

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN E. FOSTER,)
)
Petitioner,)
)
v.) C.A. No. 01M-09-082
)
KEVIN J. O'CONNELL, and)
JUDGE TOLIVER,)
)
Respondents.)

Submitted: February 15, 2002

Decided: March 13, 2002

**ON RESPONDENT CHARLES H. TOLIVER'S MOTION TO
DISMISS PETITION FOR WRIT OF MANDAMUS. GRANTED.**

ORDER

This 13th day of March, 2002, upon consideration of the submissions of the parties, it appears to this Court that:

1. Petitioner John E. Foster ("Petitioner" or "Foster") seeks from this Court a writ of mandamus to which Respondent "Judge Toliver"¹ ("Respondent" or "Judge Toliver") has filed the present Motion to Dismiss. For the reasons stated below, Respondent's motion is **GRANTED**.

2. In his Petition, Foster essentially is seeking a modification of sentence and a transfer from the Multi-Purpose Criminal Justice Facility.

¹ So named in Foster's Petition.

This Court has previously ruled on both of Petitioner's asserted grounds for mandamus in the related criminal case of State v. Foster, Cr. A. No. IN01-02-1142. Specifically, by letter dated October 4, 2001, Judge Toliver advised Petitioner that his seeking of concurrent sentencing was not supported by "anything other than [Petitioner's] allegations"² that he was entitled to such relief, and by letter dated December 11, 2001, Judge Toliver further advised Petitioner that he was unable to provide assistance in having Petitioner moved from the Multi-Purpose Criminal Justice Facility.

Petitioner has averred in both the criminal action and on petition for writ of mandamus that his trial counsel advised him that Judge Toliver did not "like" him, that Petitioner's sentences would be served consecutively due to his voluntary assistance in other police investigations, that both counsel and Judge Toliver stated "in open court" that "letters would be sent" to have him transferred, that Petitioner should not "speak in court" at the time when his plea agreement was presented, and that when asked of the charge of "maintaining a dwelling,"³ counsel stated that it "meant nothing."⁴

² Letter from J. Toliver to Foster of 10/04/01.

³ Del. C. Ann. tit. 16, § 4755 (2001).

⁴ Pet. for Writ of Mandamus ¶¶ 5, 6, 7, 8.

Defense counsel filed an Answer to Foster's Petition specifically denying that he and Judge Toliver stated in open court that "letters would be sent" to have Petitioner transferred and that Petitioner's sentences would be served consecutively due to his voluntary assistance in other police investigations; the Court notes that the "maintaining a dwelling" was nolle prossed and is therefore inconsequential to the present petition.

3. "The writ [of mandamus] is extraordinary and [is] appropriate only when a [petitioner] is able to establish a clear legal right to the performance of a non-discretionary duty."⁵ A writ of mandamus may be issued by the Superior Court to an inferior court, public official, or agency to compel the performance of a duty to which the petitioner has established such a clear legal right.⁶ The writ will not issue unless the petitioner can establish that there is no other adequate remedy available.⁷

4. Here, Petitioner seeks the issuance of the writ so as to modify his sentencing to run concurrently. However, Del. C. Ann. tit. 11, § 3901(d) (2001) provides a broad mandate that "[n]o sentence of confinement of any criminal defendant by any court of this State shall be made to run

⁵ Darby v. New Castle Gunning Bedford Ed. Ass'n, 336 A.2d 209, 210 (Del. 1975).

⁶ Milford 2nd St. Players v. Delaware Alcoholic Beverage Control Comm'n, 552 A.2d 855 (Del. Super. 1988).

concurrently with any other sentence of confinement imposed on such criminal defendant.” “This language is clear and serves as a continuing declaration by the General Assembly that criminal sentencings involving imprisonment will be imposed as provided for each crime and will not be merged but will run consecutively.”⁸ Thus, Petitioner has failed to establish a clear legal right to serve any sentencing concurrently.

5. Additionally, Petitioner seeks to have the Court re-classify the institution to which he is assigned. However, Chapter 65 of Title 11 makes clear that such authority is vested in the Department of Corrections, not in this Court. For instance, Del. C. Ann. tit. 11, § 6504 (2001) provides that the Department of Corrections shall operate “classification” committees, and Del. C. Ann. tit. 11, § 6527(b) (2001) provides that “[t]he Institutional Classification Board shall be responsible for the classification of all inmates residing and remaining in the several institutions and facilities.” Thus, Petitioner has failed to establish a clear legal right to override the Department’s discretion.

6. Having failed to establish a clear legal right to the performance of a non-discretionary duty as well as the absence of any other adequate

⁷ In re Hyson, 649 A.2d 807 (Del. 1994).

remedy, Foster's petition does not warrant the granting of the extraordinary relief requested. Accordingly, the Respondent's Motion to Dismiss is **GRANTED.**

IT IS SO ORDERED.

Prothonotary
John E. Foster, *pro se*
Kevin J. O'Connell, Esquire
Richard W. Hubbard, Esquire

⁸ State v. Hefton, 586 A.2d 1195, 1200 (Del. Super. 1988), *aff'd*, 574 A.2d 263 (Del. 1990).