

IOWA CRIMINAL APPEALS: By the Numbers

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1. Iowa Code Chapter 814.

Direct appeals

In Iowa, the right to appeal is statutory. Under Iowa Code section 814.6(1), defendants have a direct right of appeal from final judgment (generally entry of the sentence in a criminal case). Exceptions are simple misdemeanors, ordinance violations and civil commitment proceedings. In addition, a deferred judgment is not considered a final judgment and cannot be appealed directly. Under Iowa Code section 814.5(1), the State can directly appeal from dismissal of an indictment or information, judgment for defendant on motion to indictment or information, and order arresting judgment or granting new trial.

Discretionary reviews

A defendant may seek discretionary review of suppression orders; change of venue orders; simple misdemeanor and ordinance violations; and orders raising an issue of importance to the bench or bar. Iowa Code § 814.6(2). Similarly, the State may seek discretionary review of orders dismissing an arrest or search warrant; suppression orders; change of venue orders; and orders raising a question of importance to the bench or bar. Iowa Code sec. 814.5(2). The State may apply for discretionary review from final judgments in simple misdemeanor cases under the importance-to-the-judiciary category despite the language of Iowa Rule of Criminal Procedure 2.73(1). See State v. Davis, 493 N.W.2d 820 (Iowa 1992).

Petitions for certiorari

Certiorari is a way to test the legality of an action taken by a district court judge. Examples of when a certiorari action lies are when a lower tribunal exceeds its jurisdiction (State v. Moret, 486 N.W.2d 589 (Iowa 1992), fails to apply the proper law (Hightower v. Peterson, 235 N.W.2d 313 (Iowa 1975) or its findings lack evidentiary support (Fetters v. Degnan, 250 N.W.2d 25 (Iowa 1977)). Contempt rulings are challenged by a petition for certiorari. Chidester v. Needles, 353 N.W.2d 849 (Iowa 1984).

Remember no appeal is available from probation revocations, reconsideration, or deferred judgments. State v. Allen, 402 N.W.2d 438 (Iowa 1987); Tindell v. Scott County, 600 N.W.2d 308 (Iowa 1999); State v. Stessman, 460 N.W.2d 461 (Iowa 1990). An appeal as a matter of right will lie from the imposition of sentence following revocation of a deferred judgment. Farmer v. Iowa Board of Parole, 234 N.W.2d 80, 80 (Iowa 1976).

While pursuing the correct avenue of relief is advised, pursuing the incorrect avenue will not result in dismissal of the appeal. Iowa Rule of Appellate Procedure 6.304 provides that the Court will treat any attempt to seek review as if the proper form had been sought.

2. Iowa Rule of Appellate Procedure 6.101; Notice of Appeal.

A criminal appeal must be perfected within *thirty (30) days* of final judgment under Iowa Rule of Appellate Procedure 6.101. This rule is jurisdictional; failure to comply requires dismissal. State v. Anderson, 308 N.W.2d 42 (Iowa 1981). Filing post-trial motions does not toll the time period. Id.

Delayed Appeal

The Iowa Supreme Court may grant a delayed appeal when a defendant in good faith directed his or her attorney to proceed with an appeal, but a technical irregularity resulted in the appeal being filed late or notice being improperly served. State v. Hortsman, 222 N.W.2d 427 (Iowa 1974). The right is available in criminal appeals where failure to allow a delayed appeal will deny the party his constitutional rights....” The defendant must seek a delayed appeal directly from the Supreme Court. Cleeson v. Brewer, 201 N.W.2d 474, 476 (Iowa 1972). The defendant may not

seek a delayed appeal by filing a motion for postconviction relief. Id. If the issue is factual, the postconviction court should rule on the factual claim, but should refer the delayed appeal request to the Supreme Court. Id.

3. Iowa Rule of Appellate Procedure 6.6(1); Notice of Appeal.

The Notice of Appeal should specify the judgment being appealed. Iowa R. App. P. 6.6(1). The Notice must be filed in the district court and may be signed by the appellant or his attorney. Id. Informational copies should be sent to the Iowa Supreme Court and the Criminal Appeals Division of the Iowa Attorney General's Office. Iowa Rs. App. P. 6.6(1), 6.101. Filing the notice of appeal divests the district court of jurisdiction to rule on any pending postconviction motions unless those motions are collateral to the appeal, such as bond, appointment of counsel, or restitution. State v. Brooks, 630 N.W.2d 815, 817 (Iowa 2001). As trial counsel you have an obligation to file a notice of appeal if requested, even if you were appointed for the purposes of trial only. Blanchard v. Brewer, 429 F.2d 89, 91 (8th Cir. 1970). Once notice is filed, move to withdraw and have appellate counsel appointed.

4. Iowa Rule of Appellate Procedure 6.10(2)(a); Combined Certificate.

When to file and whom to serve.

A combined certificate must be filed within four days of filing the Notice of Appeal. I.R.App. P. 6.10(2)(a). Copies must go to all parties to the appeal (including the Attorney General's Office), the clerks of both the Supreme Court and the district court and the court reporter. Id.

All proceedings must be transcribed if issues are not specified.

You must order all transcripts of ALL proceedings OR state the issues you intend to present on appeal. If you fail to do so, the Attorney General's office is not able to tell whether the parts of the record you have ordered will be sufficient to decide the issues raised in your brief. It is the appellant's burden to provide the appellate courts with an adequate record. See Wende v. Orv Rucker Ford, 530 N.W.2d 92, 95 (Iowa Ct. App. 1995). If your combined certificate does not state clearly that you are ordering all proceedings or specify the issues to be raised, our office will seek clarification by filing an objection.

To expedite or not to expedite

Another common mistake on combined certificates is not knowing when to indicate that Iowa Rules of Appellate Procedure 6.17 and 6.105 apply. If you are appealing from a guilty plea or sentence only, the time periods for processing the appeals are abbreviated. If you are appealing from a trial (even a stipulated bench trial), you should not indicate that those rules apply.

5. Iowa Rule of Appellate Procedure 6.12; Docketing.

Criminal appeals are docketed in accordance with Iowa Rule of Appellate Procedure 6.12(a). Iowa R. App. P. 6.103. In most cases, an appeal must be docketed within 40 days of filing a Notice of Appeal. Iowa R. App. P. 6.12(a). Appeals from guilty pleas or sentences must be docketed within 20 days of filing the Notice of Appeal. Iowa R. App. P. 6.12(b). The deadline for docketing after certiorari is granted is also 20 days. Id.

Defendants who were determined to be indigent in the district court and the State of Iowa may file a request to docket without payment of a fee. Iowa R. App. 6.103.

6. Iowa Code section 811.5; Bond.

While there is no constitutional right to bail pending appeal (State v. Kellogg, 534 N.W.2d 431 (Iowa 1995)), in Iowa the statutory right to bail pending appeal is the rule, not the exception. State v. Stradt, 556 N.W.2d 149 (Iowa 1996). However, under Iowa Code section 811.5 and Kellogg, the district court has the discretion to impose conditions of release which will assure defendant's

appearance and the safety of other persons. Pursuant to Iowa Code sections 811.1 and 811.5, an appeal bond is not available for forcible felonies as defined by Iowa Code section 702.11.

Posting of the bond will stay execution of a sentence imposing imprisonment. Iowa R. Crim. P. 2.26(2). The posting of bond does not by rule stay execution of an ordered fine or probation. In practice, the various judicial districts apply this rule differently.

7. Iowa Rule of Appellate Procedure 6.10; The Record.

It is important when preparing a criminal appeal to remember to work inside “the record.” The record is defined in Iowa Rule of Appellate Procedure 6.10(a). It is a common mistake for trial attorneys who also handle the appeal to state facts or argue points which were never actually made a part of the record. The Court cannot consider matters outside the record. See In the Matter of the Estate of Kelly, 558 N.W.2d 719, 722 n.3 (Iowa Ct. App. 1996) (refusing to consider affidavits submitted during appeal); but see Berryhill v. State, 603 N.W.2d 243 (Iowa 1999) (Inadequate trial record does not relieve appellate counsel of the duty to raise the issue on direct appeal). Procedures to supplement the record are available in Iowa Rule of Appellate Procedure 6.10(3) and 10(4).

Stipulation to Open Presentence Investigation (PSI) Report

PSI reports are confidential under Iowa Code section 901.4. If you are contemplating raising a sentencing issue, you cannot review the PSI until a signed stipulation is filed with the Iowa Supreme Court. The Supreme Court has a standing order (filed June 1, 1982) which allows the parties, through their respective counsel, to stipulate to open and examine the presentence investigation for purposes of raising and responding to issues in the appeal.

Motion for Limited Remand

If you see a need to further develop a record before proceeding with an appeal, you may move for a limited remand under Iowa Rule of Appellate Procedure 6.12(7). See Osborn v. State, 573 N.W.2d 917, 921 (Iowa 1998). The State may resist the limited remand if it appears the issue could have been raised in the original district court proceedings or that the remand would result in piecemeal litigation or the issue would be better preserved for a postconviction proceeding.

8. Iowa Rule of Appellate Procedure 6.13(2); Pro Se Briefs.

The U.S. Supreme Court recently decided that Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) does not require a state to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. Martinez v. Court of Appeal of California, ___ U.S. ___, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). The Iowa Supreme Court has adopted Iowa Rule of Appellate Procedure 6.13(2) which grants a right to file a supplemental *pro se* brief. No decision has been issued by the court as to what “rights” are created by this rule. Additionally, no opinion has commented on whether Iowa constitutional or statutory law recognizes a right to self-representation on appeal.

9. Iowa Rule of Appellate Procedure 14; The Brief.

Statement of the Case

This is where you summarize for the court what is being appealed, the procedural history, and the factual background of the case. While the appellant and appellee may be expected to give the facts a different spin, this is not the place for your argument.

Routing Statement

Based upon the issue presented, the parties should identify the appropriate court for rendering the decision. The criteria upon which to decide the appropriate court are provided in Iowa Rule of Appellate Procedure 6.401. Generally, the Supreme Court will retain jurisdiction of cases of first impression, substantial issues of validity of statutes, district court rulings in conflict with published decisions, or substantial issues of public importance.

Sample Routing Statements

Because this case involves the application of existing legal principles to the facts herein, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.401(3)(b).

This case may require construction or interpretation of constitutional issues, which have heretofore never been interpreted or construed, to reach a resolution. The Supreme Court shall retain cases containing substantial issues of first impression. Iowa R.App.P. 6.402(2)(c).

Argument

The most common omissions from the argument are statements concerning *how error was preserved* and *what scope or standard of review is to be applied*. These are required by Iowa Rule of Appellate Procedure 6.14(1)(f). Failure to include these statements constitutes a potential waiver of the claim. State v. Akers, 435 N.W.2d 332, 336-37 (Iowa 1989); State v. Potts, 240 N.W.2d 654, 655-56 (Iowa 1976).

Preservation of error.

Error is not preserved simply by filing a notice of appeal. You must point to a place in the trial court record where the same issue was raised and decided adversely to your position. The Court does not give free passes for constitutional issues. State v. Simpson, 528 N.W.2d 627 (Iowa 1995). Iowa also does not recognize a "plain error" rule. State v. Johnson, 476 N.W.2d 330 (Iowa 1991). With the exception of rulings admitting or denying evidence, the State also has the obligation to preserve error or grounds for affirming an incorrect ruling may be waived. Devoss v. State, 648 N.W.2d (Iowa 2002). Two exceptions to the normal rules of error preservation are claims of ineffective assistance of counsel and illegal sentences.

Standards of review.

The three most common standards of review are: (1) for errors at law (e.g., issues of statutory interpretation), (2) for an abuse of discretion (e.g., evidentiary rulings), and (3) *de novo* (e.g., constitutional issues).

Issues raised..

You must raise all issues in the text of your Appellant's brief. Raising an issue for the first time in a reply brief comes too late for the Supreme Court to consider it. State v. Terry, 569 N.W.2d 364 (Iowa 1997). Also, setting out a claim only in a footnote is not sufficient to raise the issue. State v. Reddick, 388 N.W.2d 201 (Iowa Ct. App. 1986).

References to legal authorities.

You must cite to the National Reporter system by volume and page where the case begins, and jump cite where the proposition can be found. Failure to cite authority for a proposition may constitute waiver of that issue. Iowa R. App. 6.14(1)(c); State v. Draper, 457 N.W.2d 600 (Iowa 1990). Unpublished cases may now be cited under revised Iowa Rule of Appellate Procedure 6.14(5), but not as *controlling* authority. The unpublished opinion must be attached to brief along with a certification that counsel has done a diligent search and fully disclosed any subsequent disposition.

Sample Certification

I, the undersigned, hereby certify that I have conducted a diligent search for, and fully disclosed, any subsequent disposition of unpublished opinions cited in, and attached to, this brief as required by Iowa Rule of Appellate Procedure 14, as amended.

Assistant Attorney General

References to parts of the record.

All factual statements must be supported by reference to the appropriate place in the trial court record and/or the appendix. The appellate courts will not search the record and appendix to ascertain whether an assertion is sustained in the record where no references to pages are included. State v. Akers, 435 N.W.2d 332 (Iowa 1989).

Conclusion

You should state what relief you seek in a short conclusion.

Iowa Rule of Appellate Procedure 6.14(8) provides that both the appellant's and the appellee's brief shall not exceed 50 pages. (A reply brief must not exceed 25 pages.) This includes the statement of issues. The type size must be large enough so that on average no line contains more than 60 characters (including spaces). Iowa R. App. P. 6.16(1). If you try to circumvent the page limits by using smaller type size, the Attorney General's Office may move to strike your brief in its existing form.

Remember the Court continues to endorse the idea that highly competent appellate counsel do not assign all possible errors, but select the strongest points upon which to urge reversal. To do otherwise is frequently a tactical blunder devastating to the defendant's case. Cuevas v. State, 415 N.W.2d 630, 633 (Iowa 1987). Rarely should a brief in which counsel has selected the strongest points for review and succinctly urged the point require an overlength brief.

10. Iowa Rule of Appellate Procedure 15; The Appendix.

When Appellants file their briefs they must also file a designation of parts of the appendix. Iowa R. App. 6.15(2). It doesn't help to be so conservative or selective in your designation that you do not fairly represent the factual background of the case. An appendix which lacks the necessary information to enable the Court to assess the claims made may result in summary dismissal. See Hanson v. Harvey's Casino Hotel, 2002 WL 1757911 (Iowa Ct. App. 2002). The State, as appellee, will likely designate additional parts so that the factual background is fairly provided in the appendix. Appellants must wait until after the appellee files a brief and additional designation of parts before they file their appendix. Iowa Rule of Appellate Procedure 6.15.

Although the rule does not provide any required style that the appendix must take, remember that clerks and judges read the appendix as the record in the case. Appendices that fail to include the portion of the record which identifies the witness, the start of cross-examination or direct examination, and have pages that begin and end in the middle of sentences are confusing to read. The appendix should read like a transcript, only shorter.

Iowa Rule of Appellate Procedure 6.33 requires that certificate of confidentiality be placed on the front cover of any appendix which reproduces material which is confidential by statute. This most often arises in criminal appeals when pages of the presentence investigation report (PSI) or the minutes of testimony are designated by one or both of the parties. Briefs are not confidential and, thus, may not quote or extensively paraphrase portions of confidential material. In addition, if your case involves a child sexual abuse victim, you must substitute a "nondescriptive designation" (such as initials) instead of the victim's name in your brief. Iowa Code § 915.36(2).

10. Iowa Rule of Appellate Procedure 20; Motions.

Iowa Rule of Appellate Procedure 20 permits a request to file a motion to enlarge or shorten the time for filing. The first request is considered a procedural motion that may be granted by the Clerk of the Supreme Court without waiting for a resistance. The length of the extension shall not exceed thirty days.

11. Iowa Rule of Appellate Procedure 21(5); Additional Authority

If research in preparation for an argument results in the discovery of new authority or authority you wished you would have cited originally and you want to cite that authority in argument, you must provide notice of additional authority giving a citation for each new case upon which you will rely prior to the oral argument.

12. Iowa Rule of Appellate Procedure 23; Motions.

Motions to Dismiss, Reverse, and Affirm are expressly provided in Iowa Rule of Appellate Procedure 23. Though rarely used it is most important to remember that these are the only appellate rules that stay deadlines for further filings in the Supreme Court. All other motions such as limited remands or motions to strike do not stay any deadlines. Iowa R. App. P. 6(22)(10). Extension requests will need to be filed on the due dates if any motions other than Rule 23 motions are pending.

13. Iowa Rule of Appellate Procedure 6.104; Further Review.

Iowa Rule of Appellate Procedure 6.104 allows appointed counsel the opportunity to withdraw representation in a case where he or she deems the appeal frivolous. Counsel must file a brief in support of the motion identifying anything in the record that might support an appeal. Iowa Rule of Appellate Procedure 6.104(2) provides the notice provisions for counsel who must serve the application and brief on the defendant as well as counsel's written advice that he or she has deemed the cause frivolous. The notice shall advise the defendant to notify the Supreme Court if he agrees with the decision of counsel or file a written response noting the areas of disagreement. Failure to respond will result in dismissal of the appeal and represent a possible procedural bar to postconviction relief. Bugley v. State, 596 N.W.2d 893 (Iowa 1999); see also State v. Ailes, 574 N.W.2d 353 (Iowa Ct. App. 1997). Failure to seek further review will probably bar any habeas corpus review of the defendant's convictions on exhaustion grounds. See Dixon v. Dormire, 263 F.3d 774, 779 (8th Cir. 2001).

Though the rule provides that if the Court determines the appeal is not frivolous, new counsel may be appointed, generally, the counsel filing the motion is required to complete the appeal.

14. Iowa Rule of Appellate Procedure 6.29; The Procedendo.

The piece of paper that ends the appeal is called a procedendo. It is issued no sooner than 21 days after an opinion of the Court of Appeals nor while a further review application is pending and no sooner than 15 days after a Supreme Court decision nor while a petition for rehearing is pending. Iowa R. App. P. 6.29. All proceedings for executing the judgment shall be had in the district court. Iowa Code § 814.25. Practically, where you have a client in prison who has won his appeal, it may be possible on motion to expedite the issuance of procedendo.

