

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL  
(Memorandum Web Opinion)**

SVOBODA V. ACTON

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

CHAD L. SVOBODA, APPELLANT,

v.

MATT L. ACTON, LANCASTER COUNTY COURT JUDGE, AND

ROB JEFFREYS, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEES.

Filed April 2, 2024. No. A-23-579.

Appeal from the District Court for Lancaster County: KEVIN R. MCMANAMAN, Judge.  
Affirmed.

Chad L. Svoboda, pro se.

No appearance for appellees.

MOORE, BISHOP, and ARTERBURN, Judges.

BISHOP, Judge.

INTRODUCTION

Chad L. Svoboda was convicted of misdemeanor theft and was sentenced in 2021 to 365 days in jail by the county court for Lancaster County (misdemeanor case). This sentence was to “run consecutive to any other sentence.” Svoboda appealed his conviction and was released on bond after serving 27 days in jail. Svoboda was subsequently convicted of three felony counts and was sentenced in 2022 to a cumulative 6 to 12 years’ imprisonment by the district court for Lancaster County (felony case). By the time the appeal in Svoboda’s misdemeanor case was resolved, he had already commenced serving his prison sentences in the felony case. As a result, the county court entered an order issuing a warrant for Svoboda, “who is currently incarcerated at the Nebraska Department of Correctional Services” (Department) and directing that he “be

arrested upon the completion of his [Department] sentence and transported to Lancaster County Corrections to serve the balance of his sentence in this case.”

Svoboda filed a “Verified Petition for a Writ of Mandamus and Declaratory Judgment” in the district court, seeking an order requiring the county court to withdraw or vacate the “Detainer” placed on him in the misdemeanor case and ordering the Department’s director to “properly calculate” his sentence. He claimed his misdemeanor sentence had been completed, and therefore, the county court’s detainer was not lawful, and the Department director had a duty to properly calculate his misdemeanor sentence as “ending on 6/10/2023.” Svoboda simultaneously filed an application to proceed in forma pauperis, which the district court denied. Svoboda appeals from that denial. We affirm.

## BACKGROUND

On June 9, 2023, Svoboda, pro se, filed his petition and a “Motion and Affidavit for In Forma Pauperis Status.” He asked the district court to “issue and serve a writ of mandamus” ordering (1) the county court for Lancaster County to “withdraw or vacate the Detainer” placed upon him in the misdemeanor case (case No. CR 20-9047) and (2) the director of the Department “to properly calculate” his sentence.

According to Svoboda’s petition, he was in the custody of the Department, serving a “consolidated sentence for a misdemeanor and a felony.” He was sentenced in his misdemeanor case on February 26, 2021, and was ordered to serve 365 days in county jail consecutive to any other sentence, even though he was not serving any other sentence at that time. Svoboda filed an appeal in the misdemeanor case and “bonded out” of jail after serving 27 days. His sentence in that case was suspended while the appeal was pending.

Svoboda further alleged that he was sentenced in the felony case (case No. CR 21-508) on February 28, 2022. He received a cumulative sentence of 6 to 12 years’ imprisonment. “This sentence was NOT consecutive to any other sentence” and therefore Svoboda claimed that his misdemeanor sentence should be served concurrently with his felony sentences.

According to Svoboda, on July 7, 2022, after the county court “acted upon the Appeals Court mandate denying [Svoboda’s] appeal in the misdemeanor case,” it placed a “Detainer upon [Svoboda] to serve out his misdemeanor sentence.” The transcript before this court contains the county court’s “Order on Mandate” filed July 7, 2022, which indicates that the district court “affirmed the judgment and sentence of the trial court” and a warrant was to issue for Svoboda, “who is currently incarcerated at the [Department].” It further stated that upon Svoboda’s completion of his Department sentence, he was to be transported to “Lancaster County Corrections to serve the balance of his sentence in this case.” Svoboda alleged that at that time, he had “338 days to go on the misdemeanor sentence” based on his calculation of 365 days minus the 27 days he had already served. Svoboda claimed his misdemeanor sentence was completed on June 10, 2023, by calculating 338 days from “7/7/2022” to “6/10/2023.” Svoboda contended that the county court judge had a “duty to withdraw or nullify the Detainer that he placed upon [Svoboda]” and that Svoboda had no other remedy available to him. Svoboda sought a writ of mandamus directing the county court to do so, as well as directing the Department’s director to calculate his misdemeanor sentence as ending on June 10, 2023, and “ordering him to not enforce the Detainer in that case.”

On June 29, 2023, the district court entered an order denying Svoboda's request for in forma pauperis status after finding Svoboda's petition for writ of mandamus was without rational argument based on either the law or the evidence. The court summarized the allegations in Svoboda's petition and observed that Svoboda's "theory" was that although the county court in the misdemeanor case ordered Svoboda's sentence to be consecutive to any other sentence, the district court's sentence in the felony case had not yet been entered; therefore, the county court's "directive that the sentence in [the misdemeanor case] run consecutively to any other sentence was conditional and void as applied to the sentence in [the felony case]." Svoboda "reasons that he is now serving concurrent sentences" in both cases and will complete his sentence in the misdemeanor case on June 10, 2023. "This means that he will have no time left on his sentence in [the misdemeanor case] when he leaves the [Department]."

The district court agreed in part with Svoboda, citing to *State v. Blevins*, 223 Neb. 864, 394 N.W.2d 663 (1986) (impermissible for sentencing court to require sentence, otherwise properly imposed, to be served consecutively to possible future sentence on pending criminal charges not disposed of at time of sentencing). It agreed that the county court could not order the sentence in the misdemeanor case to be served consecutively to the "yet-to-be-determined sentence in [the felony case]." But the district court found Svoboda to be wrong on a "critical point" regarding the sentencing order in the felony case -- its silence on whether those sentences were to run concurrently or consecutively to other sentences did not mean the felony sentences must run concurrently with the misdemeanor sentence. Quoting *State v. McNerny*, 239 Neb 887, 890, 479 N.W.2d 454, 456 (1992), the court stated, "The rule is the opposite: 'Thus, the applicable rule is that unless the court imposing a later independent sentence specifically states otherwise at the time of its pronouncement, the later sentence is to be served consecutively to any earlier imposed sentence or sentences.'" The court explained, "In other words, although the sentence in [the misdemeanor case] is not consecutive to the sentence in [the felony case], **the sentence in [the felony case] is consecutive to the sentence in [the misdemeanor case].**" (Emphasis in original.) As a result, Svoboda's misdemeanor sentence and his felony sentences were not to run concurrently, and Svoboda had "not yet concluded serving his sentence in [the misdemeanor case]." And since Svoboda's "legal position in this case is . . . without rational argument based on the law or on the evidence," the district court denied Svoboda's motion to proceed in forma pauperis.

On July 12, 2023, Svoboda filed a "Motion to Alter or Amend," which attached some pages allegedly from the bill of exceptions for the district court's sentencing hearing in the felony case. In the excerpt provided, the sentencing court was asked whether "this case [will] be consecutive to any other case," and the court responded, "Well, I don't think he's serving any other sentence at this point in time; is he?" When informed, "Not yet, but he's pending something," the court indicated that "that's up to those sentences . . . not me." Svoboda contended that this colloquy was "evidence the Court did NOT make the sentences in [the felony case] consecutive" and "what was said by the sentencing court controls over a later issued Commitment Order."

On July 18, 2023, the district court denied Svoboda's motion to alter or amend. It concluded that the "pending something" comment in the felony case "probably did not refer" to the sentence in the misdemeanor case since the misdemeanor sentence was entered "about one year before the sentencing hearing in [the felony case]." And although the sentence in the misdemeanor case was

“suspended pending appeal, that sentence was not ‘pending.’” The court surmised that the reference to pending cases “was more likely referring” to cases pending in Otoe County and Cass County, for which Svoboda was sentenced in March 2022, “about one month after the sentencing hearing in [the felony case].” Further, “even if the ‘pending something’ was the sentence in [the misdemeanor case], [Svoboda’s] sentence[s] in [the felony case] would still be consecutive to his sentence in [the misdemeanor case]” because unless the court imposing a later independent sentence specifically states otherwise at the time of its pronouncement, the later sentence is to be served consecutively to any earlier imposed sentence. “That is, the second sentence is consecutive to the first sentence unless the second court specifically says otherwise.” And since the district court in the felony case was silent as to earlier imposed sentences, the sentence in the felony case must be “consecutive to any earlier imposed sentence, including [Svoboda’s] sentence in [the misdemeanor case].”

Svoboda filed a notice of appeal on July 26, 2023, challenging the district court’s denial of in forma pauperis status. We note that Svoboda’s July 12 motion to alter or amend was not filed within 10 days of the district court’s initial June 29 order denying in forma pauperis status and therefore did not toll the time to appeal. Svoboda acknowledges that his motion to alter or amend was “technically too late.” Brief for appellant at 4. Regardless, Svoboda filed his notice of appeal within 30 days of the June 29 order and his appeal is therefore timely. Svoboda was granted in forma pauperis status on appeal.

#### ASSIGNMENTS OF ERROR

Svoboda, pro se, claims the district court (1) abused its discretion by not holding a hearing on his in forma pauperis motion and not liberally construing the petition in his favor, (2) committed plain error by finding his felony sentences were consecutive to his misdemeanor sentence, and (3) clearly erred by finding his petition frivolous.

#### STANDARD OF REVIEW

A district court’s denial of in forma pauperis status is reviewed de novo on the record based on the transcript of the hearing or written statement of the court. Neb. Rev. Stat. § 25-2301.02(2) (Reissue 2016); *Sabino v. Ozuna*, 303 Neb. 318, 928 N.W.2d 778 (2019).

#### ANALYSIS

The only issue before this court is whether the district court properly denied Svoboda’s application to proceed in forma pauperis on his underlying petition. There has been no final order entered as to his request for the issuance of a writ of mandamus or declaratory judgment. Nevertheless, Svoboda has a right to interlocutory appellate review of an order denying in forma pauperis status to commence a case. See *Mumin v. Frakes*, 298 Neb. 381, 904 N.W.2d 667 (2017).

#### LEGAL PRINCIPLES

Under the in forma pauperis statutory scheme, § 25-2301.02 states in pertinent part:

(1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the application shall be made within thirty days after the filing of the application or at

any time if the ground for the objection is that the initial application was fraudulent. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding.

A frivolous legal position is one wholly without merit, that is, without rational argument based on the law or on the evidence. *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

When an in forma pauperis application is denied, the applicant has two choices: (1) to proceed with the matter upon payment of fees, costs, or security or (2) to appeal the order denying in forma pauperis. *Mumin v. Frakes*, *supra*. Svoboda timely appealed from the district court's June 29, 2023, order denying his request to proceed in forma pauperis. The district court properly granted in forma pauperis status to Svoboda on appeal. See *id.* (when in forma pauperis application is denied and applicant seeks leave to proceed in forma pauperis to obtain appellate review of that denial, trial court does not have authority to issue order that would interfere with such appellate review).

Neb. Rev. Stat. § 25-2156 (Reissue 2016) provides that a "writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station."

Mandamus is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought; (2) there is a corresponding clear duty existing on the part of the respondent to do the act in question, and (3) there is no other plan and adequate remedy available in the ordinary course of law.

*State ex rel. Pederson v. Howell*, 239 Neb. 51, 56, 474 N.W.2d 22, 26 (1991) (internal citations omitted).

The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *State ex rel. FirstTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995). In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

#### DISTRICT COURT PROPERLY DENIED IN FORMA PAUPERIS STATUS

Although Svoboda assigns three errors, they all pertain to whether the district court erred in denying Svoboda's request to proceed in forma pauperis on his underlying petition.

We first address Svoboda's argument regarding the district court not holding a hearing on his in forma pauperis application. As stated in § 25-2301.02 set forth above, a court can on its own

motion object to an application for in forma pauperis, and an evidentiary hearing shall be conducted on the objection “unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious.” And if no hearing is held, “the court shall provide a written statement of its reasons, finding, and conclusions for denial of the applicant’s application.” *Id.* No hearing was required in this case since the court objected to the application on its own motion and entered orders thoroughly explaining its reasoning for denying it. The court concluded that Svoboda was asserting a frivolous legal position, which is a position that is without rational argument based on the law or on the evidence. See *State v. Carter, supra*.

Svoboda’s remaining assigned errors challenge the district court’s conclusion that Svoboda’s petition was frivolous. We find no error in the court’s analysis of the law and facts raised by Svoboda’s petition. The district court’s reasoning has been set forth in detail above and we need not repeat it here.

There is no question that had Svoboda served his misdemeanor sentence first and then his felony sentences thereafter, the felony sentences would have been served consecutively to the misdemeanor sentence. Since the order on the felony sentences was silent as to whether they were to run concurrently or consecutively to any existing sentence, the law required the felony sentences to run consecutively to any existing sentence. See *State v. McNerny*, 239 Neb 887, 479 N.W.2d 454 (1992).

Svoboda’s asserted legal position appears to be that the felony sentences cannot be considered consecutive to the misdemeanor sentence if the felony sentences are served first. By flipping the order in which the sentences are served, Svoboda contends this makes the misdemeanor sentence consecutive to his felony sentences. This, he claims, impermissibly makes his 2021 misdemeanor sentence consecutive to the later imposed 2022 felony sentences, which is not allowed under the law. See *State v. Blevins*, 223 Neb. 864, 394 N.W.2d 663 (1986) (impermissible for sentencing court to require sentence to be served consecutively to possible future sentence on pending criminal charges). However, just because Svoboda will serve his misdemeanor jail sentence after serving his felony sentences does not change the fact that the felony sentences must be served consecutively, not concurrently, to the misdemeanor sentence, regardless of whether the felony sentences are served before or after the misdemeanor sentence. Because Svoboda was already in prison on his felony sentences when his appeal was resolved in the misdemeanor case, the county court acted within its authority to direct that Svoboda be brought to the county court jail upon completion of the felony sentences. Whether Svoboda served his misdemeanor sentence before or after his felony sentences does not matter; the felony sentences cannot run concurrently with the misdemeanor sentence. The total amount of time Svoboda must serve will be the same regardless of which order Svoboda serves his misdemeanor and felony sentences.

We find no error with the district court’s determination that Svoboda’s underlying petition asserts a legal position that is frivolous, meaning Svoboda is asserting a legal position that is without rational argument based on the law or on the evidence. See *State v. Carter, supra*.

## CONCLUSION

For the reasons set forth above, we affirm the district court's June 29, 2023, order denying Svoboda's request to proceed in forma pauperis.

AFFIRMED.