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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-0420

James Hamilton Scott

v.

State of Alabama

Appeal from Escambia Circuit Court
(CC-15-656)

WELCH, Judge.

AFFIRMED BY UNPUBLISHED MEMORANDUM.

Windom, P.J., and Joiner and McCool, JJ., concur.
Kellum, J., concurs specially, with opinion.

CR-17-0420

KELLUM, Judge, concurring specially.

I concur with the conclusion reached by this Court that James Hamilton Scott waived his right to challenge the circuit court's adverse ruling on his motion for immunity from prosecution because Scott did not raise this claim before trial and conviction by filing a petition for a writ of mandamus with this Court.

I write specially, however, to reiterate a concern I expressed in Smith v. State, [Ms. CR-17-0825, September 7, 2018] ___ So. 3d ___ (Ala. Crim. App. 2018), in which I stated:

"Ordinarily, a pretrial motion, such as Smith's motion for immunity from prosecution, is not reviewable through mandamus. "Subject to certain narrow exceptions ..., we have held that, because an 'adequate remedy' exists by way of an appeal, the denial of a motion to dismiss or a motion for a summary judgment is not reviewable by petition for writ of mandamus." Ex parte Kohlberg Kravis Roberts & Co., 78 So. 3d 959, 966 (Ala. 2011), quoting Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 762 (Ala. 2002). An assertion of immunity, however, is one of those narrow exceptions. See Ex parte Hampton, 189 So.3d 14, 16 (Ala. 2015).

"While I understand, and agree with, the general principle that a finding of guilt following a criminal trial renders the question of immunity moot, I write specially to express my concern in limiting a defendant's ability to challenge a

pretrial ruling on immunity solely to petitions for a writ of mandamus.

"Before a writ of mandamus may issue, the petitioner must show (1) a clear legal right in the petitioner to the relief sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) no adequate remedy at law; and (4) the properly invoked jurisdiction of the reviewing court. State v. Williams, 679 So. 2d 275 (Ala. Cr. App. 1996)."

"State v. Reynolds, 819 So. 2d 72, 79 (Ala. Crim. App. 1999). Because a writ of mandamus is an extraordinary remedy that places on a petitioner a particularly heavy burden, I question whether a petitioner would ever be successful in challenging a circuit court's pretrial immunity ruling by mandamus. The better option, but one that is unfortunately not currently available under Alabama law, would be to allow the defendant to file a pretrial appeal of the circuit court's immunity ruling. By allowing a defendant to file a pretrial appeal as opposed to a petition for a writ of mandamus, this Court could review the judgment of the circuit court without first requiring the defendant to overcome the extraordinary requirements necessary for mandamus relief. Therefore, I encourage the legislature to consider amending § 13A-3-23(d), Ala. Code 1975, to include a right to appeal a circuit court's pretrial ruling on an immunity defense in a criminal prosecution."

Smith v. State, ___ So. 3d at ___.