

A 23-922

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Plaintiff-Appellee,

v.

JACOB POLLOCK,

Defendant-Appellant.

Appeal from the District Court of Jefferson County, Nebraska

The Honorable David J.A. Bargaen,
District Court Judge

REPLACEMENT BRIEF OF DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this case pursuant to Neb. Rev. Stat. § 25-1902 (Reissue 2016), as the order being appealed was a sentence in a criminal case, which is a final, appealable order. *See State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015); *see also* Neb. Rev. Stat. § 25-1911 (Reissue 2016). The District Court for Jefferson County entered its order of dismissal on October 17, 2023. (T142). Appellant filed his Notice of Appeal and paid the required docket fee and a \$75.00 cash bond on November 14, 2023.

STATEMENT OF THE CASE

I. Nature of the Case.

This is an appeal from the dismissal of an appeal to the District Court of Defendant's conviction for DUI based on the admission of an illegal blood test.

II. The Issues Actually Determined.

Due to issues obtaining evidence pertaining to the appeal, Appellant requested several continuances of the brief deadline. While Defendant's final request for extension was pending, he filed his brief with the District Court.

III. Resolution of the Issues and Sentencing by the Trial Court.

The District Court entered an order dismissing the Defendant's appeal for failure to timely file a brief. (T144).

IV. Scope and Standards of Review. An appellate court has inherent authority to regulate such things as timing of record preparation, extension of brief dates, and argument dates and such decisions are reviewed for abuse of discretion. *Houser v. American Paving Asphalt*, 299 Neb. 1, 907 N.W.2d 16 (2018)

ASSIGNMENTS OF ERROR

1. The District Court erred by dismissing appellant's appeal because of an untimely filed brief.

PROPOSITIONS OF LAW

I. If appellant fails to file its brief within the time allowed and no extension of brief date has been granted, the Clerk shall provide notice to all self-represented litigants and all attorneys of record that appellant is in default for failure to file a brief and is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief within the 10-day period subjects the appeal to dismissal. If appellant has sought and obtained an extension of brief date and the court's order granting the extension subjects the appeal to dismissal without further notice, failure to file the brief within the extended time allowed may result in dismissal of the appeal without further notice. Under no circumstances shall more than one notice of default be required.

Neb. Ct. R. App. P. §2-110(A)

II. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

State v. Moore, 277 Neb. 111, 759 N.W.2d 698 (2009)

STATEMENT OF FACTS

On February 21, 2022, Defendant was charged with one count of DUI and one count of open container in Jefferson County Court. (T4) on December 12, 2022, the county court overruled the Defendant's motion to suppress the results of a blood test. (T57) On March 3rd, 2023, the State filed an amended complaint charging Defendant with one count of DUI. (T67). The case was tried on stipulated facts on stipulated facts filed on March 10, 2023. (T72) At that time, Defendant renewed both of his motions to suppress. (T72) On March 10, 2023, the court found the Defendant guilty based on the stipulated facts. (T75) On April 26, 2023, Defendant was sentenced to seven days in jail, a fine and costs totaling \$731, and the revocation of his driver's license for six months. (T80)

Defendant filed a notice of appeal to the District Court of Jefferson County on May 4, 2023. (T90) On July 20, 2023, the District Court entered a scheduling order directing appellant to file his brief within 30 days. (T126) On September 5, 2023, the court entered an order extending Defendant's brief date for 14 days. (T133) On September 15, 2023, the court entered an order extending Defendant's brief date to October 2, 2023. (T137) The order contained the following language: "This is the last extension the Court will grant Defendant for submission of his brief. . . . Thereafter, the briefing schedule will proceed with or without Defendant's initial brief. (T137)

On October 2, 2023, Defendant filed a motion for an additional seven days to file his brief for the reason that his brief writer found that it was taking longer than anticipated to go through the booking video which was the major focus of the appeal. (T139-40) Having received no denial of his motion for additional time, Defendant filed his brief on October 11, 2023. (T142) The court entered an order rejecting Defendant's request for additional time to file his brief, and dismissed his appeal.

SUMMARY OF THE ARGUMENT

The District Court erred by dismissing the Defendant's appeal without giving him adequate notice that the result of an untimely filing of a brief would be dismissal of his appeal. The Defendant made a request for an additional week in which to file his brief due to difficulties with reading the Defendant's booking video. The primary basis for the appeal was the insufficiency of advisement regarding the taking of a blood test in lieu of a breathalyzer. This necessitated going through the lengthy video to discover these specific statements made to Defendant prior to taking of his blood.

The court had not ruled on the motion for extension of time when the Defendant filed his brief in good faith. Denying him his right to an appeal of his criminal conviction based on a technicality constitutes an abuse of discretion which must be reversed on appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING APPELLANT’S APPEAL BECAUSE OF AN UNTIMELY FILED BRIEF.

In its order of dismissal, the court referred to the requirements of Neb. Ct. R. App. P. §2-110(A) regarding notice to a party in default. That rule provides as follows:

If appellant fails to file its brief within the time allowed and no extension of brief date has been granted, the Clerk shall provide notice to all self-represented litigants and all attorneys of record that appellant is in default for failure to file a brief and is required to file a brief within 10 days after receipt of such notice. Appellant's failure to file a brief within the 10-day period subjects the appeal to dismissal. If appellant has sought and obtained an extension of brief date **and the court’s order granting the extension subjects the appeal to dismissal without further notice**, failure to file the brief within the extended time allowed may result in dismissal of the appeal without further notice. Under no circumstances shall more than one notice of default be required.

In this case, the District Court entered an order dated September 15, 2023, in which it stated as follows: “This is the last extension the Court will grant Defendant for submission of his brief. It is due on or before October 2, 2023. Thereafter, the briefing schedule will proceed with or without Defendant's initial brief.” (T137) Thus, the final extension does not give the Defendant notice that failure to file his brief in a timely manner will subject him to dismissal of his appeal. Rather, the order clearly implies that the appeal will continue under the prior briefing schedule.

The court further noted that it had warned the parties that failure to comply with the original brief dates would subject the appellant to dismissal. (T143) However, as the court itself noted, that order was revised several times through the granting of a motion to extend the Defendant’s brief date. Having so altered the original

Certificate of Service

I hereby certify that on Wednesday, March 13, 2024 I provided a true and correct copy of this *Brief of Appellant Pollock* to the following:

State of Nebraska represented by Teryn Rene Blessin (27022) service method: Electronic Service to **teryn.blessin@nebraska.gov**

Signature: /s/ Garrison, Dustin Allen (23812)