

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

LARRY L. RUEGGE II,

Defendant.

Case No. CR02-33

ORDER DENYING MOTION

DATE OF HEARING: No hearing held.

APPEARANCES: None.

SUBJECT OF HEARING: Defendant's motion for post conviction relief filed on July 1, 2003.

ORDER: The motion is denied without prejudice to filing of proper motion after disposition of direct appeal, because:

1. The defendant filed a pro se motion for post conviction relief on July 1, 2003. This court initially questioned whether it has jurisdiction to consider the motion because of the pendency of defendant's direct appeal.

2. Ordinarily, after an appeal is perfected, the trial court is generally divested of jurisdiction over the case until an appellate court renders a final determination, which ordinarily occurs when the appellate court issues its mandate. *Swain Constr. v. Ready Mixed Concrete*, 4 Neb. App. 316, 542 N.W.2d 706 (1996). While a case is on appeal, the trial court ordinarily cannot take action in the case, and in order for the inferior court to reacquire jurisdiction, it must take action on an appellate court's mandate. *Id.* The general rule obtains because the general policy in Nebraska is against concurrent jurisdiction of trial and appellate courts. *Id.*

3. On the other hand, the notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court. *Holste v.*

Burlington Northern R.R. Co., 256 Neb. 713, 592 N.W.2d 894 (1999). But the pending appeal of the judgment and sentence of this court clearly arises from an appealable order. Consequently, this court would normally decline to consider any matter in the case pending disposition of the appeal.

4. However, in *State v. Moore*, 187 Neb. 507, 192 N.W.2d 157 (1971) (*Moore II*), the Supreme Court affirmed a district court order denying post conviction relief, in which it appears that the post conviction motion was filed during the pendency of the direct appeal. See *State v. Moore*, 187 Neb. 498, 192 N.W.2d 155 (1971) (*Moore I*) (direct appeal of same case). The affirmance in *Moore II* at least implicitly determined that the district court had jurisdiction. Had the Supreme Court determined that the district court lacked jurisdiction, the Supreme Court presumably would have dismissed the appeal.

5. Thus, this court concludes that it has jurisdiction to make the present determination notwithstanding the pendency of the direct appeal from the defendant's sentence.

6. In *Moore II*, the Supreme Court stated that “[w]here a defendant in a criminal case invokes our appellate jurisdiction, no post conviction remedy is then available to him. The post conviction remedy is cumulative, not concurrent.” *Id.* at 508, 192 N.W.2d at ____.

7. Accordingly, this court determines that post conviction relief is not available to the defendant during the pendency of the defendant's direct appeal, and that the motion filed on July 1 is void. The motion must therefore be denied without prejudice to the filing of such a motion after disposition of the direct appeal.

Signed in chambers at **Ainsworth**, Nebraska, on **July 16, 2003**;
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.

Note the decision on the trial docket as: [date of filing] Signed “**Order Denying Motion**”
entered.
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge