

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL WHITFIELD,

Petitioner,

vs.

NEVADA STATE PERSONNEL
COMMISSION, STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION,
LORNA WARD, APPEALS OFFICER,
and DEPARTMENT OF CORRECTIONS,
as Employer,

Respondents.

Supreme Court No. 79718
Dist. Court Case No. 15-2016-02
Electronically Filed
Nov 15 2016 4:21 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

REPLY IN SUPPORT OF MOTION TO DISMISS

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Department of Corrections

COMES NOW, NEVADA DEPARTMENT OF CORRECTIONS, by and through its counsel, Aaron D. Ford, Attorney General, and Kevin A. Pick, Senior Deputy Attorney General, and hereby submits this Reply in Support of Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After this appeal was docketed, NDOC immediately recognized several fatal jurisdictional flaws in Whitfield's appeal. As such, NDOC moved to dismiss this appeal for two reasons: (1) Whitfield's appeal of reconsideration was untimely, because Whitfield never timely appealed the underlying dispositive Order Granting Motion to Dismiss and because a motion for reconsideration is not a tolling motion under NRAP 4(a)(4); and (2) an order denying reconsideration is not an independently appealable order. For these reasons, the Supreme Court lacks jurisdiction over this appeal, which must be dismissed with prejudice.

In response, Whitfield filed an untimely "amended notice of appeal" with the District Court on November 7, 2019, in which Whitfield now attempts to add the Order Granting Motion to Dismiss to his original Notice of Appeal.

At the same time as filing his untimely "amended notice of appeal," Whitfield filed his Opposition to NDOC's Motion to Dismiss. Interestingly, Whitfield's Opposition admits that the Order Granting Motion to Dismiss was never included in his original Notice of Appeal, which is further evidenced by Whitfield's recent "amended notice of appeal." *See* Opposition, at 3. It is also undisputed that Whitfield never filed a notice of appeal within 30 days of the Notice of Entry of Order Granting Motion to Dismiss and that the "amended notice of appeal" was filed more than 30

days after the Notice of Entry of Order Denying Reconsideration. Lastly, it is undisputed that an order denying reconsideration (i.e. the lone order identified in Whitfield's Notice of Appeal) is not an independently appealable order under Nevada law.

As discussed below, these undisputed issues demand that this appeal be dismissed for lack of jurisdiction. Furthermore, the Opposition's arguments are clearly without merit and seek to avoid both Nevada law and the content of Mr. Whitfield's own pleadings. As such, NDOC strongly urges the Court to dismiss this appeal with prejudice for lack of jurisdiction.

II. LAW AND ARGUMENT

Again, it is undisputed that Whitfield never filed a timely Notice of Appeal with respect to the District Court's dispositive Order Granting Motion to Dismiss. The Order Granting Motion to Dismiss was wholly omitted from the Notice of Appeal and the time for appealing that dispositive order is long, long expired. *See Nev. R. Civ. P. 4(a)(1)*. As such, Whitfield is time-barred from appealing the Order Granting Motion to Dismiss and this Court lacks jurisdiction to entertain an appeal of that dispositive order. *See Nev. R. App. P. 4(a)(1); see also Lozada v. State*, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994) (An untimely notice of appeal fails to vest jurisdiction in the Supreme Court).

As a result, Whitfield's appeal of the Order Denying Reconsideration must also be dismissed because that appeal is nothing more than a de facto untimely appeal of the Order Granting Motion to Dismiss. As recognized by the District Court, Whitfield's Motion for Reconsideration was rooted in the exact same legal arguments previously rejected in the Order Granting Motion to Dismiss. Put another

way, the Order Denying Reconsideration is inextricably intertwined with the Order Granting Motion to Dismiss. As such, Whitfield's appeal of the Order Denying Reconsideration must be dismissed because the Court cannot rule on reconsideration without entertaining an untimely appeal of the Order Granting Motion to Dismiss. *See Lozada*, 110 Nev. at 352.

As a wholly separate issue, an order denying reconsideration is not among the list of independently appealable judgments and orders under NRAP 3A(b) and is not an independently appealable determination. *See Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007); *see also Rico v. Rodriguez*, 121 Nev. 695, 700 n.1, 120 P.3d 812, 815 n.1 (2005); *King v. Morgan Stanley & Co.*, No. 76463, 423 P.3d 612 (Nev. August 3, 2018). Consequently, the Order Denying Reconsideration is not an independently appealable final determination and the Supreme Court lacks jurisdiction to consider this appeal. *See Taylor Constr. Co.*, 100 Nev. 207.

Whitfield's Opposition widely ignores the foregoing issues and conveniently argues that his September 23, 2019, Notice of Appeal was timely because his "Motion for Reconsideration" was actually intended as a motion to alter or amend judgment under NRCP 59, which tolled the appeal deadline. *See* Opposition at 3. However, Whitfield's argument fails for several reasons.

First, the Court need look no further than the text of the Motion to Reconsider to discover this was a non-tolling motion to reconsider under NRCP 60. *See* Exhibit No. 1 (Motion to Reconsider). Not only is the document titled "Motion for Reconsideration" but the very first sentence of the "Motion for Reconsideration" requests "reconsideration of the Court's Order, dated June 24, 2019." *Id.* Nowhere did the "Motion for Reconsideration" ask the District Court to "alter" or "amend"

any judgment. *Id.* Nor did the “Motion for Reconsideration” ever invoke or reference NRCP 59(e). *Id.* As such, the “Motion for Reconsideration” was not a tolling motion and the appellate deadline for the Order Granting Motion to Dismiss was July 24, 2019; therefore, Whitfield is time-barred from appealing that dispositive order via his September 23, 2019, Notice of Appeal.

Second, even if Whitfield’s “Motion for Reconsideration” was treated as a tolling motion, the only order cited in the Notice of Appeal was the Order Denying Reconsideration, which is not an independently appealable order. *See supra*, at 3. Therefore, the Supreme Court still lacks jurisdiction to consider this appeal. *See Taylor Constr. Co.*, 100 Nev. 207.

Third, even if Whitfield’s “Motion for Reconsideration” was treated as a tolling motion, the Order Granting Motion to Dismiss was not included in the Notice of Appeal and cannot be considered as a matter of law. *See Collins v. Union Fed. Savings*, 97 Nev. 88, 89–90, 624 P.2d 496, 497 (1981) (A judgment or order that is not included in the notice of appeal is not considered on appeal); *accord Abdullah v. State*, 129 Nev. 86, 91, 294 P.3d 419, 422 (2013). Accordingly, it is irrelevant whether the Motion for Reconsideration was a tolling motion because the Court still cannot consider the Order Denying Reconsideration without improperly considering the Order Granting Motion to Dismiss, which was omitted from the Notice of Appeal.

Fourth, the “amended notice of appeal” filed by Whitfield on November 7, 2019, is untimely and Whitfield still cannot challenge the Order Granting Motion to Dismiss. Even if the 30-day appeal period was tolled until service of the September 17, 2019, Notice of Entry of Order Denying Reconsideration, the “amended notice

of appeal” was filed 21 days after the appellate deadline. *See* Nev. R. App. P. 4(a)(1). Since an untimely notice of appeal fails to vest jurisdiction, this Court still cannot consider the dispositive Order Granting Motion to Dismiss. *See Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998) (an untimely notice of appeal fails to vest jurisdiction in this court). Moreover, since the Order Granting Motion to Dismiss was independently appealable, Whitfield’s untimely “amended notice of appeal” does not comply with NRAP 4(a)(7) and is in contravention of NRAP 3A(b). *See Weddell v. Stewart*, 127 Nev. 645, 649, fn.1, 261 P.3d 1080, 1083 (2011). As such, the jurisdictional defects in Whitfield’s appeal were not and cannot be cured by Whitfield’s untimely “amended notice of appeal.” Therefore, the Order Granting Motion to Dismiss cannot be considered on appeal and the Order Denying Reconsideration still cannot be considered without entertaining an untimely and improper appeal of the Order Granting Motion to Dismiss.

III. CONCLUSION

Based on the foregoing, NDOC respectfully requests that the Court dismiss this appeal for lack of jurisdiction.

DATED this 15th day of November 2019.

AARON D. FORD
Attorney General

By: /s/ Kevin A. Pick
KEVIN A. PICK
Senior Deputy Attorney General
Nevada Bar No. 11683
Attorneys for NDOC

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This reply has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. font in Times New Roman; *or*

This brief has been prepared in a monospaced typeface using Microsoft Word 2013 with 12 pt. font in Times New Roman.

2. I further certify that this brief complies with the page- or type- volume limitations of NRAP 27(d)(2), excluding the parts of the brief exemption by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or ___ lines of text; or

Does not exceed 5 pages.

3. Finally, I hereby certify that I have read this reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of November 2019.

AARON D. FORD
Attorney General

By: /s/ Kevin A. Pick
KEVIN A. PICK
Deputy Attorney General
Nevada Bar No. 11683
Attorneys for NDOC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General and that on the 15th day of November 2019 I filed and served a true copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** through the Supreme Court Electronic Filing System or by U.S. Mail, postage prepaid, to the following:

Michael Whitfield
P.O. Box 18421
Reno, NV 89511

/s/ Ginny Brownell
An Employee of the State of Nevada, Office
of the Attorney General

EXHIBIT 1

EXHIBIT 1

1 Code: 2175
2 Michael Whitfield
3 P.O. Box 18421
4 Reno, NV 89511
5 (775) 737-3493
6 Email: mwhitfi2000@gmail.com
7 Self-Represented Litigant

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10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

11 IN AND FOR THE COUNTY OF WASHOE

12 * * *

13 IN THE MATTER OF:

Case No. CV19-00641

14 MICHAEL WHITFIELD
15 (Appeal No. 1803430-LLW)

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Petitioner,

vs.

NEVADA STATE PERSONNEL
COMMISSION, STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION,
LORNA WARD, APPEALS OFFICER, and
JAMES DZURENDA, NEVADA
DEPARTMENT OF CORRECTIONS,
As Employer,

Respondents.

MOTION FOR RECONSIDERATION

COMES NOW, Petitioner, MICHAEL WHITEFIELD, in proper person, and respectfully requests reconsideration of the Court's Order, dated June 24, 2019.

This Motion is based on the Memorandum of Points and Authorities as referenced and attached hereto, as well as all other pleadings and papers on file with this Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. ARGUMENTS

Respectfully, and with all deference to the Court, the Court’s Order, granting the Defendants’ Motion to Dismiss, is erroneous and unsupported by the evidence.

In reviewing a motion to dismiss, the court should determine whether the pleading states allegations sufficient to make out the elements of a right to relief. *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). In determining whether the pleadings are sufficient, the court is bound to accept all the factual allegations in the complaint as true. *Marcoz v. Summa Corporation*, 106 Nev. 737, 739, 801 P.2d 1346, 1347 (1990). Most importantly, a claim should not be dismissed unless it appears to a certainty that the plaintiff/petitioner is not entitled to relief under any set of facts which could be proved in support of the claim. *Hale v. Burkhardt*, 104 Nev. 632, 636, 764 P.2d 866, 868 (1988).

In *Prevost v. State of Nevada et. al.*, 134 Nev., Advance Opinion 42, Prevost named CCMSI in the body of the petition through incorporation by reference of the administrative decision, which Prevost also attached as an exhibit to the petition. See NRCP 10(c) (“Statements in a pleading may be adopted by reference in a different part of the same pleading. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”). The court concludes that this is sufficient to satisfy NRS 233B.130(2)(a), which requires that “the agency and all parties of record to the administrative proceeding” be named as respondents, but does not explicitly require that the parties be named in the caption of the petition. Petitioner’s failure to name a party of record in the caption of a petition for judicial review **is not jurisdictionally fatal under NRS 233B.130(2)(a)**. As such dismissal is not required, unwarranted and in this case, does not serve justice.

1 Plaintiff's claims have significant merit and Defendants' Motion to Dismiss was
2 based on a mere technicality.

3 **Defendants' Motion to Dismiss Lacked Merit**

4 As previously asserted, Petitioner argues that he has in fact complied with NRS 233B
5 by properly naming the Respondents within the body of his Petition for Judicial Review and
6 therefore Defendants' Motion to Dismiss should be denied.
7

8 **Deficiencies were corrected via the Amended Petition**

9 Additionally, even if the court continues to find merit in Defendants' arguments, the
10 Court's order was erroneous for failing to accept Petitioner's Amended Petition which fully
11 corrected the caption's deficiencies and was filed well within the time frame of 21 days to
12 amend pursuant to Rule 15(a)(1)(A). "Leave to amend should be freely given when justice
13 requires, and a request to amend should not be denied simply because it was made in open
14 court rather than by formal motion." *Weiler v. Ross*, 80 Nev. 380, 382, 395 P.2d 323, 324
15 (1964). Additionally, if a complaint can be amended to state a claim for relief, leave to
16 amend, rather than dismissal, is the preferred remedy. *Cohen v. Mirage Resorts, Inc.*, 62
17 P.3d 720, 734 (Nev.,2003).
18
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20 In the instant case, the Petition for Judicial Review has merit and Petitioner timely
21 filed his Amended Petition pursuant to Rule 15(a)(1)(A).

22 **2. CONCLUSION**

23 Based on the foregoing, Petitioner respectfully moves this Court to reconsider its
24

25 //
26 //
27 //

1 Order for Dismissal and Reinstate the Briefing Schedule for this matter.

2 **This document does not contain the personal information of any person**
3 **as defined by NRS 603A.040.**

4 Dated this 2nd day of July, 2019

5 /s/ Michael Whitfield
6 Michael Whitfield
7 Petitioner in Proper Person
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CERTIFICATE OF SERVICE

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I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on the 2ND day of July, 2019, I served a copy of the foregoing **MOTION FOR RECONSIDERATION** by causing a true copy thereof to be filed with the Clerk of the Court using the eFlex system and by depositing a true copy of the same for mailing addressed as follows:

Kevin Pick, Esq.
Deputy Attorney General
5420 Kietzke Lane, Suite 202
Reno, NV 89511

Lorna L. Ward, Esq.
Hearing Officer
c/o Hearings Division
1050 West William Street, Suite 450
Carson City, NV 89701

Department of Administration
Hearing Division
1050 West William Street, Suite 450
Carson City, NV 89701

Human Resource Management
209 East Musser Street, Suite 101
Carson City, Nevada 89701-4204

/s/ Michael Whitfield
Michael Whitfield
Petitioner in Proper Person