

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Submitted on Briefs June 18, 2008

**TONY STEWART v.
TENNESSEE BOARD OF PROBATION AND PAROLE., ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 07-173-IV Richard H. Dinkins, Chancellor**

No. M2007-01425-COA-R3-CV - Filed July 11, 2008

Tony Stewart (“Petitioner”) is incarcerated at the Riverbend Maximum Security Institution. Petitioner had a parole hearing in August of 2006. Petitioner was denied parole and informed that his next parole hearing would be in August of 2012. Petitioner filed an administrative appeal and lost. Thereafter, he filed a petition for common law writ of certiorari claiming the Board of Probation and Parole had acted arbitrarily, illegally, and had exceeded its jurisdiction. Petitioner sued numerous defendants who collectively filed a motion to dismiss asserting that the Trial Court did not have subject matter jurisdiction because: (1) the petition was not verified; and (2) the petition did not state that it was the first application for the writ. The Trial Court agreed with the defendants that the petition was fatally deficient for these reasons and dismissed the petition. Petitioner appeals, and we affirm.

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

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Tony Stewart, pro se Appellant.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Joshua D. Baker, Assistant Attorney General, Nashville, Tennessee, for the Appellees, Tennessee Board of Probation and Parole, Charles Traughber, Gayle Barbee, Patsy Bruce, Emily S. Hudgens-Wilson, James Austin, and Jack Elder.

OPINION

Background

Petitioner currently is incarcerated at the Riverbend Maximum Security Institution in Nashville, Tennessee. In December of 1998, Petitioner was convicted of various felonies and sentenced to ten years of probation. In June of 2000, Petitioner was convicted of committing additional felonies and sentenced to twelve years in prison, to be served consecutively to the original ten year sentence. Thus, at that point in time, Petitioner effectively was sentenced to twenty-two years in prison.

In June of 2003, Petitioner was released on parole. In June of 2004, Petitioner's parole was revoked after he was arrested and once again charged with committing a felony. Petitioner was convicted on the new felony charge and sentenced to two years in prison, to be served consecutive to his outstanding sentences.

Petitioner appeared before the Tennessee Board of Probation and Parole in August of 2006. The following month, Petitioner was denied parole with the Board's stated reason being the seriousness of his most recent offense. Petitioner's next parole hearing was scheduled for August of 2012.

Petitioner filed an administrative appeal, which was denied. After exhausting his administrative remedies, Petitioner filed a petition for common law writ of certiorari in January of 2007. Petitioner claimed, *inter alia*, that the Board of Probation and Parole (the "Board") had acted arbitrarily and illegally when it denied him parole and then set his next parole hearing date in 2012. Petitioner also claimed that the Board had exceeded its jurisdiction. Petitioner sued as defendants the Board, as well as the Board's chairman, two members of the Board, and three employees (collectively referred to as "Defendants").

Defendants filed a motion to dismiss. Defendants claimed that the Trial Court lacked subject matter jurisdiction because the petition was not verified by a sworn affidavit as required by Tenn. Code Ann. § 27-8-104, and because the petition did not state that it was the first application for the writ as required by Tenn. Code Ann. § 27-8-106. Petitioner responded to the motion to dismiss claiming it was properly verified or, if it was not, the Trial Court should waive the requirements because Petitioner was pro se, had a low I.Q., and was uneducated.

The Trial Court issued a memorandum opinion and order granting Defendants' motion to dismiss. The Trial Court concluded that:

Tenn. Code Ann. §§ 27-8-104 & -106 confer jurisdiction only over a verified Petition that states that it is the first application for the writ. If a Petition is not so verified or does not contain the appropriate language, then the Court does not obtain jurisdiction over it.

Petitioner appeals claiming the Trial Court erred when it dismissed the petition because it was not verified and because it failed to contain language that the petition was the first application for the writ.

Discussion

In *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000), our Supreme Court set forth the standard of review when reviewing a motion to dismiss based on lack of subject matter jurisdiction. The Court stated:

A motion to dismiss for lack of subject matter jurisdiction falls under Tennessee Rule of Civil Procedure 12.02(1). The concept of subject matter jurisdiction involves a court's lawful authority to adjudicate a controversy brought before it. See *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 639 (Tenn. 1996); *Standard Sur. & Casualty Co. v. Sloan*, 180 Tenn. 220, 230, 173 S.W.2d 436, 440 (1943). Subject matter jurisdiction involves the nature of the cause of action and the relief sought, see *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994), and can only be conferred on a court by constitutional or legislative act. See *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989). Since a determination of whether subject matter jurisdiction exists is a question of law, our standard of review is de novo, without a presumption of correctness. See *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

Northland Ins. Co., 33 S.W.3d at 729.

Tenn. Code Ann. § 27-8-104(a) (2000) provides that “[t]he 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.” Similarly, Tenn. Code Ann. § 27-8-106 (2000) provides that “[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.”

This Court recently addressed whether the requirements contained in Tenn. Code Ann. § 27-8-104(a) and § 27-8-106 were mandatory so that the absence of which would deprive a trial court of subject matter jurisdiction. In *Jackson v. Tennessee Department of Correction*, 240 S.W.3d 241 (Tenn. Ct. App. 2006), we stated:

A prisoner in the custody of the Tennessee Department of Correction filed a pro se petition for common law writ of certiorari in the trial court seeking to contest the prison disciplinary board's

findings. The department filed a motion to dismiss for lack of subject matter jurisdiction, citing the petition's lack of notarization, its failure to state that it was the first application for the writ, and the prisoner's failure to file it within sixty (60) days of the administrative action. The trial court granted the department's motion to dismiss. The prisoner filed a motion for a new trial asserting that he complied with Tennessee Rule of Civil Procedure 5.06. The trial court denied the motion. The prisoner timely filed an appeal to this court.

Id. at 242.

When addressing the particular issues in *Jackson*, the *Jackson* Court noted that it already had addressed the identical issues in *Wilson v. Tennessee Department of Correction*, No. W2005-00910-COA-R3-CV, 2006 WL 325933, at *4 (Tenn. Ct. App. Feb.13, 2006). The *Jackson* Court quoted the following from *Wilson*:

In order for a petition for a common law writ of certiorari to be valid, the petitioner must verify the contents of the petition and swear to the contents of the petition under oath, typically by utilizing a notary public. *See* Tenn. Code Ann. §§ 27-8-104(a), -106 (2000); *Underwood*, 2005 WL 123501, at *1-*2, 2005 Tenn. App. LEXIS 23, at *7-8; *Bowling v. Tenn. Bd. of Paroles*, No. M2001-00138-COA-R3-CV, 2002 WL 772695, at *2, 2002 Tenn. App. LEXIS 291, at *9 (Tenn. Ct. App. Apr. 30, 2002). As the Tennessee Court of Criminal Appeals noted, “merely swearing to having knowledge of the allegations contained in the petition is insufficient to qualify as a verification under oath. To conclude otherwise would allow a petitioner to file a petition which knowingly contained frivolous, false, and even perjured allegations or statements of facts.” *Montague*, 2001 WL 1011464, at *2, 2001 Tenn. Crim. App. LEXIS 692, at *5. Subject matter jurisdiction “can only be conferred on a court by constitutional or legislative act.” *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000) (citing *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989)). The Tennessee Constitution and the statutes promulgated by the legislature require that a petition for a writ of common law certiorari be made under oath. *See* Tenn. Const. art. 6, § 10; Tenn. Code Ann. §§ 27-8-104(a), -106 (2000). While *Wilson*'s petition contained his verification that its contents were true and correct to the best of his knowledge, he failed to have the petition notarized by a notary public. Accordingly, the trial court did not err in dismissing his petition for a lack of subject matter jurisdiction. *Cf.* *Underwood*, 2005 WL 123501, at *1-*2, 2005 Tenn. App. LEXIS 23,

at *7-8 (holding that a trial court correctly dismissed a prisoner's petition for a writ of common law certiorari when the prisoner failed to verify his petition, therefore, the trial court lacked subject matter jurisdiction); *Bowling*, 2002 WL 772695, at *2, 2002 Tenn. App. LEXIS 291, at *9 (ruling that a prisoner's petition for a writ of common law certiorari was properly dismissed when the prisoner failed to verify the contents of his petition).

Jackson, 240 S.W.3d at 245 (quoting *Wilson*, 2006 WL 325933, at *3-*4)(footnote omitted).

Based on the foregoing, this Court in *Jackson* affirmed the dismissal of the petition because it was not notarized. *Jackson*, 240 S.W.3d at 245-46. The *Jackson* Court then went one step further and held that the failure to provide a statement that the petition was the first application for the writ was an additional basis on which to dismiss the petition. According to *Jackson*:

We are mindful of the fact that the prisoner in *Wilson* did state in his petition that it was his first application for the writ. *Wilson*, 2006 WL 325933, at *4, 2006 Tenn. App. LEXIS 91, at *3. No such statement can be found in Jackson's petition. As this statement is required by statute to be in the petition, *see* Tenn. Code Ann. § 27-8-106 (2000), we find that the trial court did not err when it dismissed the petition for this reason as well.

Jackson, 240 S.W.3d at 246.

This Court reached an identical result in *Hughes v. NECX Disciplinary Board Members*, No. E2005-01972-COA-R3-CV, 2006 WL 656789 (Tenn. Ct. App. Mar. 16, 2006). According to *Hughes*:

The petition filed by the plaintiff is not verified and it fails to state that it is the first application, as required by the above-quoted constitutional and statutory provisions. Failure to comply with these two requirements has been held to be a proper basis for dismissal. *See Bowling v. Tenn. Bd. of Paroles*, No. M2001-00138-COA-R3-CV, 2002 WL 772695, at *3 (Tenn. Ct. App. M.S., filed April 30, 2002). The fact that the plaintiff is representing himself in this case does not excuse him "from complying with the same applicable substantive and procedural law that represented parties must comply with." *Id.*, at *3 n.6 (citing *Hodges v. Tenn. Att'y Gen.*, 43 S.W.3d 918, 920 (Tenn. Ct. App. 2000); *Kaylor v. Bradley*, 912 S.W.2d 728, 733 n.4 (Tenn. Ct. App. 1995)).

Hughes, 2006 WL 656789, at *3.

In the case now before us, the petition contains only a certificate of service which states: "I certify that a copy of the above has been forwarded by first class postage pre paid US mail, to office of Cristi Scott at 2 Metro Chtse, Nash, Tn 37201 on this 19 day of January, 2007." The Certificate of Service is signed by Petitioner and notarized. Noticeably lacking from the petition is any verification wherein Petitioner verifies the contents of the petition. As *Jackson*, *Wilson*, and *Hughes* make clear, a petition must contain both a verification and a notarization. Since the petition in the present case lacked a verification, the Trial Court correctly determined that it lacked subject matter jurisdiction.

The above case law also makes it abundantly clear that applicable law requires that a petition for writ of certiorari "shall state that it is the first application for the writ." Tenn. Code Ann. § 27-8-106. The petition in the present case does not so state. Because this statement is required by law to be in the petition, we follow our holding in *Jackson* and dismiss "the petition for this reason as well." See *Jackson*, 240 S.W.3d at 246.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Tony Stewart, and his surety, if any.

D. MICHAEL SWINEY, JUDGE