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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2024 ND 86

Joseph Edward Glaum, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20230236

Appeal from the District Court of Grand Forks County, Northeast Central Judicial District, the Honorable Donald Hager, Judge.

AFFIRMED; MOTION DENIED.

Opinion of the Court by McEvers, Justice.

Joseph E. Glaum, self-represented, Bismarck, ND, petitioner and appellant; submitted on brief.

Megan Essig, Assistant State's Attorney, Grand Forks, ND, for respondent and appellee; submitted on brief.

Glaum v. State
No. 20230236

McEvers, Justice.

[¶1] Joseph Glaum appeals from a pre-filing order finding him to be a vexatious litigant. The State moved to dismiss the appeal as untimely. We deny the State's motion to dismiss, concluding the appeal is timely, and affirm the pre-filing order.

I

[¶2] In 2008, Glaum pled guilty to criminal trespass and simple assault in Case No. 18-07-K-02786 ("Case 2786"), and the district court sentenced him and entered the criminal judgments.

[¶3] In early 2023, Glaum moved to reopen Case 2786 and to withdraw his guilty pleas. In March 2023, the district court entered an order denying his motions to reopen and withdraw pleas.

[¶4] Around the same time (early 2023), Glaum made similar motions—to reopen, expunge, or withdraw pleas—in four other closed cases in which he was a party. Those cases included: Case No. 18-97-K-02099 ("Case 2099") where Glaum pled guilty to possession of drug paraphernalia in 1997; Case No. 18-98-K-00330 ("Case 0330") where Glaum pled guilty to theft of property in 1998; Case No. 18-08-K-02002 ("Case 2002") where Glaum pled guilty to preventing arrest in 2008; and Case No. 18-2019-DM-00566 ("Custody Case") where the district court vacated the default judgment and dismissed Glaum's complaint for primary residential responsibility of his minor children in June 2021. The motions to reopen, expunge, or withdraw pleas in these four cases were denied by the district court.

[¶5] In April 2023, the presiding judge of the Northeast Central Judicial District ("presiding judge") entered a proposed pre-filing order and findings ("proposed order") under N.D. Sup. Ct. Admin. R. 58. Glaum moved to strike his own self-represented filings from the record and filed a response to the proposed order. On May 4, 2023, the presiding judge entered his findings and

pre-filing order ("pre-filing order"), finding Glaum to be a vexatious litigant, prohibiting him from filing any new litigation or new documents in existing litigation as a self-represented party without first obtaining leave of the court, and denying him a hearing on the proposed order. Glaum appeals from the pre-filing order.

II

[¶6] The State moves to dismiss the appeal, arguing the appeal is untimely. The State contends Glaum's appeal of the pre-filing order is an appeal from an order in a criminal case. Under N.D.R.App.P. 4(b)(1)(A), a defendant in a criminal case must file his notice of appeal within 30 days after entry of the order being appealed. Glaum, conversely, argues this is an appeal from an order in a civil case. Under N.D.R.App.P. 4(a)(1), the notice of appeal in a civil case must be filed "within 60 days from service of notice of entry of the judgment or order being appealed."

[¶7] The pre-filing order was entered on May 4, 2023. Glaum then misfiled the notice of appeal in the district court. Under N.D.R.App.P. 4(f), "If a notice of appeal in either a civil or a criminal case is mistakenly filed in the district court, the clerk of district court must note on the notice the date when it was received and send it to the clerk of the supreme court. The notice is then considered filed in the supreme court on the date so noted." The clerk of the district court noted the notice was received on July 10, 2023, and sent the notice to the clerk of the supreme court. Therefore, the notice of appeal was filed on July 10, 2023, which is more than 30 days after entry of the pre-filing order. If this appeal was taken in a criminal case, the appeal is untimely. Because the time to appeal in a civil case is 60 days from *service of notice of entry of the order* being appealed, a civil appeal would require further analysis. Accordingly, we first analyze whether this appeal was taken from an order in a criminal case.

A

[¶8] The district court found Glaum to be a vexatious litigant. Rule 58 of the North Dakota Supreme Court Administrative Rules "addresses vexatious

litigation." N.D. Sup. Ct. Admin. R. 58(1). "Litigation means any civil or disciplinary action or proceeding, including any appeal from an administrative agency, any review of a referee order by the district court, and any appeal to the supreme court." N.D. Sup. Ct. Admin. R. 58(2)(a). Under Section 6 of N.D. Sup. Ct. Admin. R. 58, "A pre-filing order entered by a presiding judge designating a person as a vexatious litigant may be appealed to the supreme court under N.D.C.C. § 28-27-02 and N.D.R.App.P. 4." Section 28-27-02, N.D.C.C., states what orders in a civil case may be appealed to this Court. Therefore, "[o]n its face, Rule 58 does not apply to criminal actions or documents filed in criminal actions." *State v. Kovalevich*, 2023 ND 206, ¶ 9, 997 N.W.2d 628; *see also People v. Harrison*, 112 Cal. Rptr. 2d 91, 96-97 (Cal. Ct. App. 2001) (concluding California's vexatious litigant statutes apply to "'litigation,' which is expressly defined as 'any *civil* action or proceeding, commenced, maintained or pending in any state or federal court,'" and therefore do not apply to criminal cases). By issuing the pre-filing order, it appears the district court considered all of Glaum's motions to be civil in nature.

[¶9] Despite the nature of the order, and the plain language of N.D. Sup. Ct. Admin. R. 58 excluding criminal actions from its application, the State maintains this is a direct appeal in a criminal case. We disagree. Glaum's time to appeal the criminal judgments has long passed and this appeal, contrary to the State's argument, is not a direct appeal in a criminal case. Glaum moved to reopen Case 2786 and to withdraw his guilty pleas over 14 years after the underlying criminal judgments were entered in the case. *See* N.D.C.C. § 29-32.1-01(4) (stating the Uniform Postconviction Procedure Act is the exclusive remedy for collaterally challenging the judgment of conviction); *State v. Atkins*, 2019 ND 145, ¶ 11, 928 N.W.2d 441 (concluding "a defendant may not avoid the procedures of the Uniform Postconviction Procedure Act by designating his motion under a rule of criminal procedure or by filing his motion in his criminal file, rather than filing as a new action for post-conviction relief"); *Kremer v. State*, 2021 ND 195, ¶ 9, 965 N.W.2d 866 ("[A] defendant may not evade the rules of postconviction relief proceedings by moving to withdraw a guilty plea under the rules of criminal procedure.").

[¶10] We have, however, recognized an exception where the defendant moves for relief under the North Dakota Rules of Criminal Procedure, has not previously filed an application for postconviction relief, and does not seek to circumvent the postconviction process. *See State v. Vogt*, 2019 ND 236, ¶ 7, 933 N.W.2d 916; *Kovalevich*, 2023 ND 206, ¶¶ 11-12. The district court noted that Glaum failed to provide any legal authority for his request to reopen Case 2786. Neither of Glaum's motions to reopen or withdraw pleas cite the Rules of Criminal Procedure, such as N.D.R.Crim.P. 11(d) (withdrawing a guilty plea). Therefore, we conclude this action is properly considered postconviction relief.

[¶11] Postconviction relief proceedings "are civil in nature and governed by the North Dakota Rules of Civil Procedure." *Wootan v. State*, 2023 ND 151, ¶ 4, 994 N.W.2d 347. Under N.D.R.App.P. 4(d), the notice of appeal in a postconviction proceeding "must be filed with the clerk of the supreme court within 60 days of service of notice of entry of the judgment or order being appealed." Therefore, appeals in postconviction proceedings and civil cases are taken in the same manner: within 60 days of service of notice of entry of the order. Given the result will be the same regardless of which specific rule applies in this case—N.D.R.App.P. 4(a)(1) (civil appeal) or 4(d) (postconviction appeal)—we need not reach the issue of whether one rule applies for all pre-filing orders (i.e. N.D.R.App.P. 4(a)(1)) or whether the time to appeal a pre-filing order is controlled by the action the pre-filing order is issued in (here, N.D.R.App.P. 4(d) (postconviction appeal)). Accordingly, we turn to whether Glaum's notice of appeal was filed within 60 days of service of notice of entry of the pre-filing order.

B

[¶12] The record shows the district court served Glaum with the pre-filing order through first-class mail as evidenced by the court's declaration of service by mail. The record does not show that Glaum was served with the notice of entry of the pre-filing order. Under N.D.R.Civ.P. 58(b)(2) and (3), the prevailing party must serve notice of entry of judgment on the opposing party within 14 days after entry of judgment, and file the notice of entry of judgment. *See* N.D.R.Civ.P. 54(a) (defining "Judgment" to include "any order from which

an appeal lies"). "The responsibility to serve notice of entry of judgment to commence the period for appeal is upon counsel for the prevailing party, and the time for appeal does not begin to run until notice is served." *Gierke v. Gierke*, 1998 ND 100, ¶ 6, 578 N.W.2d 522. Because the record does not show Glaum was served with the notice of entry of the pre-filing order, the time for filing an appeal did not commence. *See id.*

[¶13] "Service of notice of entry of judgment is not required to begin the time for filing . . . an appeal if the record clearly evidences actual knowledge of entry of judgment through the affirmative action" of the appealing party. N.D.R.Civ.P. 58(b)(4); *see also Gierke*, 1998 ND 100, ¶ 7. In *Thorson v. Thorson*, 541 N.W.2d 692, 694 (N.D. 1996), the appellee failed to serve the appellant with notice of entry of an order dismissing a divorce action. Appellee argued appellant had actual knowledge of entry of the order when the trial court served copies of the order on the parties' attorneys as evidenced by an affidavit of service by mail prepared by the court. *Id.* We rejected that argument and noted that "[a]n affidavit of mailing may be record notice but it does not equate with actual notice under these precedents establishing an exception to the requirement of service of notice of entry of judgment by the prevailing party." *Id.* at 694-95. We concluded that actual knowledge "requires action evident on the record on the part of the appealing party." *Id.* at 695.

[¶14] Under *Thorson*, the district court's declaration of service would not qualify as actual knowledge by Glaum of entry of the pre-filing order. Further, although Glaum's "Response to Findings and Pre-filing" is an affirmative action, the filing appears to be a response to the proposed order, not the pre-filing order. S*ee* N.D. Sup. Ct. Admin. R. 58(5) (requiring the presiding judge to issue a proposed pre-filing order and findings before issuing a pre-filing order and allowing 14 days to respond to the proposed order and findings). Specifically, Glaum notes in his response that there is an incomplete sentence at the "end of page 1 to page 2 where page 1 ends 'March 3, 2023.' [T]hen page 2 begins 'and made in haste.'" This statement is consistent with only the proposed order, not the pre-filing order. Therefore, we conclude the record does not clearly evidence actual knowledge of entry of the pre-filing order through the affirmative action of Glaum. Because there was no service of notice of entry

of the pre-filing order or evidence of actual knowledge of entry, the time for filing a notice of appeal did not begin to run. *Gierke*, 1998 ND 100, ¶ 6; *In re Est. of Vendsel*, 2017 ND 71, ¶ 7, 891 N.W.2d 750. We conclude that Glaum timely filed his notice of appeal, and deny the State's motion to dismiss the appeal.

III

[¶15] Glaum argues the district court erred in finding him to be a vexatious litigant. We review a pre-filing order finding a litigant vexatious for an abuse of discretion. *Rath v. Rath*, 2022 ND 105, ¶ 21, 974 N.W.2d 652. "A court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably; when it misinterprets or misapplies the law; or when its decision is not the product of a rational mental process leading to a reasoned determination." *Id.*

[¶16] A "[v]exatious litigant" is defined under N.D. Sup. Ct. Admin. R. 58(2)(b), which provides:

> Vexatious litigant means a person who habitually, persistently, and without reasonable grounds engages in conduct that:
> (1) serves primarily to harass or maliciously injure another party in litigation;
> (2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law;
> (3) is imposed solely for delay;
> (4) hinders the effective administration of justice;
> (5) imposes an unacceptable burden on judicial personnel and resources; or
> (6) impedes the normal and essential functioning of the judicial process.

The district court found N.D. Sup. Ct. Admin. R. 58(2)(b)(2), (5), and (6) apply to Glaum. Specifically, the court found "Glaum is a vexatious litigant because he is a person who habitually, persistently, and without reasonable grounds engaged in conduct that is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law"; "Glaum's actions impose an unacceptable burden on judicial

personnel and resources by filing similar motions in multiple files"; and his conduct "impede[s] the normal and essential functioning of the judicial process by his unwarranted consumption of judicial resources."

[¶17] Section 4 of N.D. Sup. Ct. Admin. R. 58 provides in relevant part:

> A presiding judge may determine a person is a vexatious litigant based on one or more of the following findings:
>
> (a) in the immediately preceding seven-year period the person has commenced, prosecuted or maintained as a self-represented party at least three litigations that have been finally determined adversely to that person;
>
> . . .
>
> (c) in any litigation while acting as a self-represented party, the person repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary burden, expense or delay;
>
> . . . .

The district court found subsections (a) and (c) apply because Glaum has "commenced, prosecuted or maintained as a self-represented party at least three litigations in the immediately preceding seven-year period that have been finally determined adversely to him" and repeatedly filed, as a self-represented party, unmeritorious motions, pleadings, or other papers.

[¶18] Glaum argues the district court abused its discretion by finding subsection (a), N.D. Sup. Ct. Admin. R. 58(4), applied to him. He asserts prior vexatious litigant determinations were made after an average of "10 or more adverse filings." Glaum admits, however, that the court ruled adversely to him in five of his recent cases.

[¶19] In early 2023, Glaum moved to reopen, expunge, or withdraw pleas in Cases 2786, 2099, 0330, and 2002 and to reopen the Custody Case. Cases 2786, 2099, 0330, and 2002 were closed criminal cases where Glaum pled guilty to

criminal offenses between 1997 and 2008. In Cases 2786, 0330, and 2002, Glaum's motions cite no legal authority. In Case 2099, Glaum moved to expunge the record under N.D.C.C. § 19-03.1-23(9), and moved to withdraw his guilty plea, citing no legal authority. Glaum's motions in Cases 2786, 2099, 0330, and 2002 were denied by the district court and therefore "finally determined adversely" to him. Glaum's motions were not made under the Rules of Criminal Procedure. Nor does he argue his motions fail to meet the definition of "litigation" under N.D. Sup. Ct. Admin. R. 58. With respect to Cases 2786, 0330, 2002, and the motion to withdraw the plea in Case 2099, we conclude these "motions" are properly considered applications for postconviction relief, qualifying as "litigation" under N.D. Sup. Ct. Admin. R. 58. *See Atkins*, 2019 ND 145, ¶ 11 (concluding "a defendant may not avoid the procedures of the Uniform Postconviction Procedure Act by designating his motion under a rule of criminal procedure or by filing his motion in his criminal file, rather than filing as a new action for post-conviction relief"); *Kremer*, 2021 ND 195, ¶ 9 ("[A] defendant may not evade the rules of postconviction relief proceedings by moving to withdraw a guilty plea under the rules of criminal procedure."); *Wootan*, 2023 ND 151, ¶ 4 (noting postconviction relief proceedings are civil in nature). Further, Glaum's self-represented motion to reopen the Custody Case was denied by the court, and therefore is "litigation" that has been finally determined adversely to him. Accordingly, we conclude that the court did not err in finding that Glaum commenced, prosecuted, or maintained as a self-represented party at least three litigations in the preceding seven-year period that have been finally determined adversely to him.

[¶20] The court's findings support its ultimate finding that Glaum is a vexatious litigant, and the court did not abuse its discretion in issuing the pre-filing order.

IV

[¶21] Glaum contends the district court erred in denying him a hearing on the proposed order. Under N.D. Sup. Ct. Admin. R. 58(5), if a response to the proposed pre-filing order is filed, "the presiding judge may, in the judge's discretion, grant a hearing on the proposed order. If no response is filed within

14 days, or if the presiding judge concludes following a response and any subsequent hearing that there is a basis for issuing the order, the presiding judge may issue the pre-filing order."

[¶22] The district court noted that Glaum filed a response to the proposed order, but denied a hearing on the proposed order, concluding there was sufficient basis for issuing the pre-filing order absent a hearing. Glaum does not argue how the court abused its discretion in denying him a hearing. Given the undisputed facts concerning Glaum's litigation history—at least three self-represented litigations in the preceding seven-year period have been finally determined adversely to him—we conclude the court did not abuse its discretion in denying Glaum a hearing.

V

[¶23] Glaum argues generally the district court erred in denying his motion to withdraw his guilty pleas and that he received ineffective assistance of counsel in the underlying criminal case. Glaum, however, only appealed from the pre-filing order, not the order denying his motions to reopen and withdraw pleas in Case 2786. Under N.D.R.App.P 3(c), "The notice of appeal must: (1) specify the party or parties taking the appeal; (2) designate the judgment, order, or part thereof being appealed; (3) name the court to which the appeal is taken; and (4) include a concise preliminary statement of issues." Glaum's notice of appeal states he is appealing from "Findings and Pre-filing Order Pursuant to N.D. Sup. Ct. Admin. R. 58." Therefore, Glaum is precluded from challenging the order denying his motion to withdraw pleas. *See In re Emelia Hirsch, June 9, 1994, Irrevocable Tr.*, 2022 ND 89, ¶ 7, 973 N.W.2d 427; *In re Emelia Hirsch, June 9, 1994, Irrevocable Tr.*, 2017 ND 291, ¶ 13, 904 N.W.2d 740.

[¶24] As to Glaum's argument that he received ineffective assistance of counsel, that issue was not raised in the district court. Glaum is precluded from raising the issue for the first time on appeal. *Moe v. State*, 2015 ND 93, ¶ 14, 862 N.W.2d 510; *State v. Chatman*, 2015 ND 296, ¶ 22, 872 N.W.2d 595.

VI

[¶25] We have considered the remaining arguments and conclude they are either unnecessary to our decision or are without merit. The State's motion to dismiss the appeal is denied. The pre-filing order against Glaum is affirmed.

[¶26] Jon J. Jensen, C.J.
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte
Douglas A. Bahr