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State v. Nilan Appellant's Brief Dckt. 41764

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) No. 41764
)
 v.)
)
 MITCHELL NILAN,) APPELLANT'S BRIEF
)
 Defendant-Appellant.)
 _____)

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

HONORABLE MICHAEL MCLAUGHLIN
District Judge

HEIDI TOLMAN
Deputy Ada County Public Defender
I.S.B. # 8648
200 W. Front Street, Suite 1107
Boise, Idaho 83702
208-287-7400

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEYS FOR
DEFENDANT-APPELLANT**

**ATTORNEY FOR
PLAINTIFF-RESPONDENT**

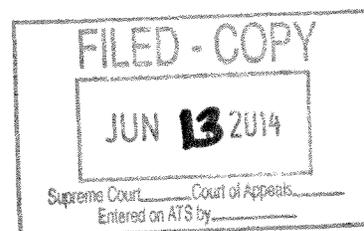


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STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

Mr. Nilan entered a conditional guilty plea on July 16, 2013 to Minor in Consumption and Open Container a violation of Idaho Code 23-949 and 23-505(2). (R., 40-42) He filed his Notice of Appeal in the District Court on August 2, 2013, the issue on appeal was whether the trial court erred in denying the defendant's motion to enlarge time to hear a motion to suppress. (R., 45) An Order Governing Procedure on Appeal was filed on August 13, 2013. (R., 50) The notice ordered that the Appellant's brief be filed and served on or before December 2nd, 2013. On December 2, 2013 the parties filed a Stipulation For New Briefing Schedule which was denied on December 5, 2013. (R., 54) On December 6, 2013 the District Court issued an Order Dismissing Appeal due to the failure of the appellant to file his brief. (R., 57) Mr. Nillan filed a Motion For Reconsideration on December 16, 2013 to which an Affidavit of the handling attorney was attached, this motion was Denied on December 19, 2013 due to what the District Court considered "no showing of good cause." (R., 59). Mr. Nilan now timely appeals the dismissal of the appeal and the denial of the motion for reconsideration.

On appeal, Mr. Nilan asserts the following: 1) the District Court abused its discretion when it denied Mr. Nilan's Stipulation For New Briefing Schedule on December 6, 2013; 2) the District Court abused its discretion when it denied Mr. Nilan's Motion for Reconsideration on December 20, 2013; and 3) The District Court violated Mr. Nilan's right to Due Process of Law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 13, of the Idaho Constitution, when it dismissed his appeal on December 6, 2013.

Statement of the Facts

A brief summary of the facts is included for this Court's convenience; however the only issue currently on appeal is the district court's sua sponte dismissal of the underlying appeal. On March 15, 2013 at approximately 11:39 p.m. Officer Wing and Cook made contact with Mitchell Nilan for parking in the parking lot of a closed business at 1637 S. Curtis Rd. The officers pulled in behind the vehicle, making it impossible for Mr. Nilan to drive away or avoid contact. After speaking with Mr. Nilan about whether he had consumed alcohol, the officer alleges that he noticed glassy, bloodshot eyes and slurred, thick-tongued speech. Officer Cook then questioned Mr. Nilan while Officer Wing attempted to conduct a horizontal gaze nystagmus test on him. Mr. Nilan continued to deny consuming alcohol and was arrested for Minor in Consumption and Open Container; a violation of Idaho Code 23-949 and 23-505(2).

ISSUES

- I. Did the District Court abuse its discretion when it denied Mr. Nilan's Stipulation for New Briefing Schedule on December 6, 2013 and when it denied his Motion for Reconsideration on December 20, 2013?
- II. Did the District Court violate Mr. Nilan's right to Due Process of Law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 13, of the Idaho Constitution, when it dismissed his appeal on December 6, 2013?

ARGUMENT

I.

The District Court Abused Its Discretion When It Denied Mr. Nilan's Stipulation For New Briefing Schedule On December 5, 2013, And When It Denied His Motion For Reconsideration On December 20th 2013.

A. Introduction

Mr. Nilan entered a conditional guilty plea on July 16, 2013 to Minor in Consumption and Open Container a violation of Idaho Code 23-949 and 23-505(2). (R., 40-42) He filed his Notice of Appeal in the District Court on August 2, 2013, the issue on appeal was whether the trial court erred in denying the defendant's motion to enlarge time to hear a motion to suppress. (R., 45) An Order Governing Procedure on Appeal was filed on August 13, 2013. (R., 50) The notice ordered that the Appellant's brief be filed and served on or before December 2nd, 2013. On December 2, 2013 the parties filed a Stipulation For New Briefing Schedule which was denied on December 5, 2013. (R., 54) On December 6, 2013 the District Court issued an Order Dismissing Appeal due to the failure of the appellant to file his brief. (R., 57) Mr. Nillan filed a Motion For Reconsideration on December 16, 2013 to which an Affidavit of the handling attorney was attached, this motion was Denied on December 19, 2013 due to what the District Court considered "no showing of good cause." (R., 59) Mr. Nilan asserts that the district court abused its discretion when it denied his request/stipulation for a new briefing schedule and when it denied his motion for reconsideration.

B. Standard of Review

Failure of a party to take any step in the appellate process may be grounds for such sanction as the district court deems appropriate, including dismissal of the appeal. The sanctions for failing to diligently prosecute an appeal from the magistrate division are discretionary with

the district court; an exercise of sound discretion will not be disturbed on appeal. *Duff v. Bonner Building Supply, Inc.*, 105 Idaho 123, 666 P.2d 650 (1983). In appropriate circumstances, dismissal may be a proper sanction for failure to file a timely appellate brief. *See Woods v. Crouse*, 101 Idaho 764, 620 P.2d 798 (1980).

C. The District Court Abused Its Discretion When It Denied Mr. Nilan's Stipulation For New Briefing Schedule On December 5, 2013, And When It Denied His Motion For Reconsideration On December 20th 2013.

Pursuant to IAR 46 the court may enlarge the time for the filing of a brief in accordance with IAR 34(e). A motion for extension of time for filing a brief may be made no later than the due date for the appellate brief. Thus it is a discretionary standard and it is clearly within the Court's discretion to deny the enlargement of time. If the rule allows for filing for extension up until the due date for the appellate brief, it follows that if that request is denied the Court must then provide the moving party a reasonable period of time after the denial to submit the briefing to the court before dismissing the appeal.

The District Court in a separate case, CR-MD-2012-2898, had recently accepted a stipulation for a new briefing schedule. The parties followed a similar procedure in this case for an extension of time. It follows that as briefing schedules have been vacated in prior cases and in this case simply denied with no explanation, that it is an abuse of discretion. The handling attorney cited numerous reasons for seeking an extension including unexpected family illness, previously scheduled time out of state, being a public defender with an involuntary caseload and several other cases on appeal in which briefs were filed. (R., 63-64)

To determine whether the district court abused its discretion, this court must ascertain (1) "whether the trial court correctly perceived the issue as one requiring the exercise of discretion;" (2) "whether the trial court acted within the outer boundaries of its discretion and consistently

with the legal standards applicable to the specific choices available to it;” and (3) whether the court reached its conclusion by an exercise of reason.” *State v. Johnson*, 148 Idaho 664, 669 (Idaho 2010).

In *State v. Langdon*, 117 Idaho 115, 785 P.2d 679 (Ct.App.1990) the Court found that the district Judge did not abuse his discretion in dismissing defendant’s appeal following a conditional guilty plea and a failure to file a timely brief. However the Court also held that by dismissing the appeal without prior notice and opportunity to be heard, presented extraordinary circumstances requiring altering of normal appellate procedures to permit defendant to have an opportunity for rehearing. *Id.* The circumstances in this case are that the appellant did not just ignore a deadline, or not seek to file any briefing with the court, the appellant followed the proscribed appellate rules of procedure by asking for a continuance of time in which to file the briefing and the court simply denied the stipulation and later motion for rehearing essentially disposing of the appeal and forgoing Mr. Nilan’s right to appeal his conditional guilty plea.

Without citing any reason for the denial of the extension of time to file briefing in the appeal, the district court *sua sponte* dismissed the appeal. Had the court even given a cursory justification perhaps the argument could be made that it was not an abuse of discretion. But, because no explanation was given until after Mr. Nilan filed a motion for reconsideration citing the issues in the affidavit of counsel *see* R. 63-64 the court clearly abused its discretion. No hearing was provided, and no reason other than “no showing of good cause” was cited.¹ What is even more particularly egregious in this case is that the parties had stipulated to the extension of time.

¹ Assuming the State argues there was “no showing of good cause” this is clearly untrue as counsel in her affidavit cited unexpected family illness, the closure of the Court due to the Thanksgiving Holiday, being a public defender with an involuntary caseload, (8) cases on appeal to the district court and (2) cases at the Supreme Court level, and 3 briefs which had been written and filed within the last month with the district court.

Therefore based on the record presented to this Court, the District Court abused its discretion by not issuing a new briefing schedule, dismissing the appeal and denying Mr. Nillan's Motion for Reconsideration.

II.

The District Court Violated Mr. Nilan's Right To Due Process Of Law As Guaranteed By The Fifth and Fourteenth Amendments To The United States Constitution And Article I, Section 13, Of The Idaho Constitution, When It Dismissed His Appeal On December 6, 2013.

A. Introduction

Mr. Nilan asserts that the right to appeal in this state is conferred by legislative authority and is authorized by Article V, § 3, of the Idaho Constitution to "provide a proper system of appeals." Further, Article V, § 9, of the Idaho Constitution provides that the Supreme Court has jurisdiction to review, upon appeal any decision by the district courts, or the judges thereof. Although it is a statutory right, authorized by the Constitution, Mr. Nilan asserts that the district court violated his right to due process when it dismissed, *sua sponte* his appeal on December 6, 2013.

B. Standard of Review

On appeal from the decision of district court while acting in its intermediate appellate capacity, the Appellate Court considers the record independently of the district court's determination, giving due regard to the district court's analysis. *State v. Doe*, 144 Idaho 534, 535, 164, P.3d 814, 815 (2007). This Court exercises free review when it interprets a statute. *State v. Robinson*, 143 Idaho 306, 307, 142 P.3d 729, 730 (2006). The interpretation of statutes and judicial rules is also a matter of free review. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct.App.2003). *State v. Slater*, 133 Idaho 882, 888, 994 P.2d 625, 631 (Ct.App.1999). Finally, in applying constitutional standards to the facts found, this Court review of a claim of

due process violations is one of free review. *State v. Weber*, 116 Idaho 449, 452, 776 P.2d 458, 461 (1989); *State v. Bell*, 119 Idaho 1015, 1017, 812 P.2d 322, 324 (Ct.App.1991).

C. The District Court Violated Mr. Nilan's Right To Due Process Of Law As Guaranteed By The Fifth and Fourteenth Amendments To The United States Constitution And Article I, Section 13, Of The Idaho Constitution, When It Dismissed His Appeal On December 6, 2013

The Due Process Clause of the United States Constitution provides that a state shall not “deprive any person of life, liberty, or property, without due process of law.” US Const, Amend XIV. This federal safeguard has been adopted through the Idaho Constitution, Article I, § 13. Determining whether a state action violates an individual’s right of procedural due process involves a two-part test: (1) whether the state deprived the individual of a liberty or property interest; and (2) if so, what process was due pursuant to the deprivation. *Logan v. Zimmerman Brush Co.*, 455 US 422, 428 102 S.Ct 1148 (1982); *see also Washington v. Glucksburg*, 521 US 702, 721, 117 S.Ct 2258 (1997) (noting that a particular right qualifies as a protected liberty interest if it is “deeply rooted in this Nation’s history and tradition,” and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” (internal quotation marks and citations omitted)).

Relevant to this case Mr. Nilan is invested with a protected liberty interest in his statutory right to appeal his conditional guilty plea. Mr. Nilan cannot constitutionally be deprived of this interest without procedures which provide him due process. Determining what process is sufficient to authorize such interference depends on weighing three factors:

“(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.”

Mathews v. Eldridge, 424 U.S. 319, 321, 332, 96 S.Ct 893 (1976)

Under the *Matthews* test, the private interest affected by the action is the dismissal of Mr. Nilan's appeal without an opportunity to be heard which effectively bars his right to appeal and have his case decided on the merits. The risk of this erroneous deprivation is significant and closes the door to any remedial relief Mr. Nilan is entitled to if his appeal were successful, and the value of additional safeguards to ensure that an appeal is heard on the merits seems limitless. There are rules in place to provide protections to Mr. Nilan including IAR 46 and IAR 34(e). The court may grant a motion for extension of time for filing a brief, this motion can be made no later than the due date for the filing of the appellate brief. However there is no rule that further explains the appellant's or court's authority if that motion for extension is denied. There would be no further fiscal or administrative burden to implement a rule regarding procedure for when a motion for extension of time for filing a brief is denied. However, it would follow that if the motion is denied the appellant would have a reasonable period of time i.e 48 hours to file the briefing once the denial is entered. A *sua sponte* dismissal of the entire action is violation of Mr. Nilan's rights to due process and as stated above a complete abuse of discretion.

CONCLUSION

For the reasons set forth above, Mr. Nilan respectfully requests that his case be remanded to the District Court, that a new briefing schedule be ordered and that the case be heard on the merits.

DATED this 13th day of June 2014.



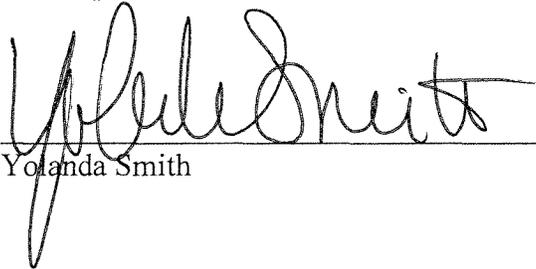
HEIDI TOLMAN
Attorney for Defendant

CERTIFICATE OF MAILING

I **HEREBY CERTIFY**, that on this 13th day of June 2014, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter to:

DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.



Yolanda Smith