

# ARKANSAS SUPREME COURT

No. 08-390

RICHARD DELON DAY, JR.  
Petitioner

v.

MACKIE PIERCE, CIRCUIT JUDGE,  
JAMES BADAMI, DIRECTOR,  
ARKANSAS JUDICIAL DISCIPLINE  
AND DISABILITY COMMISSION  
Respondents

Opinion Delivered June 19, 2008

PRO SE PETITION FOR WRIT OF  
MANDAMUS [CIRCUIT COURT OF  
PULASKI COUNTY, CV 2004-3607;  
JUDICIAL DISCIPLINE AND  
DISABILITY COMMITTEE,  
COMPLAINT NO. 07215]

PETITION DENIED.

## PER CURIAM

Now before us is a petition for writ of mandamus filed in this court by petitioner Richard Delon Day, Jr. In the petition, Day asks this court to direct Mackie Pierce, Pulaski County Circuit Court Judge, and James Badami,<sup>1</sup> Director of the Arkansas Judicial Discipline and Disability Commission, to perform certain actions. He also asks this court to enter a declaratory judgment. For the reasons stated below, the petition for writ of mandamus is denied.

The following history of the case is necessary to understand the issues presented in the petition for writ of mandamus. In 2004 and 2005, petitioner, who is incarcerated by the Arkansas Department of Correction in Lee County, filed in Pulaski County Circuit Court a series of civil complaints against Larry Norris, Director of the Arkansas Department of Correction. He also filed various other pleadings in the matter. Each complaint appeared to be comprised of an application

<sup>1</sup>Mr. David Stewart is currently the executive director of the Judicial Discipline and Disability Commission. However, as Mr. Badami was named in the complaint, we will continue to refer specifically to him for the limited purpose of this decision.

for judgment against Mr. Norris and an application for leave to present additional evidence. All of the pleadings were filed under a single case number and pertained to numerous disciplinary and grievance matters involving petitioner during his incarceration. Each of these complaints was similar in that petitioner named the same defendant and sought relief under the Arkansas Administrative Procedure Act (“APA”). Ark. Code Ann. § 25-15-201–25-15-218 (Repl. 2002 & Supp. 2007). Petitioner filed a request for a written disposition of his complaints and a motion for judgment against Mr. Norris, and the State filed a motion for judgment on the pleadings.

In an order entered on November 18, 2005, the circuit court ruled in pertinent part:

Comes now on this day to be heard the Plaintiff’s Motion for Judgment on the Pleadings, pursuant to A.R.C.P. Rule 12(c). . . .

\* \* \*

1. That the Plaintiff made a pro se request via letter received by the Court on November 7, 2005, in which he requested the Court to make a disposition of the matters before it on this case.<sup>[2]</sup> The Court considers the letter to be in the nature of a Motion for Judgment on the Pleadings, as defined in A.R.C.P. Rule 12(c).

2. After thorough and careful consideration of the pleadings, the Court finds that the complaint, and all subsequent amendments to the complaint, should be dismissed with prejudice.

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IT IS THEREFORE, CONSIDERED, ORDERED AND DECREED that Plaintiff’s Complaint is hereby dismissed with prejudice[.]

In the order, the court stated the bases for finding in favor of Mr. Norris were that (1) Mr. Norris was immune from suit in his official capacity, (2) the “Administrative Practice [sic] Act” excludes judicial review of prisoner disciplinary matters thereby providing no remedy to petitioner, and (3) petitioner’s complaint did not establish a constitutional violation of a protected liberty or property interest.

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<sup>2</sup>The record before us does not contain such a request from petitioner, and the order does not refer to petitioner’s request for a written disposition of the matter filed on March 17, 2005, or motion for judgment filed on May 20, 2005.

On December 30, 2005, petitioner untimely filed a posttrial motion for relief from the November 18, 2005, order and on July 5, 2006, untimely filed a notice of appeal from the order. Thereafter, he filed in the trial court a motion, designated as a brief, alleging that the circuit court clerk failed to file petitioner's notice of appeal and record of court proceedings with the Arkansas Court of Appeals. This pleading raised, for the first time, the argument that the 2005 order was not final or appealable. No pleadings have been filed in that matter since 2006 and no appeal from the circuit court's order was perfected.

In 2007, petitioner filed a complaint with the Arkansas Judicial Discipline and Disability Commission against Judge Pierce. He alleged, among other things, that the 2005 order did not dispose of all outstanding claims and that petitioner was entitled to prevail on the merits of the complaints against Mr. Norris. The complaint prayed in part that Judge Pierce would be required to enter a judgment that disposed of all outstanding complaints against Mr. Norris. Mr. Badami, as the executive director of the Commission, stated in a letter to petitioner that the remedy sought by petitioner could not be effectuated by the Commission and that the complaint against Judge Pierce was dismissed.

In 2008, petitioner filed the instant petition for writ of mandamus. A writ of mandamus is a remedy to be used on occasions where the law has established no specific remedy and justice requires it. *State v. Vittitow*, 358 Ark. 98, 186 S.W.3d 237 (2004). Mandamus is not a writ of right but is within the judicial discretion of the court to issue or withhold. *Robertson v. Norris*, 360 Ark. 591, 203 S.W.3d 82 (2005). The purpose of the writ is to enforce an established right or to enforce the performance of a duty, *Manila School District No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004), but not to establish a right, *Robertson, supra*.

A writ of mandamus is issued by this court only to compel an official or judge to take some action. *Manila, supra*. To be entitled to the writ, a petitioner must show that he has a clear, legal right to the subject matter and the absence of any other adequate remedy. *Id.* Also, extraordinary relief, such as a writ of mandamus, is not a substitute for raising an issue on appeal. *Gran v. Hale*, 294 Ark. 563, 745 S.W.2d 129 (1988).

In the petition for writ of mandamus as it applies to Judge Pierce, petitioner claims that the court's 2005 order was not a final, appealable order pursuant to Ark. R. Civ. P. 54(b). He asks this court to direct the circuit court to enter an order that disposes of all claims made by petitioner so that he may proceed with an appeal. Petitioner also challenges the substance of the order by seeking a declaratory judgment from this court that makes specific legal rulings that would in essence reverse the court's decision.

First, as to the finality of the order, Rule 54(b) provides that an order or judgment is not considered final and appealable if it adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties involved in a cause of action. *McKinney v. Bishop*, 369 Ark. 191, \_\_\_ S.W.3d \_\_\_ (2007). When an order or judgment is not final and appealable, the appellate courts do not have jurisdiction to hear the matter. *Id.; Kinkhead v. Spillers*, 327 Ark. 552, 940 S.W.2d 437 (1997).

Rule 54(b) also provides for a certificate to be made part of the order in which the trial court certifies that an order is final, although it adjudicates fewer than all claims or interests of all parties. Absent a Rule 54(b) certificate, "any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties." Ark. R. Civ. P. 54(b)(2).

Finality of an order appealed from is a jurisdictional issue. *Martin v. National Bank of Commerce*, 316 Ark. 83, 870 S.W.2d 738 (1994). Jurisdiction is a matter this court will consider even when the parties do not raise it. *Id.*

Petitioner maintains in the petition before us that the order addressed only one complaint when petitioner actually filed seven complaints.<sup>3</sup> He points to the circuit court's use of the word "complaint" in the singular form and the lack of a Rule 54(b) certificate in the order as support for his contention.

Here, all pleadings filed by petitioner in the court below were combined under a single case number, against the same defendant and pursuant to the same statute.<sup>4</sup> This is allowed under our rules of procedure, as multiple claims can be made against a defendant in a single complaint and a party may amend his pleadings at any time without leave of the court. Ark. R. Civ. P. 18(a); Ark. R. Civ. P. 15(a).

Furthermore, it is clear that the circuit court considered petitioner's multiple complaints to be an original complaint and multiple amendments thereto when it addressed petitioner's complaint and "all subsequent amendments to the complaint" in the order. As a result, all outstanding claims against Mr. Norris were included in the ruling, and the order entered on November 18, 2005, was a final and appealable order. Petitioner has failed to demonstrate a clear and certain right to the

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<sup>3</sup>Petitioner contends that the seven complaints related to five specific disciplinary and grievance matters. A pleading filed by the state referenced two complaints filed by petitioner. The record before us contains no table of contents or sequential page numbers, and the docket contained in the record is unclear as to this issue. However, our review of the record indicates that petitioner filed three complaints on March 26, 2004, two complaints on May 12, 2004, and two complaints on November 19, 2004.

<sup>4</sup>When he initially commenced the case, petitioner sent a memorandum to the circuit clerk in which he recognized that he would have been required to pay separate filing fees for separate complaints. Petitioner did not object when the three initial complaints were placed under the same case number and used the case number on all subsequent pleadings. If petitioner intended to file seven separate complaints, he was free to do so under seven separate case file numbers and pay the filing fee and fees for service as to each complaint. However, he chose not to do so.

relief sought.<sup>5</sup> *Manila, supra; compare Kinkead v. Spillers*, 330 Ark. 711, 955 S.W.2d 909 (1997). Petitioner's remedy instead was an appeal from the trial court's order, and a petition for writ of mandamus is not a substitute for an appeal. *Gran, supra*.

We next consider petitioner's request for this court to enter a declaratory judgment. In the petition for writ of mandamus, he asks this court to set forth a number of legal holdings related to his allegations against Mr. Norris.<sup>6</sup> These holdings specifically reverse each substantive legal conclusion made by the trial court.

As a threshold matter, actions for declaratory judgment are properly brought in trial courts and not in appellate courts. Ark. Code Ann. § 16-111-103(a) (Repl. 2006); *see also City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005); *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). Cases in which the jurisdiction of this court is in fact appellate although original in form under Ark. Sup. Ct. R. 6-1, or that are original actions under Ark. Sup. Ct. R. 6-5, are limited in nature and do not include issuing declaratory judgments. We therefore have no jurisdiction or authority to issue a declaratory judgment as sought by petitioner.

Finally, we turn to the petition for writ of mandamus as it applies to Mr. Badami as the executive director of the Judicial Discipline and Disability Commission. Petitioner filed a complaint with the Commission against Judge Pierce for alleged ethical violations in relation to his claims against Mr. Norris. In a letter to petitioner dated May 11, 2007, Mr. Badami noted that petitioner's

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<sup>5</sup>As this matter is not a direct appeal from the order, and petitioner seeks a writ of mandamus, we need not address the substantive issues raised by petitioner, including whether the circuit court had jurisdiction to hear his claims against Mr. Norris under the Administrative Procedure Act.

<sup>6</sup>Petitioner asks this court to declare that he has a right to judicial review of disciplinary matters under the Arkansas Administrative Procedure Act, that Mr. Norris is not immune from suit in his official capacity, that disciplinary proceeding records must be transmitted to the court within ninety days of a prisoner filing a complaint for judicial review under the Act and that the State, on behalf of Mr. Norris, failed in its statutory obligation to transmit the record for review.

complaint against Judge Pierce addressed the correctness of the trial court's ruling but did not allege ethical misconduct. He explained that the Commission is not empowered to determine whether a judge's decision in a case is legally or factually correct and that such a review is a matter for appellate courts. The complaint was dismissed by the Commission as it found no ground to take action against Judge Pierce.

In this matter, petitioner asks this court to direct the Commission to reconsider dismissal of the complaint. Despite the wording contained in the petition, the remedy requested by petitioner is tantamount to seeking a review of the Commission's decision.

There is no direct appeal of a decision by the Commission available to petitioner in order to have this court examine the merits of his complaint. *Duty v. Arkansas Judicial Discipline and Disability Comm'n*, 304 Ark. 294, 801 S.W.2d 46 (1990); *Hopper v. Arkansas Judicial Discipline and Disability Comm'n*, 304 Ark. 296, 800 S.W.2d 722 (1990). Rule 12(F) of the Commission's rules provides that we may grant certiorari to bring before this court any action or failure to act on the part of the Commission. Ark. Jud. Disc. & Disab. Comm'n R. 12(F). In *Duty, supra*, we construed this provision to limit review by this court to those instances where there is error on the face of the record. *See* Rule 12(F); *Huffman v. Arkansas Judicial Discipline and Disability Comm'n*, 344 Ark. 274, 42 S.W.3d 386 (2001). Petitioner failed to demonstrate that he has a clear, legal right to the relief sought. *Manila, supra*; compare *Griffen v. Arkansas Judicial Discipline and Disability Comm'n*, 368 Ark. 557, 247 S.W.3d 816 (2007).

Petition denied.