

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

CHESTER E. McCONNELL,

Defendant.

Case No. CR00-3

ORDER DISMISSING APPEAL

DATE OF HEARING: October 11, 2000.

DATE OF RENDITION: October 17, 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 (county court case no. CR00-41).

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 and subsequent custodial statements of the defendant. The county court granted the motion by a written order. The plaintiff appeals pursuant to NEB. REV. STAT. § 29-824 (Cum. Supp. 1998).

2. In this case, the county court entered the suppression order on August 14, 2000. The state's notice of intent to seek review was filed with the county court on August 15, 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 15, 2000, the county court fixed the time for filing as “on or before September 8, 2000.” T9. The application was filed with this court on August 15, 2000.

3. 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 *ever* 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 less than 30 days after the entry of the order from which the state appeals.

4. 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.*

5. 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).

6. In a companion case (*State v. McConnell*, District Court of Brown County, Case No. CR00-1, decided October 11, 2000), this court considered the jurisdictional impact of the decision in *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

a. In *Ruiz-Medina*, 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.

b. 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.

c. The two-volume bill of exceptions filed on August 23 clearly does not contain *all* of the evidence, having omitted the two exhibits received by the county court. However, the filing of the supplemental bill of exceptions containing the missing evidence on September 8 cured that defect. 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 filing of the bill of exceptions containing all of the evidence by September 8, 2000, satisfied the *Ruiz-Medina* jurisdictional requirement.

d. Thus, in this case, unlike Case No. CR00-1, the State met the jurisdictional requirement discussed in *Ruiz-Medina*. In this case, the jurisdictional inquiry rests solely on the matter of the docket fee.

7. 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.

8. 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 the county court to the district 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).

9. 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 never deposited with the proper officer.

10. In other words, although the plaintiff timely paid a docket fee, it mistakenly paid the fee directly to the district court clerk, rather than depositing the fee with the county court clerk-magistrate as

the statute expressly requires. This court suspects that the average citizen would scornfully view this as a mere technicality. However, this court is bound by oath to support the Nebraska constitution and to faithfully follow the laws duly enacted in compliance with the Nebraska and federal constitutions.

11. The statutes regulating appeals from the county court to the district court are modeled on those statutes controlling appeals from the district court to the Court of Appeals and Supreme Court. See NEB. REV. STAT. § 25-1912 (2000 Neb. Laws, L.B. 921, § 15). Indeed, in *Rorick Partnership v. Haug*, 228 Neb. 364, 367, 422 N.W.2d 365, ___ (1988), the Nebraska Supreme Court expressly recognized that “[a] district court’s acquisition of appellate jurisdiction of an appeal from a county court is much like the jurisdiction of the Supreme Court concerning a civil appeal from the district court.” The quotation omits discussion of the Court of Appeals because the decision predates the establishment of our higher intermediate appellate court.

12. Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court. *State v. Hopkins*, 7 Neb. App. 895, 587 N.W.2d 408 (1998).

13. This court finds no higher appellate decision considering the situation in which the docket fee was paid directly to the district court clerk in an appeal from county court. However, the analogous situation on appeal from the district court to the Supreme Court was considered in *Barney v. Platte Valley Pub. Power & Irrig. Dist.*, 144 Neb. 230, 13 N.W.2d 120 (1944). The Supreme Court dismissed the appeal for lack of jurisdiction where the fee was paid directly to the clerk of the Supreme Court rather than deposited with the clerk of the district court. The logic and rationale of that decision control the present case and require the outcome.

14. NEB. CONST. art. V, § 2 states that the Supreme Court “shall have . . . such appellate jurisdiction as may be provided by law.” Appellate jurisdiction can be conferred only in the manner provided by law. *Barney v. Platte Valley Pub. Power & Irrig. Dist.*, *supra* at 234, 13 N.W.2d at ___ (citing *Larson v. Wegner*, 120 Neb. 449, 233 N.W. 253 (1930)). Similarly, NEB. CONST. art. V, § 9 states that the district courts “shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide” NEB. REV. STAT. § 24-302 (Reissue 1995) states that the district courts “shall have and exercise . . . appellate jurisdiction in all matters, both civil and criminal,

except where otherwise provided.” An appeal from the county court is not within the chancery (equity) or common law jurisdiction directly conferred by the constitution. Thus, a district court has appellate jurisdiction only as “the Legislature may provide.” The Legislature has provided for such jurisdiction in § 24-302.

15. The decision in *Barney* also teaches that:

The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal. Failure to comply with the required conditions terminates the potential power of an appellate court to acquire thereafter any jurisdiction to review the judgment below. An appeal is not perfected until the jurisdictional steps required by statute or constitutional provision have been taken within the time fixed by the applicable provisions. Appellate jurisdiction of a case cannot be conferred upon a court by any action of the parties. The want of such jurisdiction may be taken advantage of at any stage of the proceedings. An appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by Constitution or statute.

Barney v. Platte Valley Pub. Power & Irrig. Dist., *supra* at 235, 13 N.W.2d at ____.

16. In *Barney*, the Supreme Court determined that in § 25-1912 the Legislature “intended that the filing of the notice of appeal and the depositing of the docket fee ‘in the office of the clerk of the district court’ should be both mandatory and jurisdictional.” *Id.* at 236, 13 N.W.2d at ____ . NEB. REV. STAT. § 25-2729(2) declares that “[s]atisfaction of the requirements of subsection (1) of this section shall perfect the appeal and give the district court jurisdiction of the matter appealed.” These words clearly demonstrate the Legislature’s intent to make compliance with the requirements both mandatory and jurisdictional. These requirements, similar to their counterparts in § 25-1912, mandate the filing of the notice of appeal and the deposit of docket fee with the trial court from which the appeal is taken; here, in an appeal from the county court, “with the clerk of the county court.” The rationale in *Barney* compels this court to hold that noncompliance with these requirements terminates the power of this court, acting as an intermediate appellate court, to review the judgment below.

17. 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. Section 25-2736 also requires that the

proceedings in the county court “shall continue as if no appeal had been taken.” NEB. REV. STAT. § 25-2736 (Reissue 1995).

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 17, 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 ____.

BY THE COURT:

William B. Cassel
District Judge

Mailed to: