

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs to the Western Section of the Court of Appeals
on March 30, 2007

JERRY L. JOHNS v. WILLIAM DALTON, ET AL.

**Direct Appeal from the Chancery Court for Davidson County
No. 05-42-III Ellen H. Lyle, Chancellor**

No. M2005-01784-COA-R3-CV - Filed on May 31, 2007

The trial court dismissed Petitioner's petition for writ of certiorari. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Jerry L. Johns, *Pro Se*.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Michael B. Schwegler, Assistant Attorney General, for the appellees, William Dalton, Townsend Anderson,

Lynn Duncan, Sheila Swearingen and Director, Tennessee Board of Paroles.

MEMORANDUM OPINION¹

Petitioner/Appellant Jerry L. Johns (Mr. Johns) is currently incarcerated and serving a seventy-three year prison sentence for offenses committed in 1985. This appeal arises from the trial court's dismissal of Mr. Johns' petition for a writ certiorari to review the Board of Probation and Parole's ("the Board's") denial of parole. Mr. Johns was formally advised of the Board's decision

¹**RULE 10. MEMORANDUM OPINION**

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

on August 27, 2003. He filed a petition for writ of certiorari in the Chancery Court of Davidson County. On September 24, 2003, the Clerk and Master of the chancery court informed Mr. Johns that his petition for writ of certiorari had not been filed and could not be filed until all outstanding court costs had been paid. Mr. Johns subsequently paid the outstanding fees, and in January 2005 he refiled his petition for writ of certiorari. In February 2005, the Board moved to dismiss the petition on the grounds that 1) Mr. Johns had failed to file a properly verified complaint under Tennessee Code Annotated §§ 27-8-104 and 106; 2) the petition was barred by the sixty-day limitations period prescribed at Tennessee Code Annotated § 27-9-102; 3) Mr. Johns had failed to state a claim for common law writ of certiorari; and 4) Mr. Johns had failed to provide a supersedeas bond or oath of pauper. In his reply to the Board's motion, Mr. Johns stated that his petition was one for certiorari pursuant to § 27-9-101. He also filed a "demand for equitable tolling," asserting the sixty-day limitations period should be tolled where his earlier petition was not filed for failure to pay outstanding court costs.

The trial court granted the Board's motion in April 2005 on the grounds that 1) Mr. Johns neither had his signature notarized nor stated that this was his first application for the writ as required by §§ 27-8-104 and 106, and 2) the petition was barred by the statute of limitations where it was filed beyond the sixty-day limitations period. The trial court further determined that the court clerk's inability under Tennessee Code Annotated § 41-21-812 to file Mr. Johns' 2003 petition pending payment by Mr. Johns of outstanding costs did not constitute an excuse for tolling the sixty-day limitations period. The court also noted that Mr. Johns had filed an affidavit of indigency to comply with the requirement of the pauper's oath. Mr. Johns filed a motion to vacate/alter/amend in May 2005. In his motion, he asserted that, although his petition was styled "Petition for Common Law Writ of Certiorari," he clearly had petitioned for review pursuant to § 27-9-101, which he asserted was the only remedy available to him. He further asserted that the requirements of §§ 27-8-104 and 106 accordingly were inapplicable. Mr. Johns additionally asserted that the sixty-day limitations period should have been tolled where the court clerk was unable under § 41-21-812 to file his original petition, and submitted that failure to toll the limitations period violated his constitutional rights. The trial court denied Mr. Johns' motion, and this appeal ensued.

Issues Presented

On appeal, Mr. Johns raises the following issue:

Whether refusing to file appellants' petition for certiorari violated his rights under the 1st and 14th Amendments of the United States Constitution and is T.C.A. § 41-21-801 et seq. unconstitutional because the courts are using it to deny convicts their 1st and 14th Amendment rights when they are indigent and/or owe money to a court?

The Board raises several additional issues on cross-appeal, as we slightly restate them:

- (1) Whether the trial court properly dismissed Mr. Johns' petition where it failed to meet the requirements of § 27-8-106.

- (2) Whether the trial court properly dismissed Mr. Johns' petition based on the limitations period prescribed at § 27-9-102.
- (3) Whether the clerk and master's refusal to file a timely petition under § 41-21-812 tolls the limitations period.

Standard of Review

The issues presented on appeal are questions of law. We review questions of law *de novo*, with no presumption of correctness afforded to the conclusions of the trial court. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005).

Analysis

The correct procedural vehicle through which prisoners may seek review of decisions made by administrative boards such as disciplinary boards and parole boards is the common-law writ of certiorari. *Willis v. Tennessee Dep't of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003). In seeking the writ, one must comply with both constitutional and statutory provisions. *E.g., Hughes v. NECX Disciplinary Bd. Members*, No. E2005-01972-COA-R3-CV, 2006 WL 656789, at *2 (Tenn. Ct. App. Mar. 16, 2006)(*no perm. app. filed*). The Tennessee Constitution provides that

[t]he Judges or Justices of the Inferior Courts of Law and Equity, shall have power in all civil cases, to issue writs of certiorari to remove any cause or the transcript of the record thereof, from any inferior jurisdiction, into such court of law, on sufficient cause, supported by oath or affirmation.

Tenn. Const. art. VI, § 10. The Tennessee Code similarly provides:

The judges of the inferior courts of law have the power, in all civil cases, to issue writs of certiorari to remove any cause or transcript thereof from any inferior jurisdiction, on sufficient cause, supported by oath or affirmation.

Tennessee Code Annotated § 27-8-104(a) (2000). The Code further provides:

[t]he petition for certiorari may be sworn to before the clerk of the circuit court, the judge, any judge of the court of general sessions, or a notary public, and shall state that it is the first application for the writ.

Tenn. Code Ann. § 27-8-106 (2000).

In this case, the petition filed by Mr. Johns failed to comply with these requirements where it undisputedly was not verified and failed to state that it is the first application. This Court has held that failure to comply with these two statutory requirements is a proper basis for dismissal by the trial

court. *Hughes*, 2006 WL 656789, at *3 (citing *See Bowling v. Tenn. Bd. of Paroles*, No. M2001-00138-COA-R3-CV, 2002 WL 772695, at *3 (Tenn. Ct. App. Apr. 30, 2002)). Additionally, the fact that Mr. Johns is proceeding *pro se* does not excuse him from complying with the statutorily prescribed procedural requirements. *See id.* (citations omitted). Accordingly, the trial court properly dismissed Mr. Johns' petition.

As the plaintiff asserted in *Hughes*, Mr. Johns likewise contends that his petition is not one for common law writ of certiorari, but one for a statutory writ pursuant to Tennessee Code Annotated § 27-9-101, *et. seq.* He argues that, accordingly, his petition is not required to be filed in accordance with § 27-8-106. As we noted in *Hughes*, “[t]his contention, as the saying goes, proves too much. If the plaintiff’s petition is one for a *statutory* writ of certiorari, it is subject to dismissal as being the wrong vehicle to ‘challeng[e] a disciplinary action.’” *Id.* (quoting *Rhoden v. State Dep't of Corr.*, 984 S.W.2d 955, 956 (Tenn. Ct. App.1998)).

Holding

In light of the foregoing, the judgment of the trial court is affirmed. Additional issues are pretermitted as unnecessary to our disposition of this matter. Costs are taxed to the Appellant, Jerry L. Johns.

DAVID R. FARMER, JUDGE