

SUPREME COURT OF ARKANSAS

No. 10-127

JOE LOUIS KELLEY, JR.

APPELLANT

V.

LARRY NORRIS, DIRECTOR and
SHELLI MARONEY, RECORDS
SUPERVISOR ARKANSAS
DEPARTMENT OF CORRECTION
APPELLEES

Opinion Delivered March 1, 2012

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT,
[NO. CV2009-728-5]HONORABLE JODI RAINES
DENNIS, JUDGEREVERSED AND REMANDED
WITH DIRECTIONS.**JIM HANNAH, Chief Justice**

Joe Lewis Kelley appeals a decision of the Jefferson County Circuit Court, Fifth Division, denying his petition for declaratory judgment and a writ of mandamus. Kelley seeks declaratory judgment and an order that his two state sentences run concurrently. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(1).

On September 24, 2004, Kelley was sentenced to five years' imprisonment by the Pulaski County Circuit Court, Fourth Division, on conviction of a terroristic act. According to the judgment and commitment order, this sentence was to run consecutive to "federal case #404-CR-66-1." On January 19, 2005, the federal district court sentenced Kelley in federal case #404-CR-66-1 and ordered that the sentence run "consecutively to the undischarged term of imprisonment defendant is serving in the Arkansas Department of Correction." Subsequently, on February 10, 2005, Kelley was convicted of forgery in the Pulaski County

Circuit Court, Second Division, and received a five-year sentence. The Second Division ordered that the sentence be served concurrently with the sentence previously imposed in the Fourth Division.

Upon sentencing in the Second Division case, Kelley was remanded to the custody of the Arkansas Department of Correction (“ADC”). He was subsequently “paroled early” from the ADC and transferred to the United States Bureau of Prisons (“BOP”) to serve time for his federal conviction.¹ Kelley arrived at the ADC with convictions from the Fourth and Second Divisions, but the Fourth Division sentence was not entered into the ADC system, and it was only “discovered” by the ADC after Kelley had already been transferred to the BOP. In a letter dated September 11, 2007, Kelley was notified that he would not begin serving his sentence on the Fourth Division sentence until he was released from the BOP and returned to the ADC. Kelley objected, arguing that the Second and Fourth Division sentences were to be served concurrently, and stated that if need be, he should be brought back to the ADC to serve the sentences concurrently. The ADC rejected Kelley’s claims and by December 18, 2007 correspondence affirmed that Kelley would be returned to the ADC upon release from his federal sentence to begin serving the sentence on the Fourth Division conviction. Kelley again objected, and by February 8, 2008 correspondence, the ADC informed Kelley that the matter had been referred to the Arkansas Attorney General’s Office where it was determined that Kelley would be returned to the ADC upon release from the BOP and would only then begin serving his sentence on the Fourth Division conviction.

¹We note the “early parole” related to the Second Division forgery conviction and that the Fourth Division terroristic act conviction was not subject to the same “early parole.”

Kelley challenged the actions of the ADC by declaratory-judgment proceedings and sought a writ of mandamus. The petition was denied, and this appeal followed.

A writ of mandamus is issued to enforce an established right or to enforce the performance of a duty. See *Manila School Dist. No. 15 v. Wagner*, 357 Ark. 20, 26, 159 S.W.3d 285, 290 (2004). This court has previously considered appeals from the denial of a petition for declaratory judgment and a writ of mandamus where persons incarcerated in the ADC have sought to compel the ADC to perform its duty with respect to asserted terms of incarceration. See *Kelley v. Washington*, 311 Ark. 73, 843 S.W.2d 797 (1992); *Woods v. Lockhart*, 292 Ark. 37, 727 S.W.2d 849 (1987).

Kelley first asserts that the Fourth Division's order that his sentence run consecutively to the sentence in his federal case was "illegal" or "void." Under Arkansas Code Annotated section 5-4-403 (Supp. 2003), multiple sentences presumptively run concurrently and do not run consecutively unless so ordered. At the time the Fourth Division ordered Kelley to serve his sentence entered in that court consecutive to the sentence imposed in the federal case, there was no federal sentence, and, therefore, no sentence to which the Fourth Division sentence could run consecutively. "A trial court has no authority to direct a sentence to run consecutively to a nonexistent sentence which might thereafter be imposed in a pending case." *State v. Reed*, 703 P.2d 756, 760 (Kan. 1985). Kelley is correct in concluding that the order to serve his Fourth Division sentence consecutively to a nonexistent federal sentence was a void act.

We now turn to the claim that the ADC erred in concluding that he will not begin

serving his Fourth Division sentence until remanded to the custody of the ADC. When the Second Division entered the sentence on the forgery charge and did not order that the Second Division sentence run consecutively to the already existing Fourth Division sentence, the sentences ran concurrently as a matter of law. Pursuant to Arkansas Code Annotated section 5-4-403 (Repl. 2006), “the sentences shall run concurrently, unless upon recommendation of the jury or the court’s own motion, the court orders the sentences to run consecutively.”² Only an error by the ADC in failing to enter the Fourth Division conviction and sentence in the ADC system caused the failure to have Kelley complete his concurrent state sentences before being transferred to the BOP. If Kelley begins to serve his sentence in the ADC only on the Fourth Division sentence upon transfer back from the BOP, he will not have served his Second and Fourth Division sentences concurrently. Such action by the ADC would be a violation of section 5-4-403. The ADC must correct its record to show that Kelley began serving his Fourth Division sentence on the same date he began to serve his Second Division sentence. Upon transfer to the ADC from the BOP, Kelley must serve whatever remains of the sentence he would have served in the ADC had the ADC run his state sentences concurrently as required.

Reversed and remanded with directions.

²We note that the federal district-court order that Kelley serve his federal sentence consecutive to the state sentences is irrelevant to the issue presented to this court, which is whether the ADC erred in concluding that Kelley would not begin serving his Fourth Division sentence until return to the ADC when the two state sentences were to run concurrently.