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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 41764
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-MD-2013-3696
)	
MITCHELL TYAN NILAN,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

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

**HONORABLE THERESA GARDUNIA, Magistrate Judge
HONORABLE MICHAEL R. MCLAUGHLIN, District Judge**

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**ATTORNEY FOR
DEFENDANT-APPELLANT**

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STATEMENT OF THE CASE

Nature of the Case

Mitchell Nilan appeals from the district court's order dismissing his intermediate appeal from the judgment entered upon his conditional guilty pleas to illegal consumption of alcohol by a minor and possession of an open container.

Statement of Facts and Course of Proceedings

The state charged Nilan with illegal consumption of alcohol by a minor and possession of an open container. (R., pp.6, 19-20.) The public defender's office was appointed to represent Nilan on April 5, 2013, and Nilan entered not guilty pleas on that same date. (R., pp.2, 9.) On May 10, 2013, Nilan's appointed attorney filed a generic "Motion To Suppress Evidence," seeking suppression of "any and all evidence, admissions, confessions and/or statements made by and/or attributed to the defendant, which were illegally obtained as the result of an unlawful detention of the defendant." (R., pp.23-24.) The state opposed the motion "on the ground that it [was] untimely." (R., p.26.)

Specifically, the state argued:

The Defendant entered a not guilty plea on April 5, 2013. Pursuant to Idaho Criminal Rule 12(d), the Defendant had twenty-eight days from that date to file any Rule 12(b) motions. The Defendant's Motion to Suppress was not filed until May 10, 2013, which is past the permissible time limit to file such a motion and the Defendant has thus far failed to establish good cause/excusable neglect for the untimely filing.

(R., p.26.) Nilan's appointed attorney did not file a written response to the state's objection, but on June 17, 2013, she filed a "Supplemental Memorandum In

Support Of Motion To Suppress,” arguing the merits of the suppression motion. (R., pp.29-35.)

At a hearing on July 1, 2013, the magistrate heard argument regarding the timeliness of Nilan’s suppression motion. (See generally 7/1/13 Tr.¹; R., pp.36-37.) Appointed counsel acknowledged the motion was not timely filed but argued good cause existed to excuse the untimely filing because the suppression issue was “meritorious” and the state could not “show any prejudice.” (7/1/13 Tr., p.12, Ls.1-5, p.15, Ls.2-8.) Counsel also argued that, despite having received discovery from the state on April 16, 2013, and despite having actually filed a suppression motion on May 10, 2013, counsel was unable to ascertain all the facts to support the suppression motion until she spoke with her client at the pretrial conference on May 13, 2013. (7/1/13 Tr., p.16, L.1 – p.17, L.15.) Finding Nilan’s appointed attorney failed to demonstrate good cause or excusable neglect to justify the late filing, the magistrate sustained the state’s objection and declined to hear Nilan’s untimely motion to suppress. (R., pp.36-37.)

Nilan thereafter entered conditional guilty pleas to both the illegal consumption and open container charges, reserving the right on appeal to challenge the magistrate’s adverse ruling regarding his motion to suppress. (R., pp.42-43.) The magistrate accepted Nilan’s pleas and entered a judgment, from which Nilan timely appealed. (R., pp.40, 45-47.)

¹ The transcript of the July 1, 2013 hearing has been included as an Exhibit to the record on appeal. (R., p.71.)

On August 13, 2013, the district court entered an "Order Governing Procedure On Appeal," ordering Nilan to file and serve his Appellant's brief "on or before December 2nd, 2013." (R., pp.50-51.) On December 2, 2013, Nilan filed a "Stipulation For New Briefing Schedule." (R., pp.54-55.) The stipulation, which was signed by both Nilan's appointed attorney and the deputy city prosecutor, requested that the briefing schedule be "vacate[d] ... at the Court's convenience." (R., p.54.) The district court denied the request on December 6, 2013 (R., p.54) and, on that same date, entered an order dismissing Nilan's appeal (R., pp.57-58). Nilan's appointed attorney filed a motion for reconsideration and an affidavit in support thereof, asking the court to reconsider its order dismissing the appeal and setting forth the "reasons for and grounds as to why an extension" of time for filing the Appellant's brief was necessary. (R., pp.59-61, 63-64.) The district court denied the motion for reconsideration, stating in a handwritten notation on the face of the motion that Nilan had made "no showing of good cause." (R., p.59 (capitalization altered).) Nilan filed a notice of appeal, timely from the district court's orders dismissing his intermediate appeal and denying his motion for reconsideration. (R., pp.65-70.)

ISSUES

Nilan states the issues on appeal as:

- 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?

(Appellant's brief, p.3.)

The state rephrases the issues as:

1. Has Nilan failed to establish that the district court abused its discretion by denying his request for an extension of the briefing schedule, dismissing his appeal for failing to timely file his Appellant's brief, and denying his motion for reconsideration?

2. Has Nilan failed to establish a due process violation resulting from the dismissal of his intermediate appeal?

3. If the district court erred, should its order of dismissal nevertheless be affirmed on the alternative basis that Nilan is not entitled to relief on the merits of the only issue he preserved for appeal?

ARGUMENT

I.

Nilan Has Failed To Establish That The District Court Abused Its Discretion By Denying His Request For An Extension Of The Briefing Schedule, Dismissing His Appeal, And Denying His Motion For Reconsideration

A. Introduction

Nilan argues the district court abused its discretion by denying his request for an extension of time to file his Appellant's brief, dismissing his appeal for failing to failing to timely file his Appellant's brief, and denying his motion for reconsideration. (Appellant's brief, pp.5-7.) A review of the record and of the applicable law shows Nilan has failed to establish and abuse of discretion.

B. Standard Of Review

The decision whether to grant or deny a motion for extension of time for filing an appellate brief is a matter within the appellate court's discretion. See I.A.R. 34(e), 46; I.C.R. 54.15, 54.18. Likewise, "[t]he sanctions for failing to diligently prosecute an appeal from the magistrate division are discretionary with the district court; an exercise of sound judicial discretion will not be disturbed on appeal." State v. Langdon, 117 Idaho 115, 117, 785 P.2d 679, 681 (Ct. App. 1990) (citations omitted).

C. Nilan Has Failed To Show The District Court Abused Its Discretion By Denying His Request For An Extension Of Time, Dismissing His Appeal, And Denying His Motion For Reconsideration

1. The District Court Did Not Abuse Its Discretion By Denying Nilan's Unsupported And/Or Inadequately Supported Requests For An Extension Of The Briefing Schedule

Idaho Criminal Rule 54.15 provides that, in an appeal from the magistrate division to the district court, appellate briefs "shall be ... filed and served within the times provided for appeals to the Supreme Court by the Idaho Appellate Rules, unless otherwise ordered by the district court." The criminal rules do not specifically provide for extensions of time for the filing of appellate briefs to the district court. However, Idaho Appellate Rule 34(e), applicable to the criminal rules by virtue of I.C.R. 54.18, states:

A motion for extension of time for filing a brief may be made no later than the due date for the appellate brief and shall be supported by an affidavit setting forth:

- (1) The date when the brief is due;
- (2) The number of extensions of time previously granted, and if extensions were granted the original date when the brief was due;
- (3) Whether any previous requests for extensions of time have been denied or denied in part;
- (4) The reasons or grounds why an extension is necessary;
- (5) The number of days of extension deemed necessary and the date on which the brief would become due;
- (6) Whether there has been any stipulation of the parties for this application for extension, which stipulation shall not be binding upon the Court;
- (7) The position of the opposing parties concerning the application, and whether or not the opposing parties have verbally expressed the agreement or disagreement;
- (8) What assurance there is that the brief will be filed within the extended time requested.

I.A.R. 34(e). The decision whether to grant an extension of time for filing an appellate brief is discretionary. I.A.R. 34(e), 46. The appellate rules make clear,

however, that such extensions “shall not be favored” and may be granted “only upon a clear showing of good cause.” I.A.R. 34(e); see also I.A.R. 46 (motion for extension of time to file appellate brief “may be enlarged ... for good cause shown upon the motion of a party”).

In this case, the district court entered an order requiring Nilan to file his appellant’s brief “on or before December 2nd, 2013.” (R., p.50.) Nilan did not file his appellant’s brief by the prescribed deadline. Instead, on the day his brief was due, Nilan filed a “Stipulation For New Briefing Schedule” in which Nilan’s attorney and the deputy city prosecutor indicated only that they “stipulate[d] and agree[d] to vacate the current briefing schedule at the Court’s convenience.” (R., pp.54-55.) The district court denied the stipulation and Nilan’s subsequent motion for reconsideration, ultimately finding Nilan failed to carry his burden of showing “good cause” for the requested extension. (R., pp.54, 59.) Contrary to Nilan’s assertions, a review of the record supports the district court’s decisions to deny Nilan’s motions because Nilan failed to make the requisite showing of “good cause” justifying his request for an extension of the briefing schedule.

When Nilan requested an extension of the briefing schedule, he had already been given more than three months in which to file his appellant’s brief. (Compare R., p.50 (Order Governing Procedure On Appeal, filed August 13, 2013) with R., p.54 (Stipulation For New Briefing Schedule, filed December 2, 2013).) Although the deputy city prosecutor stipulated to the request, the written stipulation failed to set forth any information from which the district court could make an informed decision regarding whether there was good cause to justify an

extension. (R., p.54.) The stipulation did not set forth the date on which the brief was originally due, the reasons or grounds why an extension was necessary, the number of days of extension deemed necessary, or what assurance there was that the brief would be filed within the extended time requested. (R., p.54.) Nor was the stipulation accompanied by an affidavit setting forth any of the foregoing information as required by I.A.R. 34(e). Because Nilan failed to comply with the specific requirements of I.A.R. 34(e) and did not otherwise even attempt to make a showing of good cause to justify an extension of time, the district court acted well within its discretion in denying Nilan's original request for an extension of the briefing schedule.

The court also acted within its discretion in denying Nilan's motion for reconsideration. In an apparent attempt to remedy her failure to provide an affidavit supporting the original request for an extension of the briefing schedule, Nilan's attorney supported the motion for reconsideration with an affidavit setting forth several "reasons for and grounds as to why an extension [was] necessary." (R., pp.63-64.) Specifically, counsel cited an "[u]nexpected family illness," "[p]reviously scheduled time out of state," a large caseload, work on other appellate cases, and inadequate time to research and prepare the brief in Nilan's case as the bases of her request for an extension. (R., pp.63-64.) Nilan argues on appeal that these reasons necessarily amounted to a showing of "good cause" justifying his request for an extension of the briefing schedule. (Appellant's brief, p.6 n.1.) The district court obviously disagreed, however. (See R., p.59 (motion for reconsideration denied because "no showing of good

cause” (capitalization altered)).) Contrary to Nilan’s assertions, the record supports the district court’s decision.

Most of the reasons Nilan’s attorney cited for being unable to complete the brief by the December 2, 2013 deadline related to events that occurred in the latter part of October and all of November 2013. (R., pp.63-64.) The briefing schedule had been set in mid-August 2013, however, thereby giving Nilan’s attorney more than three months in which to complete the brief by the prescribed deadline. Nilan’s attorney did not even attempt in her affidavit to explain why she had not begun working on Nilan’s appellant’s brief before October or November. Nor did she include in the affidavit any information regarding the number of additional days she deemed necessary to file the brief or any assurance that the brief would be filed with the requested extension of time. Given the lack of these details, all of which were required by I.A.R. 34(e), the district court could reasonably conclude that the circumstances that prevented Nilan’s attorney from working on and/or completing the brief in the several weeks leading up to the December 2nd deadline – many of which were presumably known to Nilan’s attorney when the briefing schedule was set – did not constitute “good cause” justifying an extension of the briefing deadline for some further unknown period of time beyond the three months Nilan’s attorney had already been given.

Nilan recognizes the district court had discretion to deny his request for an extension of the briefing schedule. (Appellant’s brief, p.5.) He argues, however, that because the court had “recently accepted a stipulation for a new briefing schedule” in an entirely separate case in which “[t]he parties followed a similar

procedure,” the court should likewise have accepted the stipulation in this case. (Appellant’s brief, p.5.) Nilan’s argument is without merit. Whatever the court did or did not do in relation to a stipulation for an extension of a briefing schedule in a different case is irrelevant to whether the court acted within its discretion in this case in denying Nilan’s request for an extension. Because Nilan never supported the request for an extension (either originally or in relation to his motion for reconsideration) with an affidavit meeting the requirements of I.A.R. 34(e), the district court acted well within its discretion in denying the request for an extension. This is true even though the parties stipulated to the request. See I.A.R. 34(e)(6) (a “stipulation of the parties for [an] application for extension ... shall not be binding upon the Court”). Nilan has failed to establish an abuse of discretion.

2. The District Court Did Not Abuse Its Discretion By Dismissing Nilan’s Appeal As A Sanction For Nilan’s Failure To Timely File His Appellant’s Brief

“Dismissal of an appeal is a permissible sanction when the appellant fails to file a timely brief.” Hoopas v. Bagley, 117 Idaho 1091, 793 P.2d 1263 (Ct. App. 1990) (citing I.A.R. 21; I.R.C.P. 83(s)); accord I.C.R. 54.13; Woods v. Crouse, 101 Idaho 764, 620 P.2d 798 (1980); State v. Langdon, 117 Idaho 115, 117, 785 P.2d 679, 681 (Ct. App. 1990) (Per Curiam). The decision whether to *sua sponte* dismiss an appeal for the failure to file a timely appellant’s brief lies within the appellate court’s discretion. Langdon, 117 Idaho at 117, 785 P.2d at 681. But see McNett v. McNett, 95 Idaho 59, 501 P.2d 1059 (1972) (party

seeking dismissal of appeal for opposing party's failure to timely file appellant's brief must demonstrate prejudice).

In Langdon, *supra*, the district court *sua sponte* dismissed Langdon's intermediate appeal after Langdon failed to timely file his appellant's brief. 117 Idaho at 116, 785 P.2d at 680. Langdon appealed the order of dismissal, arguing he never received notice of the date on which his brief was due. Langdon, 117 Idaho at 117, 785 P.2d at 681. Because the record reflected the notice was accompanied by an affidavit of service certifying that copies of the notice were sent to both the prosecutor's office and Langdon's attorney, the Idaho Court of Appeals concluded "the district judge [could not] be faulted for assuming that Langdon's attorney had chosen to ignore the established deadline for filing a brief." Id. The Court also rejected, as being unsupported by the record, Langdon's assertion that the county clerk failed to actually mail Langdon the notice informing him of the briefing deadline. Id. "Although the district judge could have imposed a less onerous sanction under the circumstances," the Court of Appeals "[found] no reason to reverse his ruling based upon the record before him" and, therefore, did "not disturb the order dismissing Langdon's appeal." Id.

In this case, as in Langdon, the district court *sua sponte* dismissed Nilan's appeal after Nilan failed to timely file his appellant's brief. (R., pp.57-58.) Nilan argues this was an abuse of discretion, claiming that, in contrast to the facts of Langdon, "[t]he circumstances in this case are that the appellant did not just ignore a deadline, or not seek to file any briefing with the court," but instead "followed the proscribed [sic] appellate rules of procedure by asking for a

continuance of time in which to file the briefing.” (Appellant’s brief, p.6.) The state acknowledges Nilan sought an of extension of time in which to file his appellant’s brief; but, in doing so, he in no way followed the applicable rules of appellate procedure. As set forth in more detail in the preceding section, Nilan’s original request for an extension was not accompanied by any affidavit at all, much less one satisfying the requirements of I.A.R. 34(e). Without having been provided any information from which to determine whether there was good cause to grant an extension, the district court was in no better position than the court in Langdon and was left to assume that Nilan had merely chosen to ignore or, at best, arbitrarily change the established briefing deadline without any basis for doing so. Considering the record before it at the time, the district court did not abuse its discretion by *sua sponte* dismissing Nilan’s appeal as a sanction for failing to timely file his brief.

Citing Langdon, Nilan also appears to argue that the district court abused its discretion by *sua sponte* dismissing his appeal without giving him “prior notice and [an] opportunity to be heard.” (Appellant’s brief, p.6.) This argument is without merit. As already discussed, the Langdon Court upheld a *sua sponte* order of dismissal as being within the district court’s discretion, and it did so despite the fact that the district court did not give Langdon prior notice of its intent to dismiss his appeal. Langdon, 117 Idaho at 117, 785 P.2d at 681. The Court then addressed, as a separate issue, whether the district court erred by refusing to allow Landon to file a timely petition for rehearing. Id. at 117-18, 785 P.2d at 681-82. Addressing that question, the Langdon Court held that the

dismissal of an appeal, “without prior notice and opportunity to be heard or to file a memorandum concerning the dismissal, represents an extraordinary circumstance” requiring that the appellant be given “an opportunity to seek the court’s reconsideration.” Id. at 118, 785 P.2d at 682.

Unlike Langdon, who was prohibited from seeking reconsideration, Nilan filed a motion for reconsideration asking for relief from the court’s order of dismissal. (R., pp.59-61, 63-64.) By entertaining that motion, the court gave Nilan the opportunity to be heard regarding the reasons the appeal should not be dismissed, which is all that Langdon requires. That the court ultimately denied the motion on its merits does not establish an abuse of discretion. Nilan never complied with the requirements of I.A.R. 34(e) – either in relation to his original request for an extension of the briefing schedule or in conjunction with his motion for reconsideration. Having failed to make the requisite showing of good cause for extending the briefing schedule, Nilan cannot show that the court abused its discretion by declining to reconsider its order dismissing Nilan’s appeal for failing to file a timely appellant’s brief.

II.

Nilan Has Failed To Establish A Due Process Violation Resulting From The Dismissal Of His Intermediate Appeal

A. Introduction

Nilan argues the district court violated his right to procedural due process by dismissing his intermediate appeal without giving him prior notice and a reasonable period of time within which to file his appellant’s brief. (Appellant’s brief, pp.7-9.) Nilan’s argument fails. By entertaining Nilan’s motion for

reconsideration, the district court ultimately afforded Nilan all the process he was due in relation to the dismissal of his appeal.

B. Standard Of Review

“Due process issues are generally questions of law, and this Court exercises free review over questions of law.” Kootenai Medical Center ex rel. Teresa K. v. Idaho Dept. of Health and Welfare, 147 Idaho 872, 216 P.3d 630 (2009) (citations and quotations omitted).

C. Nilan’s Claim Of A Due Process Violation Fails Because He Was Ultimately Given Notice Of And An Opportunity To Be Heard Regarding The Dismissal Of His Appeal

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. Procedural due process requires that, except in extraordinary circumstances, “a person, whose protected rights are being adjudicated,” must receive notice and an opportunity to be heard “at a meaningful time and in a meaningful manner.” State v. Smith, 146 Idaho 822, 828, 203 P.3d 1221, 1227 (2009) (citations omitted). “Protected liberty interests can arise from two sources, either the Due Process Clause or the laws of the states.” Lightner v. Hardison, 149 Idaho 712, 717, 239 P.3d 817, 822 (Ct. App. 2010) (citing Kentucky Dep’t of Corrs. V. Thompson, 490 U.S. 454, 460 (1989)). “When the language of state statutes and regulations create a right, that right is entitled to due process protection.” Id. (citing Mendoza v. Blodgett, 960 F.2d 1425, 1432-33 (9th Cir. 1992)).

Nilan argues that because his right to appeal his conditional guilty plea is conferred by statute, he “is invested with a protected liberty interest in his statutory right to appeal” and “cannot constitutionally be deprived of this interest without procedures which provide him due process.” (Appellant’s brief, p.8.) He further contends that, by *sua sponte* dismissing his intermediate appeal without giving him prior notice or a reasonable period of time within which to file his appellant’s brief, the district court violated his rights to procedural due process. (Appellant’s brief, pp.7-9.) Nilan’s argument fails. Even assuming he was entitled to the protections of procedural due process in relation to the dismissal of his appeal, the record shows the court ultimately afforded Nilan all the process he was due.

After the district court dismissed Nilan’s appeal for failing to file a timely appellant’s brief, Nilan filed a motion for reconsideration, and an affidavit in support thereof, setting forth the arguments and facts that he believed countenanced against the dismissal of his appeal. (R., pp.59-61.) The district court entertained the motion but ultimately denied it, concluding Nilan had made “no showing of good cause” justifying either an extension of time or reconsideration of the order of dismissal. (R., p.59.) By entertaining Nilan’s request for an extension and then his motion to reconsider, the district court ultimately gave Nilan notice of² and an opportunity to be heard regarding the

² Nilan was also put on notice by I.C.R. 54.13 and I.A.R. 21 that his appeal could be dismissed if he failed to timely file his appellant’s brief.

contemplated reasons for dismissal before finally disposing of Nilan's appeal. Compare Langdon, 117 Idaho at 117-18, 785 P.2d at 681-82 (permitting appellant to seek reconsideration of court's *sua sponte* order of dismissal effective to remedy court's failure to give prior notice and opportunity to be heard concerning reasons for dismissal). Having been afforded such notice and an opportunity to be heard, Nilan has failed to establish any violation of his due process rights.

Nilan argues that the district court was required, as a matter of procedural due process, to not only afford him notice and an opportunity to be heard regarding the proposed bases for dismissal, but also to afford him a reasonable time within which to file his appellant's brief before dismissing his appeal. (Appellant's brief, p.9.) This argument is frivolous. As previously stated, procedural due process requires only that a person receive notice and an opportunity to be heard before being deprived of a protected right. Smith, 146 Idaho at 828, 203 P.3d at 1227. While Nilan had a statutory right to appeal, he did not have the right to file an untimely appellant's brief. Indeed, the appellate rules specifically provide for dismissal as a permissible sanction for failing to timely take any step in the appellate process. I.A.R. 21; I.C.R. 54.13. Because Nilan failed to comply with the appellate rules, the district court had discretion to dismiss Nilan's appeal without first affording Nilan the opportunity to file a belated brief. That the court did so, after giving Nilan the opportunity to respond in his motion for reconsideration to the basis for dismissal, does not constitute a violation of Nilan's due process rights.

Because the district court ultimately afforded Nilan all the process he was due in relation to the dismissal of his intermediate appeal, Nilan has failed to show any basis for reversal.

III.

If The Court Erred, Its Order Of Dismissal Should Nevertheless Be Affirmed On The Alternative Basis That Nilan Is Not Entitled To Relief On The Merits Of The Only Issue He Preserved For Appeal

A. Introduction

When Nilan entered his conditional guilty pleas to the charges in this case, the only issue he preserved for appeal was whether the magistrate abused its discretion by declining to entertain his untimely motion to suppress. (R., pp.42-43.) By dismissing Nilan's appeal, the district court effectively denied Nilan relief as to this issue. For the reasons set forth in Sections II and III, *supra*, the district court neither abused its discretion nor violated Nilan's due process rights by dismissing his intermediate appeal. If this Court disagrees, the district court's order of dismissal should nevertheless be affirmed on the alternative basis that Nilan is not entitled to relief on the merits of the appeal – *i.e.*, Nilan cannot show from the record that the magistrate abused its discretion in declining to hear his untimely motion to suppress. See Hoopes v. Bagley, 117 Idaho 1091, 1092, 793 P.2d 1263, 1264 (Ct. App. 1990) (because effect of order dismissing intermediate appeal “was simply to deny relief on appeal,” Court of Appeals could uphold the order of dismissal upon a determination that the appellant “was not entitled to relief, in any event, on the merits of the appeal”).

B. Standard Of Review

A trial court's decision whether to enlarge the time for filing a motion to suppress is reviewed for an abuse of discretion. State v. Glenn, 156 Idaho 22, ___, 319 P.3d 1191, 1192-93 (2014). The appellate court will "uphold the trial court's decision when the court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason." Id. at ___, 319 P.3d at 93 (internal quotations and citation omitted).

C. The Magistrate Correctly Exercised Its Discretion In Denying Nilan's Motion To Suppress On The Basis That It Was Not Timely Filed

Motions to suppress evidence "must be filed within twenty-eight (28) days after the entry of a plea of not guilty or seven (7) days before trial whichever is earlier." I.C.R. 12(b), (d). Nilan pled not guilty on April 5, 2013, and his trial was set for June 6, 2013. (R., pp.2, 9.) Pursuant to I.C.R. 12(d), Nilan's motion to suppress was due no later than May 3, 2013, which was the earlier of the two dates contemplated by I.C.R. 12(d). Nilan did not, however, file his motion until May 10, 2013, seven days after the time for filing the motion expired. (R., pp.23-24.)

Although I.C.R. 12(d) allows the district court to enlarge the time for filing a Rule 12(b) motion, in exercising that discretion, the court must find that the defendant has shown good cause or excusable neglect. I.C.R. 12(d). After a hearing at which Nilan was given the opportunity to demonstrate good cause or

excusable neglect justifying an enlargement of time, the magistrate found Nilan showed neither. (R., p.37.) A review of the record and of the applicable law supports that determination.

The only reasons Nilan's attorneys offered as justifying the late filing were that the suppression motion was "meritorious," that the state could not "show any prejudice," and that, despite having received discovery from the state on April 16, 2013, counsel was unable to ascertain all the facts to support the suppression motion until she spoke with her client at the pretrial conference on May 13, 2013. (7/1/13 Tr., p.12, Ls.1-5, p.15, Ls.2-8, p.16, L.1 – p.17, L.15.) None of these reasons demonstrated good cause or excusable neglect justifying an enlargement of time. See State v. Dice, 126 Idaho 595, 597, 887 P.2d 1102, 1104 (Ct. App. 1994) ("Idaho Criminal Rule 12(d) clearly requires either good cause or excusable neglect to be shown by a party who has missed the prescribed deadlines. Allowing untimely motions to be heard because they appear meritorious eviscerates the purpose of the rule."); State v. Irving, 118 Idaho 673, 674, 799 P.2d 471, 472 (Ct. App. 1990) (no showing of good cause or excusable neglect where, despite lack of prejudice to state, and despite state's failure to timely provide discovery, defendant was in possession of information upon which to base a suppression motion before filing deadline). Because Nilan never offered an explanation for the delay that could have formed the basis of a finding of good cause or excusable neglect, the magistrate did not abuse its discretion by denying Nilan's motion to suppress on the basis that it was untimely.

Because Nilan is not entitled to relief from the magistrate's order denying his motion to suppress as untimely, the district court's order dismissing Nilan's intermediate appeal should be affirmed on this basis. Hoopes v. Bagley, 117 Idaho 1091, 1092, 793 P.2d 1263, 1264 (Ct. App. 1990); State v. Avelar, 129 Idaho 700, 704, 931 P.2d 1218, 1222 (1997) (where the lower court reaches the correct result by a different theory, the appellate court will affirm the order on the correct theory).

CONCLUSION

The state respectfully requests that this Court affirm the district court's order dismissing Nilan's intermediate appeal.

DATED this 9th day of September 2014.


LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of September 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

HEIDI JOHNSON
DEPUTY ADA COUNTY PUBLIC DEFENDER
200 W. FRONT STREET, SUITE 1107
BOISE, IDAHO 83702


LORI A. FLEMING
Deputy Attorney General

LAF/pm