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IN THE SUPREME COURT OF THE STATE OF IDAHO

SANDRA SIMMONS,)	No. 46523
)	
Petitioner-Appellant,)	Bingham County Case No.
)	CR-2017-3871
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent-Appellee.)	
_____)	

PETITIONER'S REPLY BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM**

**JUDGE RYAN BOYER
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

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STATEMENT OF THE CASE

Nature of The Case

Ms. Simmons appeals the District Court's decision to deny her Motion for Additional Time to File Appellant's Brief and its decision to deny her conviction and sentencing appeal.

Statement of the Facts and Course of Proceedings

Ms. Simmons was rendered a guilty verdict on November 17, 2017 and was subsequently sentenced on January 4, 2018. Ms. Simmons timely filed a notice to appeal on January 29, 2018. Though Ms. Simmons had meritorious claims to appeal, those claims were not heard as the district judge denied her request for additional time to file her brief. That request was filed on August 22, 2018 in anticipation of the appellate brief's August 28, 2018 due date.

At the September 4, 2018 hearing on the motion, Ms. Simmons did not appear in court. (AR. at 4.)¹ Though Ms. Simmons did not present her counsel with her potential appeal arguments until a week before the brief was due, Ms. Simmons' counsel explained that the reason he could not complete the brief on time was because of a trial that was occurring that week before the brief was due.

¹ AR refers to the Appeal Record; TR refers to the Trial Record.

(AR. at 4, 6.) The district judge dismissed the motion on the grounds that Ms. Simmons was not dedicated to her case, though he did not inquire into the reasons for Ms. Simmons communication problems with her counsel. (AR. at 9.)

Because Ms. Simmons' motion was denied, the district court did not hear Ms. Simmons' meritorious claims regarding her trial. At her trial, a jury convicted Ms. Simmons of disturbing the peace. (TR. at 217.) Witnesses made statements indicating they were bothered by Ms. Simmons, who used fireworks on the night of July 18, 2017. However, these statements about being disturbed were all affirmations responding to the prosecutor, who directly asked whether or not they were disturbed. (TR. at 80, 109, 146.) Further, all witnesses watched Ms. Simmons for some length of time and believed that she could not see them. (TR. at 78, 107, 152.) No witnesses engaged Ms. Simmons, and instead witnesses called the police after videotaping her without her knowledge. (TR. at 89.)

A jury found Ms. Simmons guilty on her disturbing the peace charge based on the guidance of jury instruction no. 15 which stated:

In order for the defendant to be guilty of disturbing the peace, the state must prove the following: One, on or about July 18, 2017; two, in the State of Idaho; three, the defendant Sandra D. Simmons...willfully and maliciously; four, disturbed [the] peace of another person...by

tumultuous or offensive conduct or by threatening said person or by challenging to fight said person. (TR. at 183.)

ISSUE PRESENTED

1. Has Ms. Simmons established her claim is not moot by demonstrating that the lower court's factual basis for dismissing her motion to extend time was identical to its basis for dismissing her appeal for failure to prosecute and accordingly erred by dismissing both?

SUMMARY OF THE ARGUMENT

Though the State argues that Ms. Simmons' case is moot because she did not argue the "the basis for the district court's dismissal" in her opening brief, Ms. Simmons' discussion for the error in dismissing her motion for additional time addressed this issue. First, the court's factual basis for dismissing the appeal was the same factual basis for dismissing the Ms. Simmons' motion for additional time and those bases were addressed. Second, because the motion for additional time and dismissal of appeal were so intertwined, addressing the motion also addressed the dismissal of the appeal.

ARGUMENT

I. MS. SIMMONS' CASE IS NOT MOOT BECAUSE SHE WOULD HAVE PROSECUTED HER CASE HAD HER MOTION FOR ADDITIONAL TIME BEEN GRANTED.

A. Introduction

Ms. Simmons' opening brief discussed the lower court's error in dismissing her motion for additional time because it did not make a deep enough inquiry on why the extension was needed. Ms. Simmons further discussed the merits of her appeal to indicate the abuse of discretion in dismissing her appeal. In response, the State argued that the lower court acted within its discretion when dismissing Ms. Simmons motion. The state further argued that Ms. Simmons did not challenge the actual basis for the dismissal of appeal, failure to prosecute, so her case was moot and her arguments on the merits of the appeal were not preserved. Ms. Simmons' addresses the mootness argument below and allows her previous contentions to stand as contained in her opening brief.

B. Standard of Review

Denying a motion for additional time appears to be a discretionary issue of the court, and accordingly this Court must determine if the district court abused

that discretion by looking at three factors: (1) did the district court correctly perceive the issue as a discretionary one, (2) did the court stay within the outer bounds of that discretion, consistent with legal standards, and (3) did the court make the decision while exercising reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1334 (1989).

C. The lower court based its dismissal of Ms. Simmons appeal on the same factual basis as the dismissal of the motion for additional time, so Ms. Simmons' case is not moot because she previously discussed the court's errors in using that factual basis to dismiss her appeal.

In her opening brief, Ms. Simmons established that the lower court abused its discretion when it dismissed her motion for additional time. The State contends that Ms. Simmons case is moot because she did not further challenge the lower court's dismissal of her appeal based on failure to prosecute. Though Ms. Simmons used the phrase "failure to prosecute," this was the very heart of her argument in Petitioner's Brief.

In her opening brief, Ms. Simmons indicated that the lower court abused its discretion in denying her motion for additional time. If the lower court had not abused its discretion in denying the motion, then Ms. Simmons would have had sufficient time to fully prepare her appeal and there would have been no reason for

the lower court to dismiss for failure to prosecute. Moreover, the factual grounds the lower court used to dismiss Ms. Simmons' appeal were the same as those used to dismiss the motion for additional time.

The discretion to dismiss a motion for additional time and an appeal are very similar. Idaho Rules of Criminal Procedure state: "Failure of a party to timely take *any other step* in the appellate process is not jurisdictional, but may be grounds for other action or sanction as the district court deems appropriate, which may include dismissal of the appeal." I.C.R. 54(m)(emphasis added). This emphasized language from the rule distinguishes a mandatory dismissal, which must occur if notice of appeal is not timely, to all other timeliness issues which involve discretionary dismissals. Both a dismissal for failure to prosecute and dismissal of motion for additional time are discretionary issues.

In this case, the lower court first denied Ms. Simmons' motion for additional time, then denied the appeal for timeliness. In the hearing on that motion, the lower court briefly inquired into why the extension of time was needed, which included communication issues between Ms. Simmons and counsel. (AR. at 4-6.) During that inquiry, Ms. Simmons' counsel informed the judge that Ms. Simmons had been without a phone for a length of time and they were unable to discuss her case

until right before the brief's deadline. (*Id.*) Based on this inquiry, the court dismissed Ms. Simmons case based on a failure to prosecute.

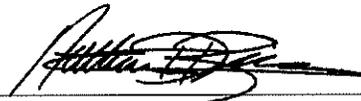
However, the Court did not ask about nor take into full consideration the breakdown of communication between Ms. Simmons and counsel. The district court dismissed the case based on assumptions made about Ms. Simmons' diligence in pursuing her appeal and abused its discretion when it failed to further investigate the reasons for the communication breakdown. (AR. at 9.) Since the failure to prosecute issue was interwoven with the motion for extension of time, Ms. Simmons' did properly raise the issue in Petitioner's Brief.

So, Ms. Simmons' case is not moot because the which was established in her opening brief. Because Ms. Simmons established that the basis of this appeal is not moot and that the lower court abused its discretion in denying her motion for additional time and the dismissal of her appeal, this court should overturn the lower court's decision.

CONCLUSION

Based on the evidence and argument presented herein, Ms. Simmons respectfully requests that this Court overturn the decision of the district court.

DATED this 10 day of Sep 2019.



NATHAN D. RIVERA, ESQ
Attorney for the Petitioner/respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have on this 10 day of Sep 2019, served two true and correct copies of the foregoing PETITIONER'S BRIEF, by placing the copies in the United States mail, postage prepaid, addressed to:

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