

STATE OF MINNESOTA
IN SUPREME COURT
ADM10-8049

FILED

December 10, 2019

**OFFICE OF
APPELLATE COURTS**

**ORDER PROMULGATING AMENDMENTS TO THE
RULES OF CRIMINAL PROCEDURE**

In an order filed on November 6, 2018, we directed the Advisory Committee for the Rules of Criminal Procedure to review the rules that govern the use and preparation of transcripts for audio and video recordings offered as evidence during criminal proceedings in the district court, *see* Minn. R. Crim. P. 11.10, 12.08, 26.03; and the rules that govern transcript preparation on appeal, including transcripts for audio or video evidence, *see* Minn. R. Crim. P. 28.02, subd. 9. In a report filed on February 28, 2019, the committee recommended that we amend Rules 11.10, 12.08, and 26.03, to address whether and when audio or video evidence offered in the district court should be transcribed, thereby providing clear instructions to the parties, the district court, and court reporters. The committee also recommended an amendment to Minn. R. Crim. P. 28.02, subd. 9, to address a court reporter's responsibility for transcribing audio or video evidence that is part of the record on appeal.

We opened a public comment period and received written comments from the State Public Defender, who supports the recommended amendments in part and opposes them in part; the Minnesota County Attorneys Association and the Criminal Law Section of the Minnesota State Bar Association, both of which support the recommended amendments; and the State Court Administrator on behalf of the Judicial Council, which supports some, but not all, of the recommended amendments and also proposes further amendments to the rules. We held a public hearing on September 25, 2019, and received further comments from the chair

of the Criminal Rules Committee, the Chief Appellate Public Defender, and a representative of the Criminal Law Section of the Minnesota State Bar Association.

The Court Record Workgroup established by the Judicial Council in 2016 recommended that the Advisory Committee for the Rules of Criminal Procedure consider whether the rules should be amended to clarify the transcript requirements for audio and video evidence. We agreed with the Judicial Council's adoption of this recommendation and, thus, we requested review and specific input from the advisory committee on the Workgroup's recommendation. *See In re the Minn. Supreme Court Advisory Comm. On the Rules of Crim. Proc.*, No. ADM10-8049, Order at 2 (Minn. filed Nov. 6, 2018). We have thoroughly considered the recommendations of the committee, the public comments, and the materials developed during the Workgroup's study of the transcription of audio and video evidence that is admitted at trial. After careful consideration of those materials, we have concluded that different concerns motivate the preparation of a transcript for audio or video evidence for proceedings in the district courts, versus proceedings in the appellate courts. Therefore, we have decided to amend the rules as follows.

First, we agree with the Advisory Committee that consistency between the statute that speaks to the use of audio and video evidence in trials, *see* Minn. Stat. § 634.36 (2018), and court rules and practices, can be attained with clarifying amendments to the rules. We also agree with the Judicial Council that the purpose of a transcript of audio or video evidence is illustrative only. The speakers at the public hearing agreed that the evidence before the fact-finder is the audio or video recording itself, not the transcript of that evidence. *See, e.g., State v. Stewart*, 643 N.W.2d 281, 293 (Minn. 2002) (explaining that illustrative evidence is not substantive or original evidence). Illustrative exhibits may aid the fact-finder's review, but

do not replace review of the exhibit, which as noted is the recording. *See State v. Graham*, 371 N.W.2d 204, 209 (Minn. 1985) (noting that an illustrative exhibit that was not admitted into evidence cannot be used by the fact-finder). The amendments that we adopt in Rules 11, 12, and 26 clarify this distinction while also confirming that admissibility cannot be conditioned on providing a transcript of digital evidence and addressing the court reporter's role in transcript preparation.

Second, we agree with the Advisory Committee that Minn. R. Crim. P. 28.02, subd. 9, which governs transcript preparation for an appeal, should be clarified to state that the party who offers an audio or video exhibit can be required, by the written request of the court reporter, to prepare the transcript for that exhibit. The court reporter need not certify the correctness and accuracy of the transcript prepared for an audio or video exhibit, but is responsible for filing that transcript with the district court, whether it is prepared by the court reporter or by the party.

Based on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the attached amendments to the Rules of Criminal Procedure be, and the same are, prescribed and promulgated to be effective as of March 1, 2020. Rules 11.10, 12.08, and 26.03 as amended here will be effective in cases filed in the district court on or after the effective date, and Rule 28.02, subdivision 9 as amended here will be effective for appeals filed on or after the effective date.

Dated: December 10, 2019

BY THE COURT:



Lorie S. Gildea
Chief Justice

AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

[Note: in the following amendments, deletions are indicated by a line drawn through the words, and additions are indicated by a line drawn under the words.]

Rule 11.10. Record

Subd. 1. Record. A verbatim record must be made.

Subd. 2. Transcript. When a party has timely requested a transcript of the proceedings from the court reporter, it must be provided on the following conditions:

- (a) If the defendant has ordered the transcript, the cost must be prepaid unless the public defender or assigned counsel represents the defendant, or the defendant makes a sufficient showing of inability to pay or secure the costs and the court orders that the defendant be supplied with the transcript at the expense of the appropriate governmental unit.
- (b) The transcript must be provided to the prosecutor without prepayment.
- (c) Transcripts provided to counsel must be filed with the court.
- (d) A party offering video or audio evidence ~~may also~~ must not be required by the court to provide a transcript of the exhibit as a prerequisite to admissibility. If the party provides a transcript of the exhibit and the court admits that transcript as an illustrative exhibit, the transcript which becomes part of the record, used for illustrative purposes with that exhibit only. The court reporter must not transcribe video or audio exhibits.

Subd. 3. Documents and Exhibits. All documents and exhibits must be filed with the court administrator. On motion, any exhibit may be returned to the offering party.

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Rule 12.08. Record

Subd. 1. Record. A verbatim record of the proceedings must be made unless waived by the parties.

Subd. 2. Audio and Video Evidence. If any party offers video or audio evidence, that party ~~may~~ must not be required to provide a transcript of the evidence as a prerequisite to admissibility. If the party provides a transcript of the evidence, and the court admits the transcript as an illustrative exhibit, the transcript becomes, which will be made a part of the record, used for illustrative purposes with the exhibit only. The court reporter must not transcribe video or audio evidence.

Subd. 3. Transcript and Filing. Rule 11.10, subs. 2 and 3 govern filings and obtaining a transcript.

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Rule 26.03. Procedures During Trial

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Subd. 16. Evidence. At trial, witness testimony must be taken in open court, unless these rules provide otherwise.

Jurors may not submit questions to a witness directly or through the judge or attorneys.

If either party offers an audio or video recording, that party ~~may~~must not be required by the court to offer or provide a transcript of the recording as a prerequisite to admissibility, which will be part of the record. If the party provides a transcript of the evidence, and the court admits the transcript as an illustrative exhibit, the transcript becomes, which will be made a part of the record, used for illustrative purposes with the exhibit only. The court reporter must not transcribe video or audio evidence.

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Rule 28.02. Appeal by Defendant

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Subd. 9. Transcripts of Proceedings and Transmission of the Transcript and Record.

(a) Transcripts of Proceedings. To the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern preparation of the transcript of the proceedings and the transmission of the transcript and record to the Court of Appeals, except that the appellant must order the transcript, and any requested paper copies, within 30 days after filing of the notice of appeal unless the time is extended by the appellate court for good cause. Any other party may request a paper copy of the transcript as provided in Minnesota Rule of Civil Appellate Procedure 110.02, subd. 2(b), within 10 days of the filing of either the transcript request or the court reporter's acknowledgement and acceptance of the transcript request, whichever is later. The transcript must be filed with the court administrator and a copy transmitted promptly to the attorney for each party.

(b) Transcripts of Audio or Video Exhibits. ~~If the parties have stipulated to the accuracy of a transcript of videotape or audiotape exhibits is and made it part of the district court record, it becomes part of the record on appeal and it is not necessary for the court reporter to transcribe the exhibits.~~ If no such transcript exists, a transcript need not be prepared unless expressly requested by the appellant or the respondent. If a transcript of an exhibit is requested must be transcribed, the court reporter may prepare the transcript. In the alternative, on the written request of the court reporter, the party who offered the exhibit must provide a transcript to the court reporter within 30 days of the date of the request. The court reporter may correct any transcript prepared by a party, and must include the transcript of the exhibit with all other transcripts filed and provided for the

appeal. The court reporter need not certify the correctness of ~~this~~ the transcript of an audio or video exhibit.

(c) Partial Transcripts. If the appellant does not order the entire transcript of the proceedings, then within the 30 days permitted to order it, the appellant must file with the clerk of the appellate courts and serve on the court administrator and respondent a description of the parts of the transcript the appellant intends to include in the record, and a statement of the issues the appellant intends to present on appeal. If the respondent deems a transcript of other parts of the proceedings necessary, the respondent must order from the reporter, within 10 days of service of the description or notification of no transcript, those other parts deemed necessary, or serve and file a motion in the district court for an order requiring the appellant to do so.

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Comment—Rule 28

Under Rule 28.02, subd. 1 the defendant may obtain review of lower court orders and rulings only by appeal except as may be provided in the case of the extraordinary writ authorized by Minn. Const. Art. VI, § 2, and the postconviction remedy, Minn. Stat. ch. 590. The statutory authorization for the extraordinary writs is contained in Minn. Stat. § 480A.06, subd. 5 and chs. 586 (Mandamus), 589 (Habeas Corpus), and 606 (Certiorari). The procedure for obtaining writs of mandamus or prohibition appears in Minn. R. Civ. App. P. 120 and 121.

A defendant cannot as a matter of right appeal from a stay of adjudication entered under Minn. Stat. § 152.18, subd. 1, which requires the consent of the defendant. However, a defendant may seek discretionary review of such a stay under Rule 28.02, subd. 3. State v. Verschelde, 595 N.W.2d 192 (Minn. 1999).

Rule 28.02, subd. 3 (Discretionary Review) is taken from Minn. R. Civ. App. P. 105, which sets forth the procedure to be followed by a defendant in seeking permission to proceed with an appeal from an order not otherwise appealable. A defendant seeking to appeal from a sentence imposed or stayed in a misdemeanor or gross misdemeanor case would have to proceed under this rule.

Rule 28.02, subd. 4(4) establishes a procedure by which a defendant who has initiated a direct appeal may nonetheless pursue postconviction relief. Certain types of claims are better suited to the taking of testimony and fact-finding possible in the district court, and defendants are encouraged to bring such claims, such as ineffective assistance of counsel where explanation of the attorney's decision is necessary, through postconviction proceedings rather than through direct appeal. See Black v. State, 560 N.W.2d 83, 85 n.1 (Minn. 1997). The order staying the appeal may provide for a time limit within which to file the postconviction proceeding.

Under Rule 28.02, subd. 9 (Transcript of ~~Proceedings~~ and Transmission of the Transcript and Record), the transcript must be ordered within 30 days after filing of the notice of appeal rather than within 10 days as otherwise provided by Minn. R. Civ. App. P. 110.02, subd. 1. The provisions of Minn. R. Civ. App. P. 110 and 111 concerning the content and transmission of the record and transcripts apply to criminal appeals under Rule 28. Therefore, except as provided in Rule 28.02, subd. 5(12), it is necessary in a criminal appeal on ordering the transcript to serve and file a transcript certificate as

required by Minn. R. Civ. App. P. 110.02, subd. 2. It is assumed that any transcripts of audio or video exhibits offered in the district court that are prepared on request would be limited to the portion of the audio or video exhibit that was admitted as evidence. If either of the parties questions a party disputes the accuracy of the court reporter's transcript of a videotape or audiotape exhibit, the party may address any discrepancy when referring to the transcript in a brief that party may seek to correct the transcript either by stipulation with the other party or by motion to the district court under Minn. R. Civ. App. P. 110.05.

To the extent that an order granting a defendant a new trial also suppresses evidence, it will be viewed as a pretrial order concerning the retrial and the prosecutor may appeal the suppression part of the order under Rule 28.04, subd. 1(1). *State v. Brown*, 317 N.W.2d 714 (Minn. 1982). In response to *State v. Lee*, 706 N.W.2d 491 (Minn. 2005), Rule 28.04, subd. 1(4), was revised to expressly permit a prosecutor to appeal a stay of adjudication ordered by the district court over the objection of the prosecutor.

A timely, good-faith motion by the prosecutor for clarification or rehearing of an appealable order extends the time to appeal from that order. *State v. Wollan*, 303 N.W.2d 253 (Minn. 1981). Originally under Rules 28.04, subd. 2(2) and (8) the prosecutor had five days from entry of an appealable pretrial order to perfect the appeal. It was possible for this short time limit to expire before the prosecutor received actual notice of the order sought to be appealed. These rules as revised eliminate this unfairness and assure that notice of the pretrial order will be served on or given to the prosecutor before the five-day time limit begins to run. In *State v. Hugger*, 640 N.W.2d 619 (Minn. 2002), the court held that in computing the five-day time period within which an appeal must be taken under Rule 28.04, subd. 2(8), intermediate Saturdays, Sundays, and legal holidays are excluded under Rule 34.01 before the additional 3 days for service by mail are added under Rule 34.04.

Under Rule 28.04, subd. 2(2), failure to timely serve the notice of appeal on the State Public Defender is a jurisdictional defect requiring dismissal of the appeal. *State v. Barrett*, 694 N.W.2d 783 (Minn. 2005).

Absent special circumstances, failure of the prosecutor to file the appellant's brief within the 15 days as provided by Rule 28.04, subd. 2(3) will result in dismissal of the appeal. *State v. Schroeder*, 292 N.W.2d 758 (Minn. 1980).

Rule 28.05, subd. 2 (Action on Appeal) is taken from Minn. Stat. § 244.11.