REL: July 17, 2020

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190469

Costillo A. Johnson a/k/a Sheik A.B.A. Imhotep El

v.

Alabama Department of Corrections and Tyler Ausborn

Appeal from Montgomery Circuit Court
(CV-19-502)

MOORE, Judge.

Costillo A. Johnson, also known as Sheik A.B.A. Imhotep El ("Johnson"), appeals from a judgment of the Montgomery Circuit Court ("the trial court") dismissing his complaint against the Alabama Department of Corrections ("the ADOC") and Tyler Ausborn.

Procedural History

On October 15, 2019, Johnson, who is currently incarcerated at the Bibb County Correctional Facility, filed in the trial court a complaint for a declaratory judgment, pursuant to § 6-6-221, Ala. Code 1975. He asserted, among other things, that he had been issued a citation by Ausborn, a guard at the correctional facility, for his purported possession of a cellular telephone and charger and that Ausborn had failed to comply with the ADOC's regulations and requirements related to Ausborn's electronic signature on the citation, that Ausborn had failed to use the updated version of the citation form in accordance with the ADOC's regulations, and that Ausborn's supervisor had failed to conduct an investigation surrounding the circumstances of the incident as required by the ADOC's regulations. Johnson sought a judgment declaring that the failure of Ausborn and his supervisor to comply with the ADOC's regulations constituted an unauthorized use of the citation process, thus rendering the citation at issue invalid, and that he was denied due process by the issuance of the citation. Johnson filed an affidavit of substantial hardship along with his complaint, seeking to proceed in forma pauperis.

On December 2, 2019, the trial court entered an order denying Johnson's request to proceed in forma pauperis, pursuant to § 14-15-5(b), Ala. Code 1975, a part of the Alabama Prisoner Litigation Reform Act ("the Act"), § 14-15-1 et seq., Ala. Code 1975. The order further provided that, "after a further review of the [complaint], this Court finds that this matter is due to be DISMISSED, WITHOUT PREJUDICE, pursuant to Alabama Code 1975 § 14-15-4(D)(1)(a), (c) and (e)." (Capitalization in original.) After his postjudgment motion was denied, Johnson filed a notice of appeal to the Alabama Court of Criminal Appeals on December 19, 2019. On February 28, 2020, the Court of Criminal Appeals transferred the appeal to the Alabama Supreme Court for lack of appellate jurisdiction. The Alabama Supreme Court subsequently transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

Discussion

As an initial matter, we conclude that Johnson has no right to appeal the order entered by the trial court on December 2, 2019. In Vann v. Cook, 989 So. 2d 556, 559 (Ala. Civ. App. 2008), this court held:

> "The payment of a filing fee or the filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action. See De-Gas, Inc. v. Midland Res., 470 So. 2d 1218, 1222 (Ala. 1985); see also Farmer v. Farmer, 842 So. 2d 679, 681 (Ala. Civ. App. 2002) ('The failure to pay the filing or docketing fee is a jurisdictional defect.')."

In this case, Johnson applied to the trial court for a waiver of the filing fee to commence the underlying civil action, but the trial court denied his application. As a result, the trial court lacked jurisdiction to take any action on the complaint other than to dismiss the complaint for nonpayment of the filing fee. See Johnson v. Hetzel, 100 So. 3d 1056, 1057 (Ala. 2012). Any other order would be void for lack of subject-matter jurisdiction. Id.

In the December 2, 2019, order, the trial court purported to dismiss Johnson's complaint based on the Act, but it had no jurisdiction to consider the effect of the Act because no action had been properly commenced. That part of the order purporting to dismiss the complaint based on the Act is void and will not support an appeal. Id. We, therefore, do not consider any arguments raised by Johnson insofar as he asserts that the trial court erred in applying the Act to dismiss the

underlying civil action, and we dismiss the appeal insofar as it challenges that aspect of the December 2, 2019, order.

We nevertheless exercise our discretion to review that part of the trial court's order denying Johnson's request to proceed in forma pauperis by treating the appeal, in part, as a petition for the writ of mandamus, which is the proper method for reviewing such an order. See Goldsmith v. State, 709 So. 2d 1352, 1353 (Ala. Crim. App. 1997).

> "'"A writ of mandamus is an extraordinary remedy that is available when a trial court has exceeded its discretion. Ex parte Fidelity Bank, 893 So. 2d 1116, 1119 (Ala. 2004). A writ of mandamus is 'appropriate when the petitioner can show (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 BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001)."'"

Ex parte Brown, 963 So. 2d 604, 606–07 (Ala. 2007) (quoting Ex parte Rawls, 953 So. 2d 374, 377 (Ala. 2006), quoting in turn Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005)).

The trial court denied Johnson's request to proceed in forma pauperis pursuant to § 14-15-5(b), which provides:

> "The court shall deny in forma pauperis status to any prisoner who has had three or more pro se civil actions or appeals dismissed by any federal or state

> court for being frivolous, malicious, or for failure to state a claim, unless the prisoner shows that he or she is in imminent danger of serious physical injury at the time of filing his or her motion for judgment, or the court determines that it would be manifest injustice to deny in forma pauperis."

Johnson argues before this court, as he did in his postjudgment motion in the trial court, that any previous lawsuits he may have commenced were commenced before the enactment of § 14-15-5. He asserts that applying the statute retroactively to include lawsuits that he had commenced and that had been dismissed before the enactment of § 14-15-5 is prohibited.

First, Johnson asserts that retroactive application of § 14-15-5 is prohibited by the ex post facto clause of Article I, § 22, of the Alabama Constitution of 1901. In Elliott v. Mayfield, 4 Ala. 417 (1842), the Alabama Supreme Court clarified, however, that "the prohibition of the constitution of the United States against the passage by Congress of ex post facto laws[] applies only to criminal cases" and that "such is held to be the true construction of a similar clause in the Bill of Rights of this State." 4 Ala. at 423-24. Because the relief sought by Johnson's complaint is civil in nature and because the denial of Johnson's request to proceed

in forma pauperis is also a civil matter, see Ex parte Cook, 202 So. 3d 316, 318-19 (Ala. 2016), the ex post facto clause of Article I, § 22, of the Alabama Constitution of 1901 is inapplicable in the present case.

Johnson also argues that Article IV, § 45, of the Alabama Constitution of 1901 imposes a requirement that, when an act is intended to have retroactive application, the title of the act must fairly and reasonably indicate that the act is retrospective and that, in the present case, the Act does not provide the required notice. He cites Lindsay v. United States Savings & Loan Co., 120 Ala. 156, 24 So. 171 (1897), and Alabama Education Ass'n v. Grayson, 382 So. 2d 501, 505 (Ala. 1980), for the proposition that our supreme court "has interpreted § 45 [of the Alabama Constitution of 1901] as imposing the requirement that where an act is intended to have retroactive application, the title of the act must 'fairly and reasonably indicat[e] that the act is retrospective.'" Grayson, 382 So. 2d at 505. Johnson also argues that the retroactive application of the Act is not clearly expressed therein and that the trial court's judgment deprives him of due process, rendering the denial of his request to proceed in

forma pauperis void. Even assuming, however, that Johnson's legal argument has merit, Johnson's petition for the writ of mandamus is due to be denied because Johnson has failed to show a clear legal right to have his request to proceed in forma pauperis granted.

In Mims v. State, 650 So. 2d 619, 620 (Ala. Crim. App. 1994), Raymond Mims filed petitions for postconviction relief challenging his convictions, which had been affirmed on direct appeal by the Alabama Court of Criminal Appeals. The Alabama Supreme Court had denied certiorari review, and the Alabama Court of Criminal Appeals had issued a certificate of judgment as to its decision on direct appeal. Id. Mims filed petitions for postconviction relief, and the State filed a response to the petitions, asserting that they were barred by the statute of limitations; the circuit court denied the petitions on the basis that they were time-barred. Id. Mims filed a response claiming that the petitions had been timely mailed from his place of incarceration. Id. at 621. The circuit court declined to overturn its judgment denying the petitions. Id. Mims appealed to the Court of Criminal Appeals, asserting that his petitions must be considered as

having been filed on the date they were mailed. Id. The Court of Criminal Appeals noted that Mims had failed to offer any evidence of the date his petitions were mailed or tendered to the proper prison official. Id. In concluding that the petitions were properly denied because they were barred by the applicable limitations period, the Court of Criminal Appeals stated, in pertinent part:

> "There is nothing in the record, other than the appellant's bare unverified assertion, to prove that the petitions were delivered to the 'prison mail man' when claimed. Because the appellant's 'second answer' was unverified and was not accompanied by any supporting affidavit, the bare allegations contained therein cannot be considered as evidence or proof of the facts alleged. '"Assertions of counsel in an unverified motion ... are bare allegations and cannot be considered as evidence or proof of the facts alleged."' Daniels v. State, 416 So. 2d 760, 762 (Ala. Cr. App. 1982). See also Arnold v. State, 601 So. 2d 145, 154 (Ala. Cr. App. 1992). 'Generally, parties acting pro se should be treated as parties represented by counsel are treated.... In particular, pro se litigants "must comply with legal procedure and court rules."' Boros v. Baxley, 621 So. 2d 240, 243-44 (Ala.), cert. denied, 510 U.S. 997, 114 S.Ct. 563, 126 L.Ed.2d 463 (1993)."

650 So. 2d at 621.

In the present case, like in Mims, Johnson's postjudgment motion is unverified and not accompanied by a supporting affidavit. Like in Mims, his bare allegations in his

postjudgment motion that any previously dismissed complaints had been filed before the enactment of the Act -- cannot be considered as evidence or proof of that assertion. Thus, Johnson has failed to affirmatively demonstrate that the trial court is applying the Act retroactively in the present case. "The appellant has an affirmative duty to demonstrate error on the part of the trial court." Hollon v. Williamson, 846 So. 2d 349, 353 (Ala. Civ. App. 2002). Because Johnson has failed to demonstrate that the trial court erred in denying his request to proceed in forma pauperis, his petition for the writ of mandamus is due to be denied based on his failure to demonstrate a clear legal right to the order sought. See Ex parte Brown, supra.

Conclusion

Because Johnson has failed to demonstrate that the trial court improperly denied his request to proceed in forma pauperis, we deny the petition for the writ of mandamus; however, for the reasons stated herein, we instruct the trial court to vacate the December 2, 2019, order insofar as it dismisses Johnson's complaint based on the Act and to enter an

order dismissing the complaint based solely on the trial court's lack of subject-matter jurisdiction.

APPEAL DISMISSED IN PART WITH INSTRUCTIONS; PETITION DENIED.

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

Edwards, J., concurs in the result, without writing.