

**IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**  
Plaintiff,

vs.

**APRIL WESCOTT,**  
Defendant.

Case No. CR01-23

**ORDER ON PLEA IN  
ABATEMENT**

**DATE OF HEARING:** September 21, 2001.

**DATE OF RENDITION:** October 11, 2001.

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

**TYPE OF HEARING:** Open court.

**APPEARANCES:**

For plaintiff: Eric A. Scott, Cherry County Attorney.

For defendant: Mark Kozisek with defendant.

**SUBJECT OF ORDER:** Preliminary hearing on portion of information alleging offense between January 1, 2000, and December 31, 2000.

**PROCEEDINGS:** See journal entry rendered after September 21 hearing.

**FINDINGS:** The court finds and concludes that:

1. This is a rather unusual situation. The state filed a complaint in county court alleging a felony offense over a time period between January 1, 2000, and May 21 or 31, 2001. The county court held a preliminary hearing. After hearing evidence, the county court bound the defendant over for trial regarding the time period from January 1, 2001, to the end of the alleged period. The county court declined to bind over for the calendar year of 2000.

2. When the state filed its information in this court, it again alleged a period from January 1, 2000, to May 21, 2001. The defendant filed a plea in abatement. At hearing on the plea in abatement, the defendant did not attack that portion of the information from January 1, 2001, to May 21, 2001, i.e., the time period for which the county court had bound over the defendant. The defendant contended that the preliminary hearing provided no support for any offense during the year of 2000. The plaintiff

responded that, although the county court had not found any evidence of any offense during 2000, the state was entitled to present evidence on that issue in the district court. This court agreed, and scheduled a further preliminary hearing for September 21.

3. At the September 21 hearing, the plaintiff submitted the matter on the transcript of the county court preliminary hearing.

4. This court finds that there is no evidence to show either that a crime was committed or that there is probable cause to believe that the defendant committed any crime during the calendar year of 2000. The court finds the reasoning of *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989), persuasive. In *Beermann*, the court observed that:

[A]t trial, defendant was convicted, possibly in connection with count IV, of sexual assault of a child, stemming from an incident of sexual contact in a green station wagon. No such testimony concerning a station wagon or any car was even mentioned in the preliminary hearing. Logically, therefore, defendant has been convicted of a crime that he was not bound over on after a preliminary hearing.

*Id.* at 395, 436 N.W.2d at \_\_\_\_.

5. This court agrees with the county court that there must be some evidence of a rational connection of the offense and the defendant to the time period alleged. The bind over of the defendant for the period of 2001 alleged was correct. The refusal to bind over for the time period of 2000 was also correct. Allowing the state to proceed to trial without any preliminary hearing evidence relating to the year of 2000 would be to effectively deny a preliminary hearing to the defendant as to that extended period of time. This relates not to a matter of a few days or weeks, but to an entire 12-month period.

6. The state may choose to file an amended information for the period from January 1, 2001, to May 21, 2001. It should be allowed a period of 10 days to do so. If the state so chooses, the defendant should be ordered to proceed to arraignment on Friday, October 26, 2001, at 9:30 a.m. However, if the state declines to do so, the court will enter an order at that time dismissing the information without prejudice so that the state may have a final order from which to appeal if desired.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The court determines that the state has failed to show that any crime was committed or that there is probable cause to believe that the defendant committed the crime with respect to the period of time

from January 1, 2000, to December 31, 2000, and declines to bind the defendant over for trial as to such time period.

2. The plaintiff is ordered to file an amended information within 10 days from the date of rendition of this order limiting the time period of the alleged offense to the period from January 1, 2001, to May 21, 2001.

3. If the plaintiff fails to timely file such amended information, the information shall be dismissed without prejudice by subsequent order.

4. If the plaintiff does file such amended information, the matter shall proceed to arraignment thereon.

5. In either event, the defendant is ordered to appear for further proceedings on Friday, October 26, at 9:30 a.m.

Signed in chambers at Ainsworth, Nebraska, on October 11, 2001.  
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 \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed "Order on Plea in Abatement" entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge