IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRY LEE FULTON,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 72096

ORDER DENYING PETITION

In this original petition for a writ of mandamus Terry Lee Fulton challenges the district court's denial of his motion to strike the State's notice of appeal from the justice court's dismissal of a criminal proceeding. Fulton asserts the district court manifestly abused its discretion by (1) finding that a 30-day time limit exists for a State's appeal from the justice court to the district court, rather than finding the 10-day time limit in NRS 189.010 and the provisions of NRS 189.020 govern such an appeal; (2) denying his motion to strike the notice of appeal, which was based on the State's failure to serve him; and (3) refusing to strike the denial of a motion to reconsider as a grounds on appeal.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). It is an extraordinary

remedy, and it is within the discretion of this court to determine if a petition will be considered. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). "Petitioner[ ] carr[ies] the burden of demonstrating that extraordinary relief is warranted." NRAP 21(b); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

On October 13, 2016, the justice court granted Fulton's motion to dismiss. On October 20, 2016, the State filed a motion for reconsideration, which the justice court declined to consider. On October 25, 2016, the State filed a notice of appeal in the justice court indicating it was appealing from the granting of the motion to dismiss and the justice court's refusal to consider its motion for reconsideration.

On December 28, 2016, Fulton filed a motion to strike the notice of appeal in the district court, in which he argued (1) jurisdiction had not vested in the district court because the State failed to serve him with the notice of appeal and (2) the notice of appeal should be stricken because failure to hear a motion to reconsider is not a ground for an appeal. Fulton asserted that under NRS 189.010 and NRS 189.020 the notice of appeal must have been filed and served within 10 days from the rendition of the justice court's decision for jurisdiction to vest in the district court. Fulton argued the district court lacked jurisdiction to consider the State's appeal because he was not timely served with the notice of appeal. The district court stated it believed the appropriate time period for the State to file and serve the notice of appeal was 30 days, proper notice had been provided, and the case would proceed on its merits. The district court further indicated the challenge to the motion to reconsider went to the merit of the appeal, not the court's jurisdiction, and stated it was not prepared to rule on the merit of the appeal at that time.

We conclude Fulton has failed to demonstrate this court's intervention by way of extraordinary writ is warranted. Jurisdiction vests with the district court upon the timely filing of a notice of appeal. *See generally Whitman v. Whitman*, 108 Nev. 949, 951, 840 P.2d 1232, 1233 (1992) ("[A] notice of appeal is effective on the date of receipt by the district court clerk."); *Huebner v. State*, 107 Nev. 328, 330, 810 P.2d 1209, 1211 (1991) ("the jurisdiction of this court to entertain an appeal is directly dependent on the date the clerk of the district court obtains custody of a notice of appeal"). Fulton does not assert the notice of appeal was not timely filed; rather, he asserts the failure to serve the notice of appeal on him within 10 days divested the district court of jurisdiction. Although the State was required to serve the notice of appeal on Fulton, *see* JCRLV Rule 26, there is no statute or court rule that sets forth the time within which the State had to file and serve the notice of appeal from the justice court's granting of the motion to dismiss. Contrary to Fulton's assertions, the plain language of NRS 189.010 and NRS 189.020 indicates those statutes apply to a defendant, not the State. Further, *Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 119 P.3d 1250 (2005) cannot be read to require NRS 189.010 to apply to a State's appeal from an order granting a motion to dismiss.

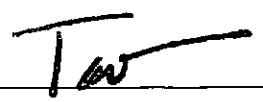
Even if the notice of appeal was never served, this deficiency would not affect the validity of the notice of appeal or divest the district court of jurisdiction over the appeal. Lack of service, however, would be grounds for such action as the court deemed appropriate. *See* JCRLV 29. Here, where jurisdiction properly vested in the district court and Fulton did not demonstrate he was prejudiced by any delay in service of the notice of appeal, we cannot conclude the district court manifestly abused its discretion by denying Fulton's motion to strike the notice of appeal. *See generally Scott v. Dep't of Commerce*, 104 Nev. 580, 587, 763 P.2d 341,

345 (1988) (declining to dismiss an appeal for lack of service where respondent suffered no prejudice from the failure to serve proper notice).

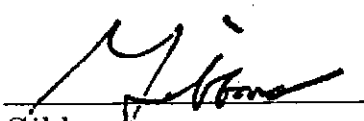
Finally, we cannot conclude the district court manifestly abused its discretion by determining the challenge raised regarding the motion for reconsideration went to the merit of the claims raised and was an issue to be decided after a response is filed.[1] Because Fulton has not demonstrated the district court erred in concluding it has jurisdiction over State's appeal, we

ORDER the petition DENIED.[2]

_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]We note an order denying a motion for reconsideration is not a final judgment of the justice court and is not independently appealable. *See* NRS 177.015(1)(a); *Phelps v. State*, 111 Nev. 1021, 1022, 900 P.2d 344, 345 (1995). Further, although an intermediate order may be reviewed on appeal from the final judgment, NRS 177.045, a motion for reconsideration that is filed after the justice court renders final judgment and which was not considered when rendering the final judgment, is not intermediate to the final judgment and therefore could not be reviewed on appeal from the final judgment.

[2]We vacate the stay imposed on January 12, 2017. We express no opinion regarding the merit of the appeal.