an abuse of discretion and the

complaint should have been dismissed as a matter of law and the record before it.

B. Did Bettwieser, as a pro-se litigant receive equal access to the courts pursuant to the United States Constitution and or was unjustly treated and denied that access and receive a proper pre-trial?

The record shows (R-17) (Exhibit A,B) there was a pre-trial that Bettwieser was present at which he requested access to the courts and was denied access by the prosecutor by lying stating the judge would not be involved in court at this proceeding and giving false information in order to deny Bettwieser his rights to due process and to all Bettwieser to legitimately defend the complaint before him. The record shows that there was proceeding after Bettwieser left which now he was able to address the court as requested. This amounts also to prosecutorial misconduct. Pro-se proceedings are not favored in the legal system with the court and prosecutors anticipating ignorance's in the processes of pro-se individuals and use those tactics in order to harm the defendant's in there liberties and rights. Be cause courts at all levels and stages are slow to supervise it's own many injustices are allowed and accelerated because of that tolerance. This court now has that opportunity to put the legal profession on track with it's non-tolerance of these kinds of actions.

Therefore this court should enforce the moral and ethical standards of the State and rule that a there was not a proper pre-trial given to Bettwieser and that he was prejudiced because the that conduct.

C. Are the handwritten orders by the Judges in the magistrates division considered legal and or proper orders?

Background.

Bettwieser filed a Motion to Dismiss on August 27, 2010, (R-6-11) There was no objection to the motion by the State nor was there a ruling on that motion. The court never ruled on that motion.

Bettwieser filed a Second Motion to Dismiss, (R.14-18). Apparently the record shows the court issued an order, handwritten on the face of the motion which stated “ Will take up all motions 11-3-10 at 1:15, there was no indication of service of that order, nor was there an objection by the State to the motion to dismiss.

The trial was held and the court stated that the motion was the trial or the trial the motion (R. 22) and denied the motion.

Bettwieser filed a Motion to Reconsider or for New Trial on November 17, 2012 (R 21-24) The court again issued a handwritten order except this time on the last page of the motion stating "Defendant was advised of right to appeal" There is no evidence of Service.

### Argument

Idaho Infractions are a quasi criminal proceeding in which both civil and criminal rules apply. I.R.C.P. 10(a)(1) sets forth format for orders as type written and would appear as a separate document and not part of an existing one. These orders were not.

Further more ICR 49(a)(b) sets out the service and filing of orders. Neither a certification of service or a filing stamp is evidenced to the alleged orders.

Further more there is no legal reasoning or basis given in it's ruling to base a credible appeal to the denial. The one motion only states will take up at a later date, the others basis for denial is that I was advised of my right to appeal. That is not a basis for denial, The court is basically saying I'm not going to rule, take it up with the appellate court. The magistrates court is truly abusing it's discretion.

This court has set the standard for abuse of discretion as: 1) whether the lower court perceived the issue as one of discretion, 2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; 3) whether the lower court reached it's decision by exercise of reason.

Therefore this must court must rule that the orders that were handwritten were not proper in form or content nor in service and in reasoning and that Bettwieser was denied proper due process and must be reversed and rule that the lower court abused it's discretion.

D. Does an appellant need a transcript in District Court when the District Court is acting in an appellant capacity and he is only raising issues of law and no fact to any proceeding that was recorded and should the District Court acting in an appellate capacity present the issues on appeal?

The Appellant is responsible for the Notice of Appeal, payment of filing fees, presenting the issues on appeal, supplying a transcript if requested and clerks record. *IAR 17, 25(a)*. Bettwieser appealed the case to the District on issues of law from which the clerks record was sufficient for argument and requested as such. This court has ruled that when arising to issues of law a transcript is not necessary.

The District Court in its appellant capacity has taken upon itself to say a transcript is needed when there are no specific questions before it to base that decision and or seems to want to present the issues on appeal for Bettwieser. Bettwieser was not appealing any proceeding. Bettwieser has asked the court to clarify on whether it was presenting the questions on appeal (R. 43) and was denied.

I argue it is not the court's place to present the issue on appeal and especially without notice and service of it's intent. I further argue that a transcript is not necessary in the District Court because a transcript is not needed in the Supreme Court and the District Court is to decide the appeal on the same grounds and standard that is appealed to the Supreme Court. *ICR 54.17(a) IAR 17(2)(h)*

Therefore since a transcript is not needed in the Supreme Court and the District Court acting in an appellate capacity is to decide the case on the same grounds and standards as appealed to the Idaho Supreme court there need not be a transcript and it would not be the appellate courts duty to present the issues on appeal.

F. Does notification by phone and or answering machin or an acknowledgment letter of a completion of the clerks record constitute as "personal service" according to law?

Bettwieser has appealed all pre and post interlocutory orders of the lower courts. (R-25 and SCF October 23, 2012) On February 21, 2012 the District Court ruled on Bettwieser's first objection to the Clerks record on appeal (SCF) In the ruling the court ruled that telephoning and leaving a message on an answering machine by the court clerk and or giving an acknowledgment letter that the clerks record was ready to be picked up satisfies *IAR 29* for personal service and *IRCP 4*. *IRCP 4(e)(2)* specifically states service is complete on the date of delivery not on a date of notification. It is well settled in

*Brooks v. Orchard Land, Co. 21 Idaho 212* that it is the delivery of the item personally that constitutes service.

Further more it appears that the clerk did finally send by certified mail, return receipt the clerks record on March 28, 2012 as evidence by the Order Objection to the Clerks Record of June 28, 2012. (SCF) The Certificate of Service in the clerks record states that service was rendered on October 25, 2011. Although telephone notifications and or acknowledgment letters do not constitute personal service this court has never specifically ruled that certified mail with return receipt qualifies as personal service. Absent that specificity allows the lower courts to clearly create ambiguity in this area.

Bettwieser is a mail carrier and states that he delivers certified mail almost every day and that it can be used as personal service if it is delivered to the person it is addressed to. If it is not it should not be counted as personal service. There is an endorsement the sender can purchase which is certified mail, return receipt, restricted delivery, which means it can only be delivered to the person it it addressed to. This would always be considered personal delivery when delivered.

When the term "mail" is used as an avenue of service in the court rules it creates to broad of a spectrum of what that means. This court has the opportunity at this time to set precedence on this issue.

There fore this court must reaffirm a long standing practice of personal service as delivering to the person and personally and rule the District court erred and abused it's discretion in it's definition of personal service pertaining to the Order of February 21, 2012 and can define what personal service means and when used in mailing the Clerks Record.

G. Is having a separate appeal record by the the appeal clerk proper for due process in the appeal which is not part of the standard court appeal record?

The District court in a post judgment order and on an objection to the clerks record on appeal on February 21, 2012( SCF) issued an order without hearing and based it's decision on what it cites as an

“appeal's clerk record.” This appears to be a separate record that the appeals clerk creates that is not part of the regular court file. In this instance the court issued an order from that appeal record and from ex-parte statements from the appeals clerk and did not allow Bettwieser to be part of the process when he requested a hearing on the matter. The court again denied Bettwieser the ability to examine the appeals clerk under oath when he had made him available for the hearing on the Objection to the clerks record on June 14, 2012 and scheduled a evidentiary hearing of which the court only scheduled the hearing for oral argument. (Exhibit 1 filed June 26, 2012) It appears that he court is issuing precedence setting rulings on evidences ex-parte with out due process.

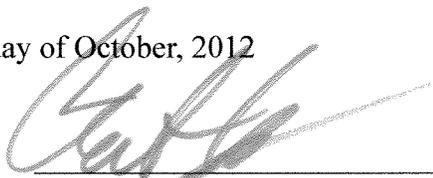
With these facts it puts into question whether there should be a separate appeals record that is not readily available for inspection to the parties. Should all records created, including an appellate proceeding be part of the District Court file? The notice of appeal is part of the file, all fees and payments receipts are part of It, any letters. A party should not find out after the fact that there is a record of the record and that the court uses it ex-parte to base it's decisions on post appeal matters. There does not seem to be a separate file allowed in the Court or Administrative Rules.

Therefore this court should give direction on the status of the separate appeal record to 1)be part of the standard record or 2) if it can be used ex-parte by the court to base it's decisions on.

## **CONCLUSION**

With the issues,facts, filings and law herein this court is able to reverse, remand, or rule that this court can not claim jurisdiction of this case because of errors of the magistrates division and District Court in the ruling and non-service of it's orders. This court can also recognize the issues of first impression and rule as just and proper.

Respectfully and Honestly submitted this 26<sup>th</sup> day of October, 2012



\_\_\_\_\_  
Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the the APPELLANT'S BRIEF to be served by pre paid first class mail on the 26<sup>th</sup> day of October, 2012 to the following;

Sara Miller  
Ass. City Attorney  
P.O. Box 500  
150 N. Capitol Blvd  
Boise, Idaho 83701-0500

A handwritten signature in black ink, appearing to read 'M. Bettwieser', is written over a horizontal line.

Martin Bettwieser