

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2005-SC-000082-OA

DATE 7-7-05 *Elva Grawitt P.C.*
PETITIONER

JACTA EST ALEA

V. ORIGINAL ACTION IN SUPREME COURT

COURT OF APPEALS

RESPONDENT

MEMORANDUM OPINION OF THE COURT

DENYING

Petitioner seeks a writ of mandamus directing the Court of Appeals to take immediate action to enforce its own writ of mandamus issued in case no. 2004-CA-000477-OA against Special Judge John L. Atkins, directing him to enter an order within thirty days, completely adjudicating all issues contained within Lyon Circuit Court Civil Action No. 00-CI-00017. A brief history of this petition follows.

Jacta Est Alea is a prisoner who appears to have a flair for the law, as he has filed more than twenty civil actions since the year 2000, and usually proceeds pro se.

In 1996, petitioner pled guilty but mentally ill to a charge of wanton endangerment in the first degree and promoting contraband in the first degree in the Lyon Circuit Court. In 1997, he filed a motion to vacate or amend his sentence pursuant to RCr 11.42, as well as a motion for appointment of counsel as guardian ad litem, both of which were denied by the Lyon Circuit Court per Judge Bill Cunningham. In 1999, petitioner filed a supplement to his original RCr 11.42 motion and a motion for the

appointment of counsel to represent him at an evidentiary hearing. Judge Cunningham again denied both motions.

Petitioner then appealed to the Court of Appeals. The Court of Appeals refused to address petitioner's claims of reversible error as the Court found he had failed to perfect the record on appeal. Petitioner had filed only a pre-printed form provided to inmates as his designation of the record to the Lyon Circuit Court, and as such, several portions of his appeal were unsupported. The Court of Appeals ruled it was petitioner's responsibility to perfect the trial court record on appeal, and because he failed to do so, it affirmed the Lyon Circuit Court.

This apparently angered petitioner and he responded by sending a threatening letter to Judge Cunningham indicating he planned to assault the judge "for deprivation of access to the courts." The next time petitioner went before Judge Cunningham he carried out his intentions, **assaulting the Judge in open court**. Petitioner was found guilty by the prison adjudicator of assaulting Judge Cunningham and assessed a penalty of 180 days disciplinary segregation time and a loss of two years non-restorable good time.

Petitioner next filed an action for declaratory judgment after prison officials allegedly lost his dentures and beat him in retaliation for his assault on Judge Cunningham. This action was filed in the Lyon Circuit Court before Judge Cunningham on February 4, 2000. After the case had no pre-trial activity for one year, pursuant to CR 77.02, on September 6, 2001, a notice to dismiss for lack of prosecution was entered. No response was filed and the action was dismissed on September 18, 2001.

Petitioner appealed to the Court of Appeals and it reversed the order of dismissal, remanding the case back to the Lyon Circuit Court on August 9, 2002, finding

petitioner was entitled to thirty days to respond to the notice to dismiss. The Court of Appeals noted petitioner's argument that Judge Cunningham is required sua sponte to recuse himself pursuant to KRS 26A.015(2)(a), but found since only petitioner's allegations were before the court, this was insufficient for the court to make a determination as to Judge Cunningham's impartiality.

On remand, Judge Cunningham recused himself from further consideration of the case, and Judge John L. Atkins was appointed as special judge. On March 8, 2004, petitioner filed an original action in the Court of Appeals directing the special judge to adjudicate his civil action. On September 9, 2004, the Court of Appeals ordered the special judge to rule on the case within thirty days. Petitioner contends no action has been taken since the issuance of the Court of Appeals' order, therefore he petitions this Court for a writ of mandamus directing the Court of Appeals to take action to enforce its order.

The Court of Appeals responds arguing relief should be denied because petitioner has not requested such relief in the Court of Appeals. Respondent points out petitioner has filed several documents in the record since its September 9, 2004 order, which may have delayed consideration of the merits of this case. Respondent also argues the court assumes compliance with its orders unless non-compliance is raised by a party, and because petitioner has failed to bring this issue to the court's attention, the Court of Appeals has had no opportunity to consider or rule on this issue.

In making our decision not to grant a writ of mandamus in this situation, we note two settled principles of law dealing with such an extraordinary remedy: (1) Mandamus will not lie where another adequate remedy is available or where relief may be obtained by motion to the court where the action or proceeding as to which petitioner seeks relief

is pending. See State ex rel. Aloj v. Klide, 67 Ohio St. 3d 442, 619 N.E.2d 691 (1993); People ex rel. Kula v. O'Connell, 394 Ill. 4069, 68 N.E.2d 758 (1946); (2) A writ for mandamus is not appropriate to compel performance of an act which respondent is willing to perform without coercion. See People ex rel. Bradford Supply Co. v. Circuit Court of Pulaski County, 393 Ill. 520, 66 N.E.2d 420 (1946); State ex rel. Schindler v. Industrial Commission of Ohio, 127 Ohio St. 39, 186 N.E. 872 (1933).

We note also that this Court's original jurisdiction should be "sparingly exercised and generally only in cases where no other court has power to proceed." Abernathy v. Nicholson, 899 S.W.2d 85, 88 (Ky. 1995).

In light of the above notions, we deny Petitioner's Motion for Writ. The Court of Appeals has indicated its willingness to address the issue in its response to the petition. Thus, we will not consider ordering the Court of Appeals to act when it is willing to act on its own. We find petitioner still has ample redress in the Court of Appeals, and therefore, no action by this Court is necessary; nor will it be taken at this time.

Special Judge John L. Atkins has indicated in the circuit court record he is awaiting our response to act in this matter, therefore, if this matter could be so easily resolved without further action taken by any court, or the petitioner herein, may we suggest, absent just cause not to rule on the matter, that he comply with the Court of Appeal's order to adjudicate all issues contained within Lyon Circuit Court Civil Action No. 00-CI-00017. Otherwise, petitioner's relief is through the Court of Appeals, the Court that issued the original order.

For reasons set out above, the Petition for Writ is hereby denied.

All concur.

PETITIONER:

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