

**IN THE COURT OF APPEALS OF IOWA**

No. 1-467 / 10-2128  
Filed July 27, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**PAUL CLAUSEN-KLUTSE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Floyd County, Peter B. Newell,  
District Associate Judge.

Defendant appeals the court's dismissal of his criminal charges for  
operating while intoxicated. **APPEAL DISMISSED.**

Colin C. Murphy of Law Offices of Colin C. Murphy, P.C., Mason City, for  
appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney  
General, Norman Klemesrud, County Attorney, and Todd Prichard, Assistant  
County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

**EISENHAUER, P.J.**

Paul Clausen-Klutse appeals the court's dismissal of his criminal charges for operating while intoxicated. Because we conclude his appeal is untimely and we lack jurisdiction, we dismiss the appeal.

In August 2009, Clausen-Klutse was charged with operating while intoxicated (OWI). In October 2009, Clausen-Klutse filed a timely motion to suppress the results of his breath test. After hearing, the district court denied his motion. Clausen-Klutse filed an application for discretionary review, and in March 2010, the Iowa Supreme Court denied his application.

At Clausen-Klutse's request, his September 14, 2010 trial was continued. On September 20, 2010, Clausen-Klutse filed a motion in limine and an Iowa Rule of Evidence 5.104 motion requesting a ruling on the admissibility of breath test evidence (alleging lack of proper foundation—drinking water within fifteen minutes of the test). On October 4, 2010, the State filed a motion to dismiss its prosecution citing “insufficient evidence to justify prosecution and conviction.” On October 11, 2010, the district court dismissed the prosecution “for the reasons set forth in the State's motion.”

On November 10, 2010, Clausen-Klutse filed a “motion to reopen for ruling on the admissibility of breath test evidence.” On November 29, 2010, the district court stated Clausen-Klutse's motion to reopen was an attempt to “reopen a dismissed case and hold a hearing on a Second Motion to Suppress which was filed over a year after the initial filing of the Trial Information,” and denied the motion. On November 30, 2010, Clausen-Klutse filed a “motion to reconsider order on motion to reopen for ruling on the admissibility of breath test evidence.”

On December 13, 2010, the court noted this was Clausen-Klutse's "second motion . . . filed on a case that has been dismissed" and denied the motion. On December 27, 2010, Clausen-Klutse filed a notice of appeal.

Initially, the State challenges our jurisdiction to hear Clausen-Klutse's appeal. "A timely appeal is jurisdictional . . ." *Lutz v. Swine Exports Corp.*, 300 N.W.2d 109, 110 (Iowa 1981). The State points out the October 11, 2010 order dismissing the case is not appealable as a matter of right. We agree. Iowa Code section 814.6(1) (2009) provides a criminal defendant has a "right of appeal" from "[a] final judgment of sentence" and "[a]n order for commitment." Neither is applicable here. See *State v. Taeger*, 781 N.W.2d 560, 564 (Iowa 2010) (granting *discretionary review* of the trial court's dismissal of an OWI prosecution); *State v. Stessman*, 460 N.W.2d 461, 462 (Iowa 1990) (ruling "[t]he State is correct in its assertion that a final judgment does not presently exist in this case").

Therefore, Clausen-Klutse may not appeal the court's dismissal as a matter of right, but he could have requested discretionary review. See Iowa Code § 814.6(2)(e) (authorizing discretionary review). Our court may treat Clausen-Klutse's notice of appeal as an application for discretionary review. Iowa R. App. P. 6.108 (stating if we determine "another form of review was the proper one, the case . . . shall proceed as though the proper form of review had been requested").

Second, the State argues even if we treat Clausen-Klutse's notice of appeal as an application for discretionary review, his application is untimely.

Accordingly, we turn to our rules governing discretionary review. Iowa Rule of Appellate Procedure 6.106(1)(b) provides:

b. *Time for filing.* An application for discretionary review must be filed within 30 days after entry of the challenged ruling, order, or judgment of the district court. . . . No extension of such time will be allowed except upon a showing that the failure to file the application within the time provided was due to a failure of the district court clerk to notify the applicant of the ruling, order, or judgment.

Under this rule Clausen-Klutse had thirty days to seek discretionary review of the court's dismissal<sup>1</sup> and his post-dismissal motions to reopen and reconsider do not extend the time period. See Iowa R. App. P. 6.106(1)(b). Clausen-Klutse elected not to seek timely discretionary review. As the Iowa Supreme Court explained in an analogous case:

A timely appeal is jurisdictional, and the time limit for appeal cannot be extended by filing an improper post-trial motion. An untimely post-trial motion is defective and does not toll the running of the thirty-day period within which an appeal must be taken.

*State v. Olsen*, 794 N.W.2d 285, 289 (Iowa 2011) (quoting *Lutz*, 300 N.W.2d at 110. We are therefore without jurisdiction, and the State's challenge to our jurisdiction must be sustained.

**APPEAL DISMISSED.**

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<sup>1</sup> Clausen-Klutse's notice of appeal specifies the December 13 and November 29 orders denying his motion to reopen and his motion for reconsideration of the denial of his motion to reopen. His notice of appeal was filed within thirty days of those two orders. However, on appeal Clausen-Klutse argues only that the court erred in dismissing the charges on October 11, and his notice of appeal was untimely as to that order.