

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

CHESTER E. McCONNELL,

Defendant.

Case No. CR00-1

ORDER DISMISSING APPEAL

DATE OF HEARING: October 11, 2000.

DATE OF RENDITION: October 11, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiff:

David M. Streich, Brown County Attorney.

For defendant:

Mark Kozisek without defendant.

SUBJECT OF ORDER:

Summary review pursuant to § 29-824 *et seq.* of county court order suppressing evidence.

PROCEEDINGS:

At the hearing, these proceedings occurred:

The two-volume bill of exceptions filed on August 23, 2000, together with the supplemental bill of exceptions filed on September 8, 2000, were considered as admitted in evidence pursuant to NEB. REV. STAT. § 25-2733(2). Written briefs were previously submitted. Arguments of counsel were heard. The matter was taken under advisement.

FINDINGS:

The court finds and concludes that:

1. The defendant's motion to suppress attacked a warrantless search of a private residence. The county court granted the motion by a written order. The plaintiff appeals pursuant to NEB. REV. STAT. § 29-824 (Cum. Supp. 1998).

2. The defendant raises the issue of subject matter jurisdiction, claiming the state failed to deposit a docket fee on appeal. The records of this court show that no docket fee was deposited with the county court clerk-magistrate. Those records also show that a docket fee was deposited with the clerk

of this court on September 8, 2000, which is more than 30 days after the entry of the order from which the state appeals.

3. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Muir v. Nebraska Dep't of Motor Vehicles*, 260 Neb. 450, ___ N.W.2d ___ (2000). Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Id.* Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.*

4. NEB. REV. STAT. § 29-825 (Neb. Laws 2000, L.B. 921, § 26) (emphasis supplied) requires:

The application for review provided in section 29-824 shall be accompanied by a copy of the order of the trial court granting the motion to suppress and a bill of exceptions containing *all* of the evidence, including affidavits, considered by the trial court in its ruling on the motion, and so certified by the trial court. The application shall be filed . . . with the clerk of the district court, if the trial court is the county court, within such time as may be ordered by the trial court, . . . but in no event shall more than thirty days be given in which to file such application.

5. In *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999), a single judge of the Nebraska Court of Appeals determined that, because the bill of exceptions was not filed with the Clerk of the Supreme Court and Court of Appeals within the time allowed by the trial court (in that case, the district court was the trial court), the single judge of the Court of Appeals lacked jurisdiction to consider the appeal under § 29-825.

6. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly. *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996); *Friedman v. State*, 183 Neb. 9, 157 N.W.2d 855 (1968).

7. In this case, the county court entered the suppression order on July 28, 2000. The state's notice of intent to seek review was filed with the county court on July 31, 2000. By motion filed the same

date, the state requested the county court to fix a time for seeking of review. By order rendered and entered on August 2, 2000, the county court fixed the time for filing as “on or before August 25, 2000.” T8. The application was filed with this court on August 10, 2000.

8. The two-volume bill of exceptions filed on August 23, 2000, clearly does not contain *all* of the evidence, having omitted the two exhibits offered and received by the county court. Whether the jurisdictional deadline for filing of the bill of exceptions with the clerk of this court was August 28, 2000 (30 days after entry of the suppression order), August 25, 2000 (the time fixed by the county court), or September 1, 2000 (30 days after the entry of the county court order fixing the time), a bill of exceptions containing *all* of the evidence was not timely filed. Although the opinion in *State v. Ruiz-Medina* did not explicitly so state, it appears to consider the date fixed by the trial court as the jurisdictional deadline. This court agrees. Thus, the failure to file a bill of exceptions containing all of the evidence by August 25, 2000, deprives this court of jurisdiction.

9. The supplemental bill of exceptions filed on September 8, 2000, cannot change the result. This court cannot extend the time established by the Legislature for the filing of the summary application and bill of exceptions.

10. There is nothing in this record to suggest that the time established by the trial court was intentionally set so short as to deprive the state of the opportunity to appeal.

11. The transcript does not contain any praecipe for bill of exceptions. In the absence of a transcript with a praecipe for bill of exceptions, there is nothing in the record to show that the failure to include all of the evidence in the original bill of exceptions is attributable to the county court. Similarly, there is nothing in the record to show that the failure to file the supplemental bill of exceptions until after the deadline is attributable to the county court.

12. NEB. REV. STAT. § 25-2729 (Neb. Laws 2000, L.B. 921, § 26) generally requires the appealing party to deposit a docket fee as a jurisdictional prerequisite.

13. Except for certain appeals expressly excluded by § 25-2728(2), §§ 25-2729 to 25-2738 appear to be statutes of general application to appeals from county court. The present appeal is not among those expressly excluded from the application of those sections. NEB. REV. STAT. § 25-2728(2) (Neb. Laws 2000, L.B. 921, § 25).

14. Consequently, the court concludes that the jurisdictional requirement of § 25-2729(1)(b) requiring the appellant, “within thirty days after the entry of the judgment or final order complained of,” to “[d]eposit with the *clerk of the county court* a docket fee in the amount of the filing fee in district court” applies. NEB. REV. STAT. § 25-2729 (Neb. Laws 2000, L.B. 921, § 26) (emphasis supplied). The docket fee was not timely deposited, nor was it ever deposited with the proper officer.

15. Because this court lacks subject matter jurisdiction for the above reasons, the appeal must be dismissed. Pursuant to NEB. REV. STAT. § 25-2736 (Reissue 1995), the clerk of the district court is required to certify the order without cost to the county court.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The appeal is dismissed.
2. The clerk of this court shall certify this order to the county court without cost.

Signed in chambers at Ainsworth, Nebraska, on October 11, 2000.
DEEMED ENTERED upon filing by 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 ____.
- **Deliver certified copy of order to county court without cost.**
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days **stating “Appeal dismissed”.**
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: Signed “Order Dismissing Appeal” entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge