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Criminal Procedure - The Elimination of Dismissals for Lack of Prosecution from Wyoming Intermediate Appeals - Wood v. City of Casper

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CRIMINAL PROCEDURE—The Elimination of Dismissals for Lack of Prosecution from Wyoming Intermediate Appeals. *Wood v. City of Casper*, 660 P.2d 1163 (Wyo. 1983).

On April 2, 1981, the Casper Municipal Court found Charles Wood guilty of reckless driving and leaving the scene of an accident. Wood filed a notice of appeal in the municipal court and he perfected his appeal by filing the notice, trial record, and docketing fee with the Natrona County District Court. Wood filed his brief on May 29, 1981 and the City of Casper responded with a reply brief on July 29, 1981. Wood took no further action in either the September or March terms of the district court. At no time during this delay did the district court warn Wood that it could dismiss his appeal if he did not request a date for oral argument within two court terms after the briefs were filed.[1] On July 6, 1982, the City moved that the appeal be dismissed because of Wood's failure to prosecute. The district court heard arguments on the motion and dismissed the appeal.[2] Wood appealed the dismissal to the Wyoming Supreme Court and the court reversed.[3] The court held that the district court had *no* power to dismiss a perfected intermediate appeal because of an appellant's failure to prosecute; and even if the district court had the power, it could not dismiss without first notifying the appellant, well before the dismissal hearing, of his duty to request a date for oral argument.[4]

One of the court's apparent holdings must be dictum. If a district court has no power to dismiss an intermediate appeal for lack of prosecution, then the court will never need to notify the appellant that he risks dismissal. Conversely, if a district court can dismiss an intermediate appeal for lack of prosecution as long as it gives the proper notice, then the power to dismiss must persist. The purpose of this Note is to demonstrate that the court, in fact, held that district courts have *no* power whatsoever to dismiss intermediate appeals for lack of prosecution. The notice holding was dictum. Additionally, this Note is intended to show that although the court reversed Wood's dismissal under rules that no longer apply to intermediate appeals, the decision still carries precedential weight under the brand-new rules governing intermediate appeals: the Wyoming Rules of Appellate Procedure for Courts of Limited Jurisdiction.[5] Finally, this Note will demonstrate that the court's holding made sense under the rules governing the Wood appeal[6] and makes continued sense under the Wyoming Rules of Appellate Procedure for Courts of Limited Jurisdiction.

1. For a discussion of the source of the district court's power to dismiss Wood's appeal, see *infra* note 7.
2. Wood v. City of Casper, 660 P.2d 1163, 1164 (Wyo. 1983).
3. *Id.*
4. The exact language of these two conflicting holdings is worth restating. The court announced: "When an appeal from a municipal court to a district court has been perfected except for the setting of the case for argument by the district court there is no authority for the district court to dismiss the case for lack of prosecution." *Id.* at 1165. Later in the same paragraph the court stated: "[W]e hold that when an appeal has been perfected except for argument of the appeal the district court should set the case for argument, and it has no authority to dismiss for lack of prosecution in the absence of reasonable notice which would have the effect of advising the appellant that it is necessary that a hearing [argument] be requested before the district court." *Id.*
5. The new rules became effective on January 1, 1983. W.R.A.P.C.L.J. 30.
6. The Wyoming Rules of Appellate Procedure and rule 23 of the Wyoming Rules of Criminal Procedure for Justice of the Peace and Municipal Courts controlled the Wood appeal to the extent that they contained relevant rules. *See infra* notes 40-42 and accompanying text.

THE CASELAW

The Origin of Dismissals for Lack of Prosecution: City of Casper v. Wagner

The power of the district courts to dismiss *intermediate appeals* for lack of prosecution is purely a product of Wyoming caselaw.[7] The Wyoming Supreme Court first upheld a district court's use of the dismissal sanction in 1955 when it decided *City of Casper v. Wagner*.[8] The case arose when the Casper Municipal Court convicted Leo Wagner of drunken driving and fined him $100. Wagner filed a notice of appeal and the police justice released him on his own recognizance without collecting the fine. Wagner perfected his appeal to the district court but never returned to the police justice to pay his fine. He failed to demand his trial de novo[9] through four consecutive terms of the district court and then filed a motion to discharge the conviction on the grounds that his appeal had not been tried within three district court terms of his indictment.[10] The district court, instead of discharging Wagner's conviction, dismissed his appeal and upheld the fine. The court based its dismissal upon Wagner's failure to prosecute his appeal with diligence.[11] The Wyoming Supreme Court affirmed.[12]

Wagner was decided when the intermediate appeal process afforded an appellant like Wagner a trial de novo in the district court.[13] He could demand a jury[14] and present evidence as if no decision had been reached below. The prosecutor had to prove his case again.[15] The time-consuming trials de novo were not restricted to appellants with major cases. Many of the cases appealed to the district courts involved far less than the jurisdictional maximums of the inferior courts.[16] For example, the appellant in *State ex. rel. Suchta v. District Court of Sheridan County* made a timely demand for a jury trial when appealing a seventy-five dollar drunken driving conviction. When the district court refused the request for a jury, the Wyoming Supreme Court issued a writ of prohibition preventing the district court from proceeding without a jury.[17] As much as it may have

7. Rule 14 of the Uniform Rules for District Courts expressly authorized district courts to dismiss cases for lack of prosecution when no substantial action toward their disposition occurred for six months after docketing. U.R.D.C. 14. Wood's two-term delay in requesting oral argument violated the six-month limit of rule 14 and the district court relied upon the rule to dismiss Wood's appeal. 660 P.2d at 1165. Wood argued to the supreme court that rule 14 applied only to original actions, not to appeals. Brief for Appellant at 13, Wood v. City of Casper, 660 P.2d 1163 (Wyo. 1983). The supreme court agreed with Wood. 660 P.2d at 1166. Thus the only possible source of authority supporting the district court's dismissal in *Wood* came from prior supreme court decisions authorizing the dismissal of intermediate appeals for lack of prosecution.

8. 74 Wyo. 115, 284 P.2d 409 (1955).

9. *See infra* note 13 and accompanying text.

10. 284 P.2d at 409.

11. *Id.* at 410.

12. *Id.* at 413.

13. WYO. STAT. § 15-207 (1945). Rule 29 of the Wyoming Rules of Criminal Procedure for Justice of the Peace and Municipal Courts repealed the trial de novo statute in 1975. W.R. CR. P.J.C. 29.

14. *See* State v. Hungary, 75 Wyo. 423, 296 P.2d 506 (1956).

15. *See id.* at 508.

16. In 1955 the justice courts could try cases with maximum sentences of $100 plus six months confinement. WYO. STAT. § 15-101 (1945). Today the justice courts can try misdemeanors that carry fines of $750 as well as six months in jail. WYO. STAT. § 7-16-101 (1977). Municipal courts in first class cities are limited to three month sentences, just like they were in 1955, but the possible fine has been increased from $100 to $200. *Compare* WYO. STAT. § 29-250 (1945) with WYO. STAT. § 5-6-201 (1977).

17. 74 Wyo. 48, 283 P.2d 1023 (1955).

pained the justices to order a jury trial for a seventy-five dollar appeal, they recognized that the trial de novo statute controlled and that they had "neither the privilege nor the power to ignore it."[18] Given the protections favoring appellants taking intermediate appeals, it is likely that the Wyoming Supreme Court approached the issues in *Wagner* with a bias against further protections for appellants, especially if they might burden the district courts.

A key issue in *Wagner* was whether the duty to request a date for the trial de novo rested upon the appellant or upon the prosecutor. Since the trial de novo process was adversarial, neither the supreme court nor the parties considered that it might be the district court's duty to set a date on its own initiative.[19] The supreme court decided that the appellant, Wagner, should have requested a date for his trial de novo because the prosecutor had already advanced the initial trial to conclusion.[20] Moreover, since a statute threatened the prosecutor with dismissal if he did not request an original trial date within three court terms of the indictment,[21] the supreme court reasoned that Wagner deserved dismissal because he did not request his trial de novo within three terms after he perfected his appeal.[22]

The *Wagner* court's decision to uphold the dismissal sanction rested upon more than a desire to balance the relative burdens of prosecutors and appellants. The sanction was necessary to prevent appellants from intentionally delaying their appeals. The supreme court apparently believed that Leo Wagner purposely delayed his request for his trial de novo so that he could withhold payment of his fine as long as possible and then move to have it discharged entirely.[23] Because the court already assumed that only the appellant could set the date for trial de novo, it had to provide some sanction to the district courts so they could force an appellant like Wagner to proceed. The dismissal for lack of prosecution was such a sanction, and *Wagner* was a prototypical case for its employment.

In summary, three logical steps prompted the *Wagner* court to recognize an inherent power in the district courts to dismiss intermediate appeals for lack of prosecution. First, the court decided that the adversarial process required a party, rather than the district court, to request a date for trial de novo. Second, because the system favored appellants, it made sense that the appellants, rather than the prosecutors, be required to request a date. Finally, the dismissal sanction was necessary to force appellants to proceed in timely fashion.

Dismissals for Lack of Prosecution Reassessed: Shafsky v. City of Casper

The Wyoming Supreme Court reevaluated the dismissal for lack of prosecution in 1971 when it decided *Shafsky v. City of Casper*.[24] In *Shafsky*, the

18. *Id.* at 1026.
19. 284 P.2d at 409.
20. *Id.* at 410.
21. WYO. STAT. § 10-1313 (1945). Rule 45(b) of the Wyoming Rules of Criminal Procedure now provides that a prosecutor can be dismissed for unnecessary delay. It sets no fixed time limit. W.R. CR. P. 45(b) (The supreme court superseded section 10-1313 of the Wyoming Statutes via rule 45(b), W.R. Cr. P., under the authority of section 5-4-207 of the Wyoming Statutes. WYO. STAT. § 5-4-207 (1977)).
22. 284 P.2d at 413.
23. *See id.* at 410.
24. 487 P.2d 468 (Wyo. 1971).

Casper Municipal Court convicted A. B. Shafsky of selling liquor to a minor and sentenced him to ten days in the city jail. Shafsky perfected his appeal to the district court and a year later filed a motion to quash the complaint. The district court refused the motion and, significantly, reminded Shafsky of his duty to request a date for his trial de novo. Shafsky did nothing for two more years, prompting the district court to grant the prosecutor's motion to dismiss for lack of prosecution.[25] The Wyoming Supreme Court affirmed the dismissal, explaining that the intermediate appeal process was still based on the trial de novo and therefore *Wagner* controlled.[26]

Fair Hearings on Motions to Dismiss for Lack of Prosecution: Mullen v. City of Cheyenne

One year after *Shafsky*, the supreme court decided *Mullen v. City of Cheyenne*.[27] The case arose from David Mullen's November, 1968, conviction on a drunken driving charge. Mullen perfected an appeal from the Cheyenne Municipal Court to the Laramie County District Court but made no request for a trial de novo for over two years. The district court never warned Mullen that he risked dismissal for failure to request a trial date, nor did the court grant Mullen a hearing at which to explain his lack of diligence. Instead, the court granted the prosecutor's motion to dismiss after an ex parte hearing.[28]

The Wyoming Supreme Court reversed.[29] In so doing, the court did not strike down the district court's power to dismiss the appeal for lack of prosecution; nor did the court require that the district court give Mullen the kind of advance warning to proceed that Shafsky had received. Rather, the supreme court ruled that a district court could not dismiss an appeal for lack of prosecution unless it held a hearing on the motion to dismiss at which the appellant appeared.[30]

Mullen was the first case in which the supreme court questioned the assumption made in *Wagner* that only a *party* could initiate the setting of an appeal date. In dictum at the end of *Mullen* the court observed: "During oral argument we were advised by counsel that these cases were not considered upon the calling of the docket. It appears to us that had they been called [by the court] proper disposition could have been timely made."[31] In the end, however, *Mullen* made no important changes in the district courts' power to dismiss intermediate appeals for lack of prosecution. The dismissals were still permitted, and district courts were not required to warn appellants of their duty to request trial de novo dates. As long as the district courts granted fair hearings on the motions to dismiss, they could dismiss as a matter of discretion. *Mullen* represented the supreme court's final opinion on the dismissal for lack of prosecution until the court addressed the Wood appeal in 1983.

25. *Id.*
26. *Id.* at 472.
27. 493 P.2d 1043 (Wyo. 1972).
28. *Id.*
29. *Id.* at 1044.
30. After reversing, the supreme court did not simply order the district court to hear Mullen's arguments against dismissal. The court instead ordered the district court to hear the entire appeal on the merits. *See infra* text accompanying note 31.
31. *Id.*

THE RULES

Reforming Intermediate Appeals: Rule 23 of the Wyoming Rules of Criminal Procedure for Justice of the Peace and Municipal Courts

On January 1, 1975, three years after *Mullen*, the Wyoming Supreme Court adopted the Wyoming Rules of Criminal Procedure for Justice of the Peace and Municipal Courts (W.R.Cr.P.J.C.).[32] Rule 23 of the new rules, entitled "Appeal," superseded the prior statutory law governing intermediate appeals.[33] Rule 23(a) expressly eliminated the trials de novo and provided that all appeals to the district courts would be tried on questions of law.[34] Thus an appellant could no longer request a jury and present his evidence again. Rule 23(d) provided that the appellant supply the district court with the trial record and rule 23(f) permitted the appellant to submit a brief.[35] If an appellant could not show prejudicial error in the district court his conviction was affirmed. Harmless error, defined by rule 23(g) as "[a]ny error . . . which does not affect substantial rights,"[36] could not support a reversal. Rule 23 did not address the propriety of dismissals for lack of prosecution, nor did it assign the duty to set a date for oral argument to either the appellant or the district court. In fact, rule 23 made no provision for oral argument to the district court.[37]

Further Reform in Intermediate Appeals: The Wyoming Rules of Appellate Procedure

Intermediate appeals were solely governed by rule 23 for only three years. In 1978 the supreme court replaced its own Supreme Court Rules with the Wyoming Rules of Appellate Procedure (W.R.A.P.).[38] The court intended the W.R.A.P. to govern intermediate appeals to the district courts as well as appeals to the supreme court. Rule 1.01 states that "[a]ll appeals to the district court and Supreme Court shall be governed by these rules."[39] Unfortunately, the W.R.A.P. did not expressly supersede rule 23, and as a result attorneys received conflicting instructions for several procedures.[40] First, the rule 23 deadlines for submission of the trial record and briefs conflicted with the W.R.A.P. deadlines.[41] Second, rules 6.01 and 6.02, W.R.A.P., implied that oral argument would normally be held, while nothing in rule 23 mentioned oral argument.[42] Finally, rule 6.01 of the W.R.A.P. provided that "[t]he clerk will notify counsel by mail or telephone of cases set for hearing."[43] Rule 23, on the other hand, was silent on this issue.

32. W.R. CR. P.J.C.
33. W.R. CR. P.J.C. 23. Rule 27 of the Wyoming Rules of Appellate Procedure for Courts of Limited Jurisdiction expressly superseded rule 23 in 1983. W.R.A.P.C.L.J. 27.
34. W.R. CR. P.J.C. 23(a).
35. W.R. CR. P.J.C. 23(d), (f).
36. W.R. CR. P.J.C. 23(g).
37. The City did not dispute Wood's original right to oral argument even though rule 23 made no provision for it. *See infra* note 42 for a discussion of the court's reliance upon rule 6.01 of the Wyoming Rules of Appellate Procedure, which implied the right to oral argument.
38. W.R.A.P. 27.
39. W.R.A.P. 1.01.
40. *See* Brief for Appellant, *supra* note 7, at 4-5 n.1.
41. *Compare* W.R. CR. P.J.C. 23(b), (d), (f) with W.R.A.P. 3.02, 5.06.
42. The supreme court solved rule 23's silence regarding oral argument by applying rule 6.01, W.R.A.P. The court held that before an appeal was docketed rule 23 governed proceedings, but after docketing the W.R.A.P. controlled. 660 P.2d at 1167. Thus rule 6.01, which implied that all intermediate appeals would include oral arguments, governed the Wood appeal. W.R.A.P. 6.01.
43. W.R.A.P. 6.01. *See infra* text accompanying note 52 for the complete text of rule 6.01.

Recent Changes in Intermediate Appeals: The Wyoming Rules of Appellate Procedure for Courts of Limited Jurisdiction

The supreme court based its decision in *Wood* upon rule 23 and the W.R.A.P. (as well as the case law) because the case arose under those rules. A new set of rules, the Wyoming Rules of Appellate Procedure for Courts of Limited Jurisdiction (W.R.A.P.C.L.J.), superseded both rule 23 and the W.R.A.P. while the court deliberated.[44] The new rules, which became effective on January 1, 1983, make several major changes in the intermediate appeal process. First, rule 5.01 encourages the district judge to dispense with briefs and instead decide an appeal on the trial record and a statement of error filed by the appellant.[45] Second, rule 6 states that "[t]here shall be no oral arguments of the appeal before the district court, unless the district judge directs otherwise."[46] Third, the W.R.A.P.C.L.J. contain no section comparable to rule 6.01 of the W.R.A.P. which requires the district courts to set dates for oral argument on their own initiative. Finally, the new rules are silent on the validity of the dismissal for lack of prosecution.

THE SUPREME COURT'S REASONING IN *Wood*

The Wyoming Supreme Court relied upon two rationales to support its holding that the district courts had *no* power to dismiss perfected appeals for lack of prosecution.[47] The court decided first that rule 6.01 of the W.R.A.P. controlled and required the district court to set an oral argument date. Wood therefore had no responsibility to request a date and could not be dismissed for his failure to do so.[48]

Second, the court reasoned that *Wagner* and *Shafsky* were no longer authority for continued district court dismissals for lack of prosecution because those cases had been decided under the trial de novo procedure. The review procedures of the W.R.A.P. and rule 23 of the W.R.Cr.P.J.C. were different enough, the court felt, to warrant a reversal of the *Wagner* rule.[49] Unfortunately, the court did not explain which aspects of the change in procedure most influenced its *Wood* holding.

The supreme court relied on *Mullen* as support for its notice dictum. The court did not explain how *Mullen* applied but simply cited the case after stating: "[W]e hold that . . . [the district court] has no authority to dismiss for lack of prosecution in the absence of reasonable notice which would have the effect of advising the appellant that it is necessary that a hearing be requested before the district court."[50]

ANALYSIS

Rule 6.01 of the W.R.A.P. as a Rationale for the Wood Holding

It does not appear that the Wyoming Supreme Court really employed rule 6.01 of the W.R.A.P. to reach its *Wood* reversal. The court instead

44. W.R.A.P.C.L.J. 27.
45. W.R.A.P.C.L.J. 5.01.
46. W.R.A.P.C.L.J. 6.
47. 660 P.2d at 1166.
48. *Id.*
49. *Id.*
50. *Id.*

used rule 6.01 to endorse a conclusion that it reached for other, weightier reasons. The court could easily have accepted the City's interpretation of rule 6.01; an interpretation which allowed continued district court dismissals for lack of prosecution.[51] The City quoted rule 6.01 in its brief:

> The clerk will notify counsel by mail or telephone of cases set for hearing. Counsel for either or all of the parties, when wishing to submit a case upon briefs, may avoid personal attendance at court by filing a written direction to the clerk to so submit upon briefs. A motion to postpone a hearing beyond the time assigned may be heard without argument in the discretion of the court, but a reasonable time may be allowed upon request for a showing by a party for or against the motion.[52]

The City then noted that rule 6.01 required the clerk to inform counsel of the date set for oral argument, but did not necessarily remove the appellant's duty to request that date in the first place. Thus the appellant's duty to request a date for argument and the dismissal sanction enforcing that duty could be consistent with rule 6.01.[53]

The supreme court did not accept the City's seemingly valid argument but instead agreed with Wood that "the effect of rule 6.01, W.R.A.P., is to impose upon the court and its clerk the duties of setting the case for hearing. . . ."[54] Whether its reliance upon rule 6.01 was sound or not, the fact remains that the court specifically intended that its argument based on that rule justify its holding that district courts had *no* authority to dismiss perfected intermediate appeals for lack of prosecution.[55] Moreover, since the rule 6.01 rationale has no application to the court's notice discussion, its inclusion in the opinion is evidence that the notice holding is really dictum.

If the supreme court had relied entirely upon rule 6.01 to support its holding in *Wood,* then the case would carry little precedential value. As we have seen, rule 6.01 no longer applies to intermediate appeals because the Wyoming Rules of Appellate Procedure for Courts of Limited Jurisdiction are now the sole rules governing those appeals.[56] The new rules contain no provision remotely similar to rule 6.01. A future appellant, who has not requested oral argument in a timely fashion, and who is threatened with dismissal by the district judge, will have to argue that *Wood* prohibits the dismissal even though rule 6.01 no longer applies to intermediate appeals. He will have to argue that *Wood* prohibits the dismissal because the supreme court had a second rationale.

The Change from Trials de Novo to Review Procedures as a Rationale for the Wood Holding

The supreme court's one-sentence discussion of the change from a trial de novo system to a review procedure is excellent evidence that the court intended, in *Wood,* to completely eliminate dismissals for lack of prosecution from intermediate appeals. "We distinguish," the court announced,

51. Brief for Appellee at 10-11, Wood v. City of Casper, 660 P.2d 1163 (Wyo. 1983).
52. *Id.*
53. *Id.*
54. 660 P.2d at 1166.
55. *See id.*
56. *See supra* text accompanying note 44.

"Shafsky v. City of Casper, supra, and the cases cited therein [*Wagner*] simply by virture of the adjustment from a trial de novo procedure to a review procedure."[57] If the court intended to allow continued dismissals, but require reasonable notice to appellants, then the distinction was unnecessary. As we have seen, the appellant in *Shafsky* was given advance warning of his duty to request a date for oral argument.[58] On the contrary, Wood received no such notice. The supreme court could have distinguished *Wood* from *Shafsky* on the basis of notice if the court viewed notice as the key to its holding. *Shafsky* would have remained good law and the court would still have reversed Wood's dismissal. Instead, the court ignored the possible notice distinction.

The manner in which the supreme court distinguished *Shafsky* from *Wood* is more than just evidence of the court's intended holding. The differences between Shafsky's trial de novo and Wood's review procedure prompted the court to overrule *Shafsky* and hold that district courts had *no* power to dismiss perfected appeals for lack of prosecution.[59] Specifically, the review procedures, first adopted by rule 23 of the W.R.Cr.P.J.C. in 1975, removed the adversarial trial de novo which had led the *Wagner* court to assume that only parties could request a trial date.[60] The review procedures also altered the relative burdens of appeal shouldered by appellants, prosecutors and district courts. Together these major developments produced the *Wood* decision.

The Shifting of Burdens Under the Review Procedures

An appellant proceeding under either rule 23 or the W.R.A.P. faced greater obstacles than did appellants granted trials de novo under the old system. Rule 23 and the W.R.A.P. both required appellants to file briefs, and those briefs were restricted to allegations of error. The trial de novo, on the other hand, allowed a fresh presentation of all the evidence. Thus prosecutors had to prove their cases again at the trial de novo, whereas prosecutors operating under the review procedures simply had to show that no harmful error occurred below. Finally, appellants taking trials de novo had plenty of time to make their points to either judge or jury while appellants were limited, under the W.R.A.P., to thirty minutes of argument before a judge.[61]

The review procedure of both rule 23 and the W.R.A.P. reduced the burdens of intermediate appeals on the district courts. Removal of the jury trial option allowed the district court judges to review the briefs and transcripts, hear oral argument, and then decide the cases. The judges could fit oral argument into their docketing schedules more easily than they could the time-consuming trials de novo.

In summary, the change to review procedures increased the difficulties that appellants faced on appeal while it decreased the burdens on district courts and prosecutors. This is not to say that appellants could no longer

57. 660 P.2d at 1166.
58. *See supra* text accompanying note 25.
59. *See* 660 P.2d at 1166.
60. *See supra* text accompanying note 19.
61. W.R.A.P. 6.02.

unfairly delay appeals. They could still intentionally shirk their duty to request a timely date for oral argument. Nevertheless, it made sense for the *Wood* court to search for a mechanism to prevent delay which was less drastic than the dismissal for lack of prosecution.

Preventing Delay through District Court Docket Control

The change from the trial de novo to review procedures suggested a means, less draconian than dismissal, which the district courts could employ to prevent delay. Because intermediate appeals no longer occurred as trials, the need for an adversary to request a date for oral argument became less pronounced. The American Bar Association has recognized that criminal appeals should be managed by the courts rather than by the parties. An A.B.A. standard for criminal appeals states: "Continuing, authoritative supervision of criminal cases on appeal, from docketing through submission for decision, should be exercised by the appellate court."[62] The commentary on the standard is even more relevant:

> The traditional adversary system relies on the initiatives of counsel for the parties to take the action necessary to move a case forward in accordance with the expected schedule of steps for an appeal. This standard, departing from this customary arrangement, recognizes a duty on the appellate court actively to manage its own caseload in the preparatory stages of appeals.[63]

If the *Wood* court intended to eliminate dismissals for lack of prosecution, and still prevent delay, it could have achieved both by requiring the district courts to set oral argument dates. The court, however, declined to require district courts to do so. *Wood* was decided, the court claimed, "[w]ithout regard to any philosophical differences about the management of court dockets. . . ."[64] Nevertheless, the very fact that the court disclaimed a docket control purpose indicates that the court realized its holding implied greater docket control by the district courts. In other words, the supreme court likely foresaw that district courts would have to set dates for oral argument because they could no longer prevent delay by dismissing appeals.

In conclusion, the supreme court's distinction between the trial de novo and the review procedures evidenced the court's intent to eliminate dismissals for lack of prosecution entirely. The shifting of greater preliminary burdens onto appellants, and the concept of increased docket control in the district courts, support the elimination of dismissals; which should be seen as the holding in *Wood*.

The Court's Notice Holding as Dictum

One of the two apparent holdings offered by the Wyoming Supreme Court in *Wood* must be dictum.[65] The decision cannot completely eliminate dismissals for lack of prosecution and still allow the dismissals accompanied

62. Standards for Criminal Justice § 21-3.1 (1978).
63. *Id.* at commentary 37-38.
64. 660 P.2d at 1166.
65. *See supra* note 4 for the full texts of the conflicting holdings.

by reasonable notice. We have seen that complete elimination of the sanction has substantial support in the opinion and made good sense under the review system. The notice holding, on the other hand, should not have been addressed by the court at all. It has no viable support in *Mullen,* and deserves to be labelled as dictum.

Wood claimed in his brief that the district court abused its discretion when it failed to notify him of his duty to request a date for oral argument.[66] The City responded that the district court did not abuse its discretion because *Mullen* only required a fair hearing on the motion to dismiss. The City also noted that no court rules required the kind of advance notice for which Wood argued.[67] The supreme court was responding directly to these abuse of discretion arguments when it stated that the district court *could* dismiss Wood's appeal as long as it gave Wood advance notice of his duty to request a date for oral argument. Yet at the end of the opinion the court disclaimed any attention to the alleged abuse of discretion. "[T]here is no need," the court pronounced, "for us to consider the contention of the appellant that there was an abuse of discretion on the part of the district court. The district court had no authority, discretionary or otherwise, to dismiss this appeal."[68] The court's statement is strong evidence that it did not view the notice issue, presented by the parties as an abuse of discretion, as important. The court would have avoided the confusing effect of the notice dictum if it had truly ignored the abuse of discretion claims.

Mullen v. City of Cheyenne was the sole support mustered by the court for its notice dictum.[69] Yet *Mullen* does not support that dictum. The supreme court held in *Mullen* that a district court *could* dismiss an appeal for lack of prosecution even if it failed to notify the appellant in advance that he had to request a trial de novo date. The *Mullen* court reversed the district court's dismissal only because Mullen did not receive a fair hearing on the prosecutor's motion to dismiss.[70] The supreme court, in *Wood,* misinterpreted *Mullen.* The court apparently felt that *Mullen* prohibited dismissal unless the district court gave the appellant *both* a fair hearing on the motion to dismiss *and* advance notice of his duty to request a trial de novo date.[71] Attorneys and district courts should not have to contend with the *Mullen* misreading because the court's notice holding, which the misreading supports, is only dictum.

In sum, only one holding makes sense in *Wood.* Moreover, the weight of the evidence indicates that the supreme court intended that holding. *Wood* stands for the proposition that a district court has no power whatsoever to dismiss an intermediate appeal because of an appellant's failure to request a date for oral argument.

66. Brief for Appellant, *supra* note 7, at 17.
67. Brief for Appellee, *supra* note 51, at 13.
68. 660 P.2d at 1167.
69. *See supra* text accompanying note 50.
70. 493 P.2d at 1044.
71. The *Wood* court did not flesh out its interpretation of *Mullen.* Nevertheless, the citation to the case after its notice dictum indicates that the court misinterpreted *Mullen. See supra* text accompanying note 50.

The Viability of the Wood Holding under the Wyoming Rules of Appellate Procedure for Courts of Limited Jurisdiction

The Wyoming Supreme Court decided *Wood* while fully aware that it would be the last analysis of an intermediate appeal under either rule 23 or the W.R.A.P.[72] The W.R.A.P.C.L.J. had, as the court deliberated, eliminated the W.R.A.P. from intermediate appeals and had expressly superseded rule 23 of the W.R.Cr.P.J.C.[73] Thus, if rule 6.01 of the W.R.A.P. had been the only rationale for the Wood reversal, the case would have no continued value. *Wood* remains valid, however, because the supreme court based its holding on the distinction between the trial de novo afforded Wagner, Shafsky and Mullen, and the review procedure that Wood faced. The distinction has not changed under the W.R.A.P.C.L.J. If anything, the review procedure under the new rules is even more removed from the trial de novo concept than were the procedures embodied in rule 23 or the W.R.A.P. The new rules severely limit an appellant's chances to present his allegations of error to the district court.[74] On the other hand, the rules greatly increase a district court's power to regulate the scope of an intermediate appeal.[75]

An intermediate criminal appeal can be presented in three ways under the W.R.A.P.C.L.J. First, the district judge may dispense with both oral argument and briefs, and base his decision solely upon the record and the appellant's statement of error.[76] The rules seem to prefer this least complete of the three possible processes. Rule 5.01, for example, states that "[b]riefs shall not be filed by either party unless so ordered by the district court."[77] Similarly, rule 6 provides: "There shall be no oral arguments of the appeal before the district court, unless the district judge directs otherwise."[78] Clearly, under this scenario, it makes no sense for a district judge to dismiss the appeal for lack of prosecution. The appellant will have filed his statement of error and trial record in response to deadlines set by the rules.[79] The judge will have all he needs to decide the case shortly after final judgment below. Any further delay will be solely the court's fault.

The second scenario, in which the district judge dispenses with oral argument but requires briefs, differs little from the first. The briefing deadlines are spelled out in rule 5.06 and allow the appellant only twenty days, after he files the trial record, in which to prepare his brief.[80] Again the district judge will not need the dismissal sanction to bring the case to timely conclusion.

72. The court stated: "In this regard we do note that effective January 1, 1983, the Wyoming Rules of Appellate Procedure for Courts of Limited Jurisdiction, by Rule 27, superseded the provisions of Rule 23, W.R. CR. P.J.C., and there would be no prospective conflict such as that argued in this case." 660 P.2d at 1167.
73. W.R.A.P.C.L.J. 27.
74. This is especially true when the district courts exercise their options under the new rules and eliminate oral argument and briefs. *See infra* text accompanying note 76.
75. W.R.A.P.C.L.J. 5.01, 6.
76. *Id.*
77. W.R.A.P.C.L.J. 5.01.
78. W.R.A.P.C.L.J. 6.
79. The appellant has twenty days after he files his notice of appeal in which to file the trial record with the district court. W.R.A.P.C.L.J. 3.02. He has twenty days after filing the record in which to file the statement of error. *Id.* 5.01(b), 5.06.
80. W.R.A.P.C.L.J. 5.01(a).

Finally, the district judge may require briefs and oral argument just as if the case had been appealed under the old rules. No deadline in the new rules requires the appellant to make a timely request for an oral argument date. Nor do the rules specify whether the court or the appellant should first set the date. Conceivably, the district court could wait for the appellant to set the date and the appellant could ignore his duty to make a timely request. Under *Wood*, the district court could not dismiss the appeal for lack of prosecution despite the delay. The solution to this problem, the same problem that led the *Wagner* court to establish the dismissal for lack of prosecution, is for the district court to set a date for oral argument. The district court must affirmatively order oral argument in the first place.[81] It is only logical that the court set a tentative date when it issues the order. District courts that do not adopt this practice have only themselves to blame if delay occurs.

CONCLUSION

The district courts, and attorneys taking intermediate appeals to those courts, should not be misled by the notice dictum in *Wood*. The Wyoming Supreme Court actually held that district court dismissals of intermediate appeals for lack of prosecution will not be tolerated. *Wood* has just as much vitality under the W.R.A.P.C.L.J. as it had under the W.R.A.P. and rule 23 of the W.R.Cr.P.J.C. because the controlling rationale for the decision—namely, the distinction between trial de novo and review procedure—still survives under the new rules. Perhaps the court should have gone farther and explicitly required district courts to set dates when they order oral argument. In a sense, the court did so when it decided that rule 6.01 demanded that district court clerks set dates for oral argument. But rule 6.01 no longer applies to intermediate appeals so the court's 6.01 analysis is useless under the W.R.A.P.C.L.J. The Wyoming Supreme Court has the power to amend the W.R.A.P.C.L.J. to include a rule explicitly requiring district courts to set dates for oral argument on those occasions when the district courts order oral argument.[82] The supreme court would be well advised to adopt such an amendment.

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81. W.R.A.P.C.L.J. 6.
82. WYO. STAT. § 5-2-114 (1977).