

Rel: June 26, 2020

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Ex parte James McConico, Jr.

PETITION FOR WRIT OF MANDAMUS

(In re: James McConico, Jr.

v.

Warden Mary Cook et al.)

(Escambia Circuit Court, CV-20-10)

PER CURIAM.

James McConico, Jr., an inmate at Fountain Correctional Facility, petitions this court for a writ of mandamus

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directing the Escambia Circuit Court ("the trial court") to employ a different standard for purposes of evaluating his indigent status.

The materials before this court indicate the following. On April 14, 2020, Escambia Circuit Judge Jeffrey A. White entered an order denying McConico's request for a waiver of the required filing fee in a civil action McConico had filed against Warden Mary Cook; Jeff Dunn, the commissioner of the Alabama Department of Corrections; Governor Kay Ivey; and others. In the order, the trial court stated that it had reviewed the "Average Inmate Deposit Balance" sheet that McConico had submitted. The trial court found that McConico had in excess of \$2,200 deposited into his prison account and that he "could have saved a portion of those funds to pay the filing fee in this matter (\$292)."

A copy of the complaint is not included in the materials submitted in support of McConico's petition for a writ of mandamus, nor is the affidavit of substantial hardship that McConico filed in the trial court in connection with that action. Instead, in support of his mandamus petition, McConico has submitted to this court an unsworn, undated

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affidavit and a record of his prison account that was sworn to and notarized on April 22, 2020, which was after the trial court entered its order denying the request for a waiver. Therefore, the trial court could not have had the affidavit and prison-account record that were submitted to this court before it when it entered the order at issue. Thus, the only document we can consider in reviewing this petition is the trial court's order of April 14, 2020. Ex parte K.A.S., 197 So. 3d 503, 507 (Ala. Civ. App. 2015) ("[I]n a mandamus proceeding, this Court will not consider evidence not presented to the trial court." Ex parte Cincinnati Ins. Co., 51 So. 3d 298, 310 (Ala. 2010)."); see also Rule 21(a)(1)(F), Ala. R. App. P.

"This Court has consistently held that the writ of mandamus is an extraordinary and drastic writ and that a party seeking such a writ must meet certain criteria. We will issue the writ of mandamus only when (1) the petitioner has a clear legal right to the relief sought; (2) the respondent has an imperative duty to perform and has refused to do so; (3) the petitioner has no other adequate remedy; and (4) this Court's jurisdiction is properly invoked. Ex parte Mercury Fin. Corp., 715 So. 2d 196, 198 (Ala. 1997). Because mandamus is an extraordinary remedy, the standard by which this Court reviews a petition for the writ of mandamus

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is to determine whether the trial court has clearly abused its discretion. See Ex parte Rudolph, 515 So. 2d 704, 706 (Ala. 1987).'

"Ex parte Flint Constr. Co., 775 So. 2d [805,] 808 [(Ala. 2000)]."

Ex parte Alabama Dep't of Human Res., 227 So. 3d 519, 521 (Ala. Civ. App. 2017).

Rule 21(a)(1) provides, in part:

"(1) General. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the appellate court having jurisdiction thereof with certificate of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain, under appropriate headings and in the order here indicated:

"....

"(F) Appendix. An appendix including copies of any order or opinion or parts of the record that would be essential to an understanding of the matters set forth in the petition. ..."¹

In Ex parte Veteto, 230 So. 3d 401, 403-04 (Ala. Civ. App. 2017), this court stated:

¹Rule 21(a)(1), Ala. R. App. P., was amended effective April 1, 2020, to add the requirement that a statement of the case be included in a petition for a writ of mandamus. Therefore, the language that now appears in Rule 21(a)(1)(F) formerly appeared in Rule 21(a)(1)(E), Ala. R. App. P.

"This court has held that petitions for the writ of mandamus that do not comply with Rule 21(a)(1)(E) [now Rule 21(a)(1)(F), see note 1, supra] by failing to include certain materials, such as court orders and other parts of the record essential to our consideration of the request for relief, are due to be dismissed. Ex parte Strickland, 172 So. 3d 857, 860 (Ala. Civ. App. 2014). Without such materials this court is unable to conduct a meaningful review or to grant the relief sought in the petition. In other words, without providing this court with such materials, a petitioner is unable to demonstrate that he or she has a clear legal right to the relief requested."

In this case, McConico asserts that the trial court applied an "unlawful standard" to determine whether he is indigent. However, nothing in the materials provided to us explains what standard the trial court used when deciding to deny McConico's request for a waiver. In his petition, McConico refers to § 15-12-1, Ala. Code 1975, which includes the following definition of an indigent defendant:

"(4) Indigent Defendant. Any person involved in a criminal or juvenile proceeding in the trial or appellate courts of the state for which proceeding representation by counsel is constitutionally required or is authorized or required by statute or court rule, including parents of children during the termination of parental rights hearings, who under oath or affirmation states that he or she is unable to pay for his or her representation, and who is found by the court to be financially unable to pay for his or her representation based on a written finding as further provided below that the person is indigent based on one of the following criteria:

"a. A person that has an income level at or below 125 percent of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States Department of Health and Human Services, unless the court determines that the person is able to pay for the cost of an attorney to represent the person on the pending case.

"b. A person that has an income level greater than 125 percent, but at or below 200 percent, of the most recently revised poverty income guidelines published by the United States Department of Health and Human Services and the court makes a written finding that not providing indigent defense services on the pending case would cause the person substantial hardship.

"c. A person that has an income level greater than 200 percent of the most recently revised poverty income guidelines published by the United States Department of Health and Human Services and the person is charged with a felony, and the court makes a written finding that not providing indigent defense services would cause the person substantial hardship."

As mentioned, the complaint in this action is not included in the materials that McConico submitted to this court. Although the precise nature of the action cannot be discerned from the materials submitted, we can glean from the case number assigned in the trial court, CV-20-10, that it is a civil action in which McConico is the plaintiff. It

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follows, therefore, that the action is not a criminal matter for which representation is constitutionally required. Moreover, because the action was not filed in the juvenile court, it follows that it is not a termination-of-parental-rights case. McConico does not contend that the action is one in which counsel is authorized or required by statute or court rule. Accordingly, based on the materials and argument before us, we conclude that the provisions of § 15-12-1(4) do not apply.

McConico has failed to provide this court with sufficient materials to enable us to conduct a meaningful review of the denial of his request for indigent status. Furthermore, to the extent it appears that the trial court denied the request based on the amount of money McConico had in his prison account at the time the motion for indigent status was filed, McConico has failed to demonstrate that he has a clear legal right to the relief he requests in his petition. Accordingly, the petition is due to be denied.

PETITION DENIED.

Thompson, P.J., and Moore, Donaldson, Edwards, and Hanson, JJ., concur.