

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

DENNIS L. NEKOLITE,
Defendant.

Case No. CR99-39

**ORDER DENYING MOTION TO
PROCEED *IN FORMA*
*PAUPERIS***

DATE OF HEARING: No hearing held.

SUBJECT OF ORDER: Defendant’s motion to proceed in forma pauperis.

ORDER: After examination of the files, the court finds, determines, and orders:

1. This court sentenced the defendant by judgment entered on May 4, 2000. Because the last day for filing of an appeal, June 3, 2000, fell on Saturday, the deadline for filing of an appeal was Monday, June 5, 2000. On that date, the defendant filed a notice of appeal, together with a motion to proceed *in form pauperis* and a poverty affidavit. The poverty affidavit stated only:

I, [defendant’s name], being first duly sworn on oath, depose and state that I am the [d]efendant in the above[-]entitled cause of action; that I am completely without funds within which to defend myself; and that, therefore, I request that the costs and fees in connection with my case be charged to Holt County, Nebraska, for the reason that I am unable to pay said costs.

2. In 1999, the statutes relating to proceedings in forma pauperis were substantially modified. Section 25-2301.01 provides:

Any county or state court . . . may authorize the . . . appeal therein, of a . . . criminal case in forma pauperis. Any application to proceed in forma pauperis *shall include an affidavit stating* that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the . . . appeal, and the affiant’s belief that he or she is entitled to redress.

NEB. REV. STAT. § 25-2301.01 (Supp. 1999) (emphasis supplied).

3. While not in the language of the statute, the words used in the affidavit at least arguably meet the first requirement that the affidavit state “that the affiant is unable to pay the fees and costs or give security required to proceed with the case.” Even as to this requirement, previous Supreme Court

decisions require that the affidavit follow the language of the statute, which the affidavit fails to do. However, even the most liberal construction cannot discern any words stating “the nature of the . . . appeal” or “the affiant’s belief that he or she is entitled to redress.”

4. In *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995), the Supreme Court stated that the poverty affidavit in a criminal appeal must follow the language of the statute. The Court also stated that an inadequate affidavit does not waive the mandatory docket fee or vest jurisdiction. *Id.* In that case, the Court recognized that a poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by NEB. REV. STAT. §§ 33-103 and 25-1912. In *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996), the Supreme Court, citing *Schmailzl*, concluded that if the poverty affidavit is not sufficient to meet the statutory requirements, the appeal has not been perfected. This court acknowledges that *Schmailzl* and *Noelle F.* were decided under the former statute.

5. Upon careful analysis, this court concludes that the rationale of the previous decisions is not affected by the statutory changes and is consistent with the Legislature’s intention.

6. While the jurisdictional document might now be the application to proceed *in forma pauperis*, the statute requires that the application “shall include” the affidavit stating the required statements. The use of the word “shall” is presumed to constitute a mandatory requirement. *State v. Jensen*, 259 Neb. 275, ___ N.W.2d ___ (2000). In addition, the Legislature is presumed to have been familiar with the previous decisions of the Supreme Court. *Halstead v. Rozmiarek*, 167 Neb. 652, 94 N.W.2d 37 (1959). Consequently, it appears from the language of the statute, in light of the previous Supreme Court decisions, that the Legislature intended that the application, including the required affidavit, would substitute for the docket fee. Consequently, the plain language of the statute would direct the conclusion that an inadequate affidavit thereby renders inadequate the application, upon which the court proceeds the same as if no application had been filed. Because the time for appeal has expired, it is not possible to cure the defect, and the mandatory jurisdictional requirements for appeal have not been satisfied.

7. The only matter requiring further discussion is the effect of § 25-2301.02. That section requires that the application be granted unless there is an objection upon either or both of two bases, i.e.,

that the affidavit is untruthful (affiant has sufficient funds) or that the appeal is frivolous or malicious. NEB. REV. STAT. § 25-2301.02 (Supp. 1999). The court concludes that section has no application where an inadequate application, i.e., an inadequate affidavit, has been filed. Both of the grounds specified go to the merits of the affidavit and not to the form. The Legislature obviously intended to provide a procedure for adjudication of the merits of an application. See *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). But there is no point to the procedure where the underlying application and affidavit are legally inadequate to invoke the statute. Similarly, the part of that section authorizing the applicant to pay the fee and proceed with the appeal within 30 days after a determination that the objection is proper has no proper application to the situation where the application and affidavit are legally inadequate.

8. Section 25-1301.02 commands that the application be granted unless there is an objection. But where the application is legally insufficient to constitute a proper application, the statutory mandate obviously cannot apply.

9. Because the mandatory affidavit, deemed by the statute as part of the application, is legally inadequate, the same must be denied without hearing. Because the time for appeal has expired, the court has no power to consider any amended or supplemental application or affidavit.

10. The court therefore orders that the application *in forma pauperis* be denied, and that the matter proceed as if no application had been filed. Entry of further order upon the failure to appeal is stayed until July 11, 2000, to allow appeal from this order pursuant to NEB. REV. STAT. § 25-2301.02(2) (Supp. 1999).

IT IS SO ORDERED.

Signed in chambers at O'Neill, Nebraska, on June 8, 2000.
DEEMED ENTERED upon the date of filing by the court clerk.

If checked, the Court Clerk shall:

- ⋮ Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
- ⋮ Note the decision on the trial docket as: [date of filing] Signed “Order Denying Motion to Proceed In Forma Pauperis” entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge