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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2160006

Ex parte Carl Michael Seibert

PETITION FOR WRIT OF MANDAMUS

(In re: Carl Michael Seibert

v.

Lorrie Ann Fields Seibert)

(Madison Circuit Court, DR-13-900006.01)

MOORE, Judge.

Carl Michael Seibert ("the former husband") petitions this court for a writ of mandamus directing the Madison Circuit Court ("the trial court") to set aside as void two

orders entered in case number DR-13-900006, the divorce action between the former husband and Lorrie Ann Fields Seibert ("the former wife"). We deny the petition.

Background and Procedural History

On October 5, 2012, the circuit-court judges of the Twenty-Third Judicial Circuit, of which the trial court is a part, adopted a "standing pendente lite order" that is "to be considered entered in every original contested divorce action filed in [that] Judicial Circuit without further order." On January 2, 2013, the former wife filed in the trial court a complaint seeking a divorce from the former husband based on the ground of incompatibility of temperament.[1] The former wife served the former husband with the complaint and a copy of portions of the standing pendente lite order, including a provision prohibiting the former wife and the former wife from harassing each other.

[1]We have taken judicial notice of the record from Seibert v. Seibert (No. 2140062, July 31, 2015), ___ So. 3d ___ (Ala. Civ. App. 2015) (table), the appeal of the judgment entered in the divorce action. See City of Mobile v. Matthews, [Ms. 2150237, July 15, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016) ("[A] court may take judicial notice of its own records.").

On August 12, 2013, the former wife filed a motion seeking to hold the former husband in contempt for, among other things, violating the harassment provision in the standing pendente lite order. On August 20, 2013, the trial court entered an order adopting the standing pendente lite order and stating that it considered the standing pendente lite order "to have come into full force and effect with the filing of [the divorce] action." On September 4, 2013, the former husband answered the former wife's motion for contempt, stating, among other things, that the standing pendente lite order had not been in force until it was adopted by the trial court on August 20, 2013. Subsequently, the former wife filed three more motions requesting that the former husband be held in contempt for violating the standing pendente lite order; the former husband also filed a motion to hold the former wife in contempt for violating the standing pendente lite order. After a trial, the trial court entered a judgment divorcing the parties and denying all the motions for contempt. The former husband appealed, and this court affirmed the divorce judgment, without an opinion. Seibert v. Seibert (No. 2140062, July 31, 2015), ___ So. 3d ___ (Ala. Civ. App. 2015) (table).

On December 6, 2013, the former husband was indicted on a charge of aggravated stalking in the second degree; an element of that crime is that the defendant's conduct must have "violate[d] [a] court order or injunction." Ala. Code 1975, § 13A-6-91.1. The former husband asserts that, through discovery, he was informed that he had been accused of stalking the former wife in violation of the standing pendente lite order. The former husband moved to dismiss the indictment on the basis that the standing pendente lite order was void; that motion was denied. The former husband did not seek mandamus review of the order denying the motion to dismiss, and the criminal action proceeded to trial. According to the former husband, the judge presiding over the criminal action declared a mistrial after the jury reported that it could not reach a unanimous verdict.

At some point, the former husband filed a modification action, designated as case number DR-13-900006.01. The trial court entered a final judgment in the modification action on August 17, 2016. The former husband filed a postjudgment motion in the modification action on August 22, 2016, seeking to vacate the standing pendente lite order. The trial court

denied that motion on August 25, 2016. The former husband then filed, on September 19, 2016, a "motion to reconsider and vacate plainly void order"; the trial court entered an order denying that motion on September 20, 2016. The former husband filed his petition for a writ of mandamus with this court on October 4, 2016.

Discussion

In his petition for a writ of mandamus, the former husband seeks an order from this court compelling the trial court to vacate the standing pendente lite order entered in case number DR-13-900006 and the August 20, 2013, order adopting the standing pendente lite order entered in case number DR-13-900006. However, the former husband did not file a motion to vacate those orders in case number DR-13-900006. The record from that case shows that the trial court entered a final judgment in case number DR-13-900006 on July 10, 2014, which did not incorporate either of the interlocutory orders. By operation of law, those interlocutory orders were superseded by the final judgment and no longer have any legal effect. See F.M. v. B.S., 170 So. 3d 663, 668 (Ala. Civ. App. 2014).

The former husband filed his motions to vacate the orders in case number DR-13-900006.01, the modification action. Assuming the former husband validly filed his motions in the modification action, which we do not decide, the former husband has failed to cite any legal authority by which the trial court could have vacated the standing pendente lite order and the August 20, 2013, order. Neither Rule 59, Ala. R. Civ. P., nor Rule 60(b), Ala. R. Civ. P., the only legal authorities upon which the former husband relies, permit a trial court to vacate interlocutory orders. Both Rule 59 and Rule 60(b) apply solely to final judgments. See Ex parte Troutman Sanders, LLP, 866 So. 2d 547, 549 (Ala. 2003) (explaining that a Rule 59 motion cannot be used as a vehicle to attack an interlocutory order); and EB Invs., L.L.C. v. Atlantis Dev., Inc., 930 So. 2d 502, 508 (Ala. 2005) (pointing out that Rule 60(b) does not apply to interlocutory orders).

The former husband complains that, unless the trial court declares the orders void, he will be subject to continued criminal prosecution under Ala. Code 1975, § 13A-6-91.1. Nevertheless, the former husband has failed to show that the trial court had jurisdiction to vacate the orders and a

mandatory duty to vacate the orders in case number DR-13-900006.01.

> "A writ of mandamus is an extraordinary remedy available only when the petitioner demonstrates: '"(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court."' Ex parte Nall, 879 So. 2d 541, 543 (Ala. 2003) (quoting Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001))."

Ex parte T.J., 74 So. 3d 447, 450 (Ala. Civ. App. 2011) (emphasis added). We conclude that, if § 13A-6-91.1 requires proof of the violation of a valid court order, which we do not decide, but see Morton v. State, 651 So. 2d 42, 46-47 (Ala. Crim. App. 1994), the former husband cannot negate that essential element of the criminal prosecution through the instant petition for a writ of mandamus. However, our opinion does not preclude the former husband from seeking appellate review of any order or judgment entered in any subsequent criminal proceeding regarding the validity of the orders the former husband allegedly violated.

PETITION DENIED.

Pittman and Donaldson, JJ., concur.

Thompson, P.J., dissents, with writing, which Thomas, J., joins.

THOMPSON, Presiding Judge, dissenting.

On October 5, 2012, the judges of the Circuit Court of Madison County ("the trial court") each signed an "Order Regarding Issuance of Standing Pendente Lite Orders Upon Filing of Original Contested Divorce Action" ("the 2012 standing pendente lite order"), which contained, in relevant part, a provision stating that parties to a divorce action were not to harass each other. On January 3, 2013, Lorrie Ann Fields Seibert ("the wife") filed her divorce complaint seeking a divorce from Carl Michael Seibert ("the husband"). In the divorce action, both parties, among other things, sought to have the other held in contempt for violations of the 2012 standing pendente lite order, which was specifically adopted in the divorce action by the trial court in an August 20, 2013, order ("the 2013 pendente lite order"). The husband did not file a petition for a writ of mandamus challenging that order.

In the divorce action, the trial court did not expressly rule on the parties' competing contempt claims, but in its July 10, 2014, divorce judgment, the trial court denied all claims not specifically addressed in that judgment. Although

the husband appealed that judgment, he did not assert any argument in that appeal pertaining to the 2013 pendente lite order. The husband did not assert on appeal of that judgment the issues he raises in this petition. See Seibert v. Seibert (No. 2140062, July 31, 2015), ___ So. 3d ___ (Ala. Civ. App. 2015) (table).

Assuming, solely for the purpose of this writing, that the 2013 pendente lite order was not subsumed into the divorce judgment, this court may not review the 2013 pendente lite order by way of this untimely petition for a writ of mandamus. See Ex parte Pelham Tank Lines, Inc., 898 So. 2d 733, 734 (Ala. 2004) (the presumptively reasonable time in which to file a petition for writ of mandamus is within 42 days of the entry of the order being challenged). Further, the husband has not filed any pleadings or motions in the divorce action, or an independent action, seeking to set aside any orders or judgments in the divorce action based on the arguments he currently asserts before this court. Accordingly, there is no order entered in the divorce action from which the husband could seek review in this court, and, therefore, this court

would have no jurisdiction to address the husband's arguments in connection with that divorce action.

I also conclude that this court has no jurisdiction to consider the husband's arguments as part of the husband's later modification and Rule 60(b), Ala. R. Civ. P., action. First, I conclude that the 2013 pendente lite order was superseded by the divorce judgment. See F.M. v. B.S., 170 So. 3d 663, 668 (Ala. Civ. App. 2014); and S.K. v. N.B., 160 So. 3d 27, 31 (Ala. Civ. App. 2014). However, even assuming that the husband could seek to set aside the 2013 pendente lite order as a part of the modification action, this court has no jurisdiction, under the procedural history as presented to this court by the parties, to address the issue.

The materials submitted to this court indicate that on August 17, 2016, the trial court entered a judgment in the modification action initiated by the husband in which it specified that it was addressing both the husband's petition to modify and a Rule 60(b), motion filed by the husband.[2] No

[2]In its August 17, 2016, judgment, the trial court modified custody of one of the parties' twin daughters, modified the visitation provisions of the divorce judgment, and addressed certain issues pertaining to property; it then denied all other requested relief not addressed in that judgment.

pleadings or motions that resulted in that August 17, 2016, judgment are in the materials submitted to this court by the parties. Accordingly, this court is unable to determine the nature of the relief the husband sought under Rule 60(b).

Regardless, the denial of a Rule 60(b) motion is reviewable by appeal, not by a petition for a writ of mandamus. Ex parte King, 821 So. 2d 205, 209 (Ala. 2001). Thus, in order to obtain review of that part of the August 17, 2016, judgment denying his request for relief pursuant to Rule 60(b), the husband was required to have filed a notice of appeal within 42 days of the entry of that judgment, i.e., by September 28, 2016. Reeves v. State, 882 So. 2d 872, 873-74 (Ala. Civ. App. 2003). The husband did not appeal the August 17, 2016, denial of his Rule 60(b) motion. This court cannot construe the husband's current petition for a writ of mandamus as a challenge of the August 17, 2016, denial of his request for Rule 60(b) relief because that ruling was reviewable by appeal rather than by a petition for a writ of mandamus. Ex parte S.B., 164 So. 3d 599, 602 (Ala. Civ. App. 2014); Ex parte Gallant, [Ms. 2150949, Oct. 21, 2016] ___ So. 3d ___, ___ (Ala. Civ. App. 2016) ("This court reviews the denial of

a Rule 60(b)[] motion by appeal and not by a petition for a writ of mandamus."). Also, even if this court were to interpret the husband's petition for a writ of mandamus as a notice of appeal of the August 17, 2016, judgment, it was filed outside the 42 days allowed for taking such an appeal.

Rather than appealing the denial of his initial request for Rule 60(b) relief, the husband filed in the trial court an August 22, 2016, "motion to vacate or objection," in which he argued that the 2012 standing pendente lite order was void ab initio and, therefore, that the 2012 standing pendente lite order and the 2013 pendente lite order must be "vacated and set aside." On August 25, 2016, the trial court entered an order that, among other things, specifically denied the husband's August 22, 2016, motion.

The main opinion has characterized the husband's August 22, 2016, motion as a postjudgment motion, i.e., one filed pursuant to Rule 59, Ala. R. Civ. P. ___ So. 3d at ___ ("The former husband filed a postjudgment motion in the modification action on August 22, 2016, seeking to vacate the standing pendente lite order."). I disagree with the main opinion, however, when it concludes that that motion could be

considered as having been filed in reference to the 2012 standing pendente lite order and the 2013 pendente lite order entered in the divorce action; rather, that motion was filed with regard to the August 17, 2016, judgment entered in the modification action.[3] It is arguable that the husband's August 22, 2016, motion is one made pursuant to Rule 59(e), Ala. R. Civ. P., both because it was filed within the 30 days of the August 17, 2016, judgment, as required by Rule 59(e), and because it appears to seek reconsideration of the trial court's denial of a request for the type of relief arguably available under Rule 60(b).[4] I note that the husband has failed to submit to this court portions of the record regarding the nature of the Rule 60(b) relief he sought as a part of, or together with, his modification action, which relief was denied in the August 17, 2016, judgment. In the absence of such evidence, this court may not assume that the

[3]The main opinion concludes that the August 22, 2016, motion, as well as a later, successive motion, could not be validly filed as Rule 59(e) motions from the 2012 standing pendente lite order and the 2013 pendente lite order entered in the divorce action because such a motion may not be made in reference to a nonfinal order. ___ So. 3d at ___.

[4]I address the appropriateness of such a request for relief later in this writing in note 5, infra.

relief for which the husband argued in his August 22, 2016, motion was different from the relief that he requested together with the modification claims, and upon which the trial court ruled in its August 17, 2016, judgment. Accordingly, in order to avoid presuming error on the part of the trial court, I conclude that this court must assume that the Rule 60(b) request for relief the trial court considered before entering its August 17, 2016, judgment and the relief sought in the August 22, 2016, motion were the same in nature.

If this court interprets the August 22, 2016, motion as a postjudgment motion, this court lacks jurisdiction to consider the husband's arguments. A trial court does not have jurisdiction to reconsider, through a Rule 59(e) postjudgment motion, a denial of a Rule 60(b) motion. Ex parte Keith, 771 So. 2d 1018, 1022 (Ala. 1998). To the extent that the husband, in his August 22, 2016, motion, sought to have the trial court reconsider its denial, in the August 17, 2016, modification judgment, of his request for Rule 60(b) relief, the trial court had no jurisdiction to do so. As already explained, the husband did not timely appeal the denial of his

request for Rule 60(b) relief in the August 17, 2016, judgment.

On the other hand, it is arguable that the husband's August 22, 2016, motion was a Rule 60(b) motion, albeit one on which the husband was not likely to prevail.[5] Even if this court were to assume that the husband's August 22, 2016, motion was a Rule 60(b) motion, this court does not have jurisdiction to consider the husband's petition. The husband has failed to demonstrate that the August 22, 2016, motion sought relief that was different from that addressed by the trial court in its August 17, 2016, judgment. The trial court

[5]I agree with the statement in the main opinion that a Rule 60(b) motion does not provide relief with regard to interlocutory orders such as the 2012 standing pendente lite order and the 2013 pendente lite order, assuming that those orders have not been subsumed by the divorce judgment. See E.B. Invs., L.L.C. v. Atlantis Dev., Inc., 930 So. 2d 502, 508 (Ala. 2005). However, whether such relief is ultimately available under Rule 60(b) does not determine the nature of the motion. In other words, "it is the substance of a motion, not its nomenclature, that is controlling; 'the relief sought in a motion determines how to treat the motion.'" Campton v. Miller, 19 So. 3d 245, 249 (Ala. Civ. App. 2009) (quoting Allied Prods. Corp. v. Thomas, 954 So. 2d 588, 589 n. 3 (Ala. Civ. App. 2006)) (emphasis added). The nature of a part of the relief the husband sought in his August 22, 2016, motion i.e., to have certain orders declared void, is a type of relief contemplated by Rule 60(b), although that request for relief would be appropriately denied because it was made in reference to certain pendente lite orders.

was without jurisdiction to consider a successive Rule 60(b) motion. Wadsworth v. Markel Ins. Co., 906 So. 2d 179, 182 (Ala. Civ. App. 2005).

In Wadsworth v. Markel Insurance Co., supra, the Wadsworths filed a series of successive Rule 60(b) motions. This court dismissed the appeal of the denial of one of those Rule 60(b) motions on the basis that the trial court had lacked jurisdiction to consider that motion and, therefore, this court did not have jurisdiction. In doing so, this court stated that "[s]uccessive Rule 60(b) motions on the same grounds are generally considered motions to reconsider the original ruling and are not authorized by Rule 60(b)." Wadsworth v. Markel Ins. Co., 906 So. 2d at 182.

> "'In other words, a party who has previously filed an unsuccessful motion seeking relief under Rule 60(b) may not properly file a second motion in the trial court that, in effect, requests the trial court to revisit its denial of the first motion, such as by reasserting the grounds relied upon in the first motion.'"

Williams v. Williams, 70 So. 3d 332, 334 (Ala. Civ. App. 2009) (quoting Pinkerton Sec. & Investigations Servs., Inc. v. Chamblee, 934 So. 2d 386, 390(Ala. Civ. App. 2005)) (emphasis omitted).

In the absence of proof from the husband that the relief he sought in his August 22, 2016, motion was in the nature of a Rule 60(b) motion, and that that relief was different from the request for relief upon which the trial court had already ruled in its August 17, 2016, judgment, the trial court was without jurisdiction to consider that successive Rule 60(b) motion. Even assuming further that the trial court could consider that successive Rule 60(b) motion, the appropriate method of obtaining review in this court would be by way of an appeal. Ex parte King, supra.

The husband's September 19, 2016, motion, referenced in the main opinion, argued the same issues and grounds the husband raised in his August 22, 2016, motion. Accordingly, for the same reasons explained in this writing, the trial court lacked jurisdiction to consider the September 19, 2016, motion, and this court does not have jurisdiction over a petition for a writ of mandamus from the denial of that motion. Ex parte King, supra; Wadsworth v. Markel Ins. Co., supra.

For the reasons discussed in this writing, the husband's petition for a writ of mandamus is due to be dismissed; therefore, I dissent.

Thomas, J., concurs.