

A05-2066

STATE OF MINNESOTA

IN SUPREME COURT

In re State of Minnesota, Petitioner

State of Minnesota,

Respondent,

vs.

Beth Luann Hart,

Appellant.

Respondent's Brief and Appendix

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

On December 29, 2005, the appellant appeared in-custody before Mille Lacs County District Court Judge Steven P. Ruble. On January 7, 2005, appellant made her second appearance. An amended complaint was filed with the Mille Lacs County District Court on January 13, 2005, with an Omnibus Hearing scheduled for January 19, 2005. On January 19, 2005, the hearing was re-set to March 23, 2005. On March 23, 2005, the matter was re-set to April 8, 2005. On March 27, 2005, appellant's counsel requested, via fax, a continuance of the hearing that was set for April 8, 2005. On April 1, 2005, appellant's counsel, via telephone, withdrew his request. On April 8, 2005, the matter was called and re-set for sometime after May 18, 2005. The hearing was set for May 27, 2005, when appellant's counsel, via a fax submission on April 12, 2005, requested the matter be continued. On May 18, 2005, another amended complaint was filed charging the appellant with a fifth violation of Minnesota Statute. This amended complaint was filed with the Mille Lacs County District Court on May 19, 2005. On June 9, 2005, the appellant was found to be in violation of her release conditions, specifically failing to abstain from the use of controlled substances, and required to post additional conditional bail in the amount of \$5,000. On July 13, 2005, the Mille Lacs County Attorney's Office requested a continuance of the July 29, 2005, Omnibus Hearing because state's witness, was out-of-state at training. The matter was re-set to September 16, 2005. On September 16, 2005, Assistant Mille Lacs County Attorney Chris Zipko, and relevant witnesses were present in the Mille Lacs County Courthouse and prepared to proceed with a Contested Omnibus Hearing before Judge Michael S. Jesse. While the matter was not called to permit defense counsel to prepare, Chirs Zipko, after notifying court clerk regarding his

intention, briefly appeared before Judge Steven P. Ruble in a separate courtroom, just yards away, to take the statement of a 7-year-old victim of criminal sexual conduct. Despite informing the court's clerk about his intention to appear before Judge Ruble, the matter was called before Judge Jesse. Judge Jesse, in turn, dismissed the complaint due to, "lack of prosecution," and, "with prejudice." On September 16, 2005, citing appropriate case law, the state re-issued the complaint against the above named appellant. On September 19, 2005, Judge Michael S. Jesse issued an order refusing to sign and dismissing the state's re-filed complaint. On October 17, 2005, the state filed a petition for a writ of mandamus with the Court of Appeals. The Court of Appeals granted the state's request on November 1, 2005. On November 14, 2005, a new complaint was re-filed against the appellant. On December 2, 2005, counsel for the appellant asked the Supreme Court for review. On December 6, 2005, counsel for the appellant requested a continuance at the district court level due to a scheduling conflict and the filing of this petition. On January 17, 2006, Minnesota Supreme Court Associate Justice Alan Page signed an order granting review of the Minnesota Court of Appeals Order dated November 1, 2005, which granted the states October 17, 2005, request. Said order required appellant to file its brief by February 16, 2005. On February 22, 2006, appellant filed a motion for extension to file a brief. On February 27, 2006, appellant's motion was granted in an order signed by Minnesota Supreme Court Chief Justice Russell Anderson permitting appellant to file by March 1, 2006. Appellant filed its brief on March 3, 2006, and, by an order signed by Minnesota Supreme Court Chief Justice Russell Anderson, said brief was accepted by the court on March 9, 2006.

ARGUMENT

I. The State satisfied any notice requirement of Rule 120.02 of the Minnesota Rules of Civil Appellate Procedure when it served both Mille Lacs District Court Judge Michael Jesse and Mark Kelly, counsel for the Appellant, with the State's Petition for a Writ of Mandamus on October 17, 2005.

“Rule 120.02 [submission of petition; response to the petition of extraordinary writs]...governs the manner of submission of the petition to the court and is flexible to suit the various situations with which the petitioner may be faced.” MN. Civ. App. R. 120.02, Advisory Committee Note – 1967. Even in an emergency, “[n]o formal notice is necessary nor is there any time limitation. All that is necessary is that the notice be reasonable under the circumstances.” *Id.* In some cases, “the court may [even] waive the notice requirement.” *Id.* Based on this standard, appellant's, “service” argument fails.

After filing a certificate of representation dated January 6, 2005, and submitted to Mille Lacs District Court File K6-04-1473 and the Mille Lacs County Attorney's Office in File 04-24415, Kelly first appeared on behalf of the appellant on January 7, 2005. Whether through personal appearances, motion filings or continuance requests, Kelly represented the appellant through September 16, 2005, when the district court wrongly dismissed the complaint. On that same date, Kelly was provided, via mail, a copy of the state's letter to Michael S. Jesse requesting the Judge sign the state's re-issued complaint. In the letter, the state cited both, *State, Village of Eden Prairie v Housman*, 180 N.W. 2d 251 (Minn. 1970); and, *City of West St. Paul v Banning*, 409 N.W.2d 530 (Minn. App. 1987), for the proposition that a re-issued complaint was appropriate under the circumstances. Based on this letter, Kelly had actual knowledge that on, or about,

September 16, 2005, the state was continuing to seek criminal sanctions for the events described in Mille Lacs District Court File K6-04-1473. At no time did Kelly notify the district court or the Mille Lacs County Attorney's Office that he would not be representing the appellant on the re-issued complaint. With no such answer by Kelly, especially after providing him with the state's September 16, 2005 letter, service upon him on October 17, 2005, of the State's Petition for a Writ of Mandamus was reasonable under Rule 120.02 of the Minnesota Rules of Civil Appellate Procedure.

Additionally, such notice was arguably expected by appellant based on Kelly's own "Retainer Agreement." An agreement, presumably the one signed by the appellant in this case, was provided along with Appellant's Petition for Review, and in the index of Appellant's Brief, and attached for illustrative purposes. In it, among other things, the agreement states, "representation of the Law Offices of Mark D. Kelly will continue only through sentencing..." In this case, the matter never reached sentencing but Kelly had notice of the state's desire to have the complaint re-issued and therefore notice of his continued obligations, and the possibility of sentencing based on the facts alleged in Mille Lacs District Court File K6-04-1473, under his own agreement.

In appellant's brief, cases are cited for the apparent proposition that a case must either be pending, or on remand, in order for issuance of a writ to be appropriate. Appellant's citations are not helpful in the present analysis as appellant's list is non-exhaustive.

II. The Minnesota Court of Appeals had jurisdiction to issue a writ of mandamus and also vacate the pretrial orders of the district court where the district

court had a clear and present official duty to perform a certain act but arbitrarily and capriciously failed to act thereby committing a clear abuse of discretion.

a. Standard of Review

“Mandamus is an extraordinary legal remedy awarded, not as a matter of right, but in the exercise of sound judicial discretion and upon equitable principles.” *Coyle v City of Delano*, 526 N.W.2d 205, 206 (Minn. App. 1995). Once granted, “[w]hen the...court’s decision on a petition for a writ of mandamus is based solely on a legal determination, [a reviewing court] reviews that decision *de novo*.” *Nolan and Nolan v. City of Egan*, 673 N.W.2d 487, 493 (Minn. App. 2003), *review denied* (Minn. March 16, 2004) (*citations omitted*). However, when issuance of a writ is not based solely on such a determination, such as the determination made in this case, “[o]n appeal, [a reviewing court] will reverse a district [issuing] court’s order on an application for mandamus relief, ‘only where there is no evidence reasonably tending to sustain the trial [issuing] court’s findings’.” *Id.* The writ in the present case was not issued based solely on a legal determination but because the appellate court found the district court had committed a clear abuse of discretion in a scheduling function and in, “purport[ing] to prevent any other judge from signing the re-issued complaint.” Toussaint Order, pg. 2 (11/1/05). Because issuance of the writ in appellant’s case was not based solely on a legal determination, appellant is not entitled to *de novo* review¹. Rather, based on the facts and circumstances of this case, appellant’s challenge should fail because there is ample evidence which clearly sustains the appellate court’s issuance of a writ.

¹ - The state submits even if appellant were entitled to *de novo* review, the actions of the district court judge on September 16th and 19th, 2005, justify issuance of a writ of mandamus dismissing his orders of the same date.

b. All necessary criteria was present to justify issuance of a writ of mandamus in this case.

“The legal criteria for invoking the writs is found in the various cases where the writs are sought.” Eric J. Magnuson, David F. Herr, *Minnesota Practice, Appellate Rules Annotated* 494 (2004). In the case of mandamus, this occurs when the district court abuses its discretion. *Bakery v. Connolly Cartridge Corp.* 239 Minn. 72, 57 N.W.2d 657 (1965). Further, mandamus will issue, “to compel action by lower judicial tribunals... [W]here a lower court without sufficient reason neglects or refuses to act upon a matter within its jurisdiction, properly brought before it, mandamus will issue at the instance of one entitled to invoke the remedy, to compel it to assume jurisdiction and proceed to a determination of the cause.” *McLean Distribution v Brewery and Beverage Drivers, Warehousemen and Helpers Union Local Number 993*, 254 Minn. 204, 209, 94 N.W.2d 514, 518 (1959) (*citations omitted*); *See* MN. Stat. § 586.01.

1. Not applying the Minnesota Rules of Criminal Procedure to the state’s re-issued complaint was a clear and present official duty that the Judge Jesse of the Mille Lacs District Court failed to perform.

As noted by the appellate court, when the district refused to sign the re-issued complaint and, “purported to prevent any other judge from signing the re-issued complaint by dismissing the matter with prejudice... [the district court] committed a clear abuse of discretion warranting the granting or mandamus.” Toussaint Order, pg. 2 (11/1/05); *See McIntosh v Davis*, 441 N.W.2d 115 (Minn. 1989). This is so because, “[t]he phrases ‘with prejudice’ and ‘without prejudice’ are irrelevant to a determination of the finality of a dismissal in a criminal case,” *City of West St. Paul v. Banning*, 409

N.W.2d 530, 531 (Minn. App. 1987). Judge Jesse's September 16, 2005, pretrial order dismissing the complaint, "lack of prosecution - with prejudice," was therefore not a final determination of the state's case against the appellant and the state could not appeal Jesse's pretrial order. Instead, the state was entitled to re-issue the complaint. *Id.*; *Accord State, Village of Eden Prairie v. Housman*, 180 N.W.2d 251, 252 (Minn. 1970) ("other courts [outside of Minnesota] have squarely held that were there is a dismissal for lack of prosecution under the rule it is a dismissal without prejudice"); *Accord City of West St. Paul v. Banning*, 409 N.W.2d 530, 531 (Minn. App. 1987) ("the phrases 'with prejudice' and 'without prejudice' are irrelevant to a determination of finality of a dismissal in criminal cases"); *Accord In the Matter of the Welfare of J.H.C.*, 384 N.W.2d 599 (Minn. App. 1986) ("it is settled law that a dismissal pursuant to Minn. Stat. § 631.21 is not a final order of the trial court"); *Accord City of St. Paul v. Hurd*, 216 N.W.2d 259 (Minn. 1974) ("[I]nasmuch as jeopardy has not attached, we must conclude that the use of the phrase 'with prejudice' by the lower court was inconsequential."). And, after re-issuing the complaint, "if it appear[ed] from the facts set forth in writing in the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed and that the defendant committed it, a summons or warrant *shall* be issued." MN. R. Crim. P. 3.01 (*emphasis added*); *See* MN. R. Crim. P 2.01. By operation of this rule, the district court, "had a clear and present official duty to perform a certain act," *McIntosh*, 441 N.W.2d at 118, and consider the state's re-issued complaint in context of the Minnesota Rules of Criminal Procedure.

2. In addition to failing to perform a clear and present official duty, Mille Lacs County District Court Judge Michael Jesse committed multiple errors when he dismissed the State's complaint against the Appellant.

“[B]y dismissing the matter with prejudice... [the district court] committed a clear abuse of discretion warranting the granting of mandamus.” Toussaint Order, pg. 2 (11/1/05). Dismissing the complaint was a clear abuse of discretion for several reasons.

First, the failure by District Court Judge Michael S. Jesse to sign the State's re-issued complaint on September 16, 2005, was in error because, Minnesota does not recognize, “lack of prosecution,” as a reason to dismiss a complaint. In fact, in the dismissal dated September 16, 2005, District Court Judge Michael Jesse seems to have created an unrecognized blend of both the Minnesota Rules of Criminal and Civil Procedure when he dismissed the State's complaint for, “lack of prosecution.” This amalgam appears to blend MN. R. Civ. P. 41.02(a) and MN. R. Crim. P. 30.02. According to the civil procedure rules, “[a] court may upon its own initiative, or upon motion of a party, and upon such notice as it may prescribe, dismiss an action or claim for failure to prosecute.” MN. R. Civ. P. 41.02(a). Such a dismissal is, “appropriate only when (1) the delay prejudiced *the defendants*; and (2) the delay was unreasonable and inexcusable.” *Belton v. City of Minneapolis*, 393, N.W.2d 244, 246 (Minn App. 1986) (quoting *Bonhiver v. Fugelso, Porter, Simich and Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn. 1984) (*emphasis added*)). According to the criminal procedure rules, “[a] court may also dismiss a matter, “if there is unnecessary delay by the prosecution in bringing the defendant to trial.” MN. R. Crim. P. 30.02. In this case, assuming the district court meant, “unnecessary delay,” *Id.*, when it wrote, “lack of prosecution,” such a dismissal is

appropriate when a *defendant* suffers prejudice from the delay. *See State v. Borough*, 178 N.W.2d 897 (Minn. 1970).

Regardless of which rule Judge Jesse applied to the criminal case, he made no finding, as required by both rules, specifically that the defendant had suffered any form of prejudice. Instead, with full knowledge that the assistant county attorney handling the case was, “in a nearby courtroom,” Judge Jesse cites the state’s alleged failure to appear as a reason for dismissing the state’s complaint against the appellant. Judge Jesse failed to note how the appellant herself, as required by the rule, was prejudiced. In fact, the initial delay in calling the case was due to the defense counsel’s need to make copies.

Next, the failure by District Court Judge Michael S. Jesse to sign the state’s re-issued complaint on September 16, 2005, was in error because Minnesota does not recognize allegations of failure to appear as a reason for dismissing a criminal complaint.

As noted above, a dismissal with or without prejudice is not a final judgment which prevents the State from re-issuing a complaint against an accused. Furthermore, while a district court may dismiss a complaint for unnecessary delay or failure to prosecute, such dismissals require a showing of prejudice to the defendant and no such showing was made here.

Finally, District Court Judge Jesse raised one final argument in support of his failure to sign the State’s reissued complaint. Without citing any authority for his position, Judge Jesse cites the dismissal as, “a deterrent to continued failures to appear.” *See* Jesse order dated 9/19/05, pg. 2. As indicated by notable omissions in the Court’s own memorandum, this argument lacks credibility².

² - For limited purposes of this submission, the State is not arguing here that Jesse acted in bad faith. See Rule 4(b) of the Rules of the Board on Judicial Standards. However, the State expressly rejects Jesse’s

On April 5, 2005, defendant's attorney Mark Kelly submitted an Offer of Proof³. "There are two principal ways to make an offer of proof. First, an attorney can tell the court what the proposed testimony of the witness will be. (internal citation omitted). Second, an attorney can examine a witness and produce the testimony." *Santiago v. State*, 644 N.W.2d 425, 442 (Minn. 2002) Based on the document submitted by counsel for the appellant, it is clear Mr. Kelly intended to proceed under both methods. Specifically, while appellant's counsel explained his second offer of proof in two paragraphs on the document, for appellant's first offer of proof he listed, "Kanabec County Sheriff Steve Schultz, James Osowski, Mille Lacs County Investigator," as witnesses. As the party making the offer by questioning witnesses, it was the defendant's burden to produce the witnesses. *See* Minn. R. of Evid. 103(a)(2) (an offer of proof is appropriate when made in response to a court's decision to exclude a party's evidence).

In this case, the court noted, "[d]efense counsel advised that three witnesses were to testify in the motion hearing for this case." *See* Jesse order dated 9/19/05, pg. 2. The court did not note if the persons were present. If the witnesses were not present, and the court makes no notation the witnesses were, the defendant, not the state, was unprepared for purposes of the hearing and the court's action, and explanation for the actions taken, is entirely inappropriate and calls into question the court's attempt at employing the, "strong sanction of a dismissal." *See* Jesse order dated 9/19/05, pg. 2; *See Stevens v. School Board of Independent School District No. 271*, 296, Minn. 413, 415, 208 N.W. 2d

indication prosecutors have been, "cavalierly absent," or that there have been, "continued failures to appear," on the part of members of the Mille Lacs County Attorney's Office as being wholly without merit. *See* Kolb September 23, 2005, Letter to Michael Jesse.

³ - Defendant's offer of proof was made about three weeks after her attorney requested a contested Omnibus Hearing. At both hearings, defense counsel listed James Osowski as a witness he intended to question

866, 868 (1973) (even if Jesse's Order effectively dismissed the claim against the defendant, "it must be shown there was unreasonable and inexcusable delay with resulting prejudice *to the defendant*," in order to justify the harsh remedy of a procedural dismissal) (*emphasis added*).

Appellant's contention that the district court's order dismissing the complaint was an appealable order is speculative⁴, misleading⁵ and legally wrong⁶. Instead, appellant's main argument seems to be one of form over substance. *Cf. Farnsworth Loan & Realty v. Commonwealth Title Ins. & Trust*, 84 Minn. 62, 67, 86 N.W. 877, 878 (Minn. 1901) ("[R]ights resting upon the curable defect alone cannot be deemed meritorious, and are not entitled to protection accorded to vested rights.") Specifically, here appellant proposes that because the appellate court altered the specific request of the state that appellant's right to be heard was violated.

Appellant has no such alleged right under the rules of appellate procedure.

According to the Minnesota Rules of Criminal Procedure, "[e]xcept as provided by law for the issuance of the extraordinary writs... a defendant may obtain review of orders and

⁴ - Appellant speculates that the appellate court's decision, "was indicative of an opinion." This is not so. If anything, the appellate court's order indicated the district court abused its discretion when it dismissed the original, and the re-issued, complaint(s) against the appellant.

⁵ - The day the district court wrongly dismissed the complaint against the appellant, the state re-issued one against the appellant and notified, via letter, appellant's counsel, Mark Kelly. Counsel's continuance requests delayed the disposition of appellant's case more so than the state's efforts requesting appellate relief.

⁶ - As noted above, "[t]he phrases 'with prejudice' and 'without prejudice' are irrelevant to a determination of the finality of a dismissal in a criminal case," *City of West St. Paul v. Banning*, 409 N.W.2d 530, 531 (Minn. App. 1987). As a result, Judge Jesse's September 16, 2005, pretrial order dismissing the complaint was not a final determination of the state's case against the appellant, and the state could not appeal Jesse's pretrial order. Instead, the state was entitled to re-issue the complaint. *Id.*; *See State, Village of Eden Prairie v. Housman*, 180 N.W.2d 251, 252 (Minn. 1970) ("other courts [outside of Minnesota] have squarely held that were there is a dismissal for lack of prosecution under the rule it is a dismissal without prejudice"); *See City of West St. Paul v. Banning*, 409 N.W.2d 530, 531 (Minn. App. 1987) ("the phrases 'with prejudice' and 'without prejudice' are irrelevant to a determination of finality of a dismissal in criminal cases"); *See In the Matter of the Welfare of J.H.C.*, 384 N.W.2d 599 (Minn. App. 1986) ("it is settled law that a dismissal pursuant to Minn. Stat. 631.21 is not a final order of the trial court") *See also* MN. R. Crim. P. 28.02, subd. 1 (providing for limited right of pretrial appeal).

rulings of the district courts by the Court of Appeals.” MN. R. Crim. P. 28.02, subd. 1 (*emphasis added*). As such, petitioner’s remedy is governed by the Minnesota Rules of Civil Appellate Procedure. *Id.* In this case, after the state served counsel for the appellant, the appellant, or her counsel, had five days to reply. MN. R. Civ. App. P. 120.02. Although Mark Kelly was sent a copy of the state’s letter to the district court judge requesting a re-issuance of the state’s complaint on September 16, 2005, and served with the state’s writ petition, the state does not know why appellant’s counsel failed to reply on behalf of his client or why, at the very least, he failed to forward the petition to her once he was served. Counsel did not ask for an extension to permit himself, or his client, to reply to the state’s request.

Assuming *arguendo* appellant has a some right to notice other than the one provided for by Rule 120.02 of the Minnesota Rules of Civil Appellate Procedure, any notice requirements due the appellant were fully satisfied when it was served with the state’s petition asking the appellate court require the district court to sign the re-issued complaint. This is so because had the appellate court granted the state’s requested relief in its entirety, the appellate court would have vacated the district court orders. Appellant’s unlikely scenario that the appellate court would require a district court judge to sign a re-issued complaint without first vacating an order dismissing the same is without merit as are appellant’s efforts to characterize the order of the appellate court as a direct appeal. So, while it is true the appellate court did not grant the entirety of the state’s request, what it did grant was part of the state’s initial request and fully noticed to appellant.

CONCLUSION

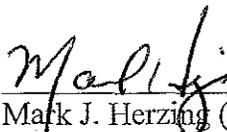
“[M]andamus is an extraordinary legal remedy awarded, not as a matter of right, but in the exercise of sound judicial discretion and upon equitable principles.” *Coyle* 526 N.W.2d at 206. Based on the actions of the district court, especially the actions taken on September 19, 2005, these equitable principles justified the issuance by the appellate court of a writ of mandamus granting, in part, the state’s requested relief. The relief granted to the state should be upheld and appellant’s challenge should be dismissed.

Respectfully submitted,

Date: April 5, 2006



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