

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 24, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-000214-MR

DATE 9-14-06 E.A. Gentry, D.C.

ELSWORTH SAMUELS

APPELLANT

V. APPEAL FROM ORIGINAL ACTION IN COURT OF APPEALS
2005-CA-001805-OA
OLDHAM CIRCUIT COURT NO. 2005-CI-211

HON. PAUL W. ROSENBLUM

APPELLEE

AND

RALPH DAILEY, WARDEN
(REAL PARTY IN INTEREST)

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Elsworth Samuels, an inmate at the Western Kentucky Corrections Complex, filed a writ of habeas corpus in the Oldham Circuit Court, alleging that the length of his sentence for various felonies was improperly calculated. The Oldham Circuit Court dismissed the action on May 10, 2005. Appellant subsequently filed a notice of appeal and a motion to proceed in forma pauperis, which the Oldham Circuit Court denied. Appellant then filed a writ of mandamus in the Court of Appeals, requesting that court to require the Oldham Circuit Court to withdraw the order denying

his motion to proceed in forma pauperis and instead to grant the motion. The Court of Appeals denied Petitioner's writ, reasoning that a writ of mandamus is available to a petitioner only when there is no other adequate remedy by appeal, and that Appellant could have appealed the order denying his motion to proceed in forma pauperis. Appellant then appealed to this Court as a matter of right, CR 76.36, asserting that the Court of Appeals abused its discretion in denying his writ of mandamus. Finding no error, we affirm.

Writ cases are divided into two classes: (1) those where the inferior court is allegedly acting without jurisdiction; and (2) those where it is allegedly acting erroneously, but within its jurisdiction, and there is no adequate remedy by appeal or otherwise. Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 808 (Ky. 2004); Hoskins v. Maricle, 150 S.W.3d 1, 6 (Ky. 2004); Bender v. Eaton, 343 S.W.2d 799, 800-01 (Ky. 1961). Whether to grant such a writ rests within the sound discretion of the court of original jurisdiction, and the standard of review is abuse of discretion, Trude, 151 S.W.3d at 809-10; Hoskins, 150 S.W.3d at 9, i.e., "whether the [inferior court] judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

The Court of Appeals correctly held that Appellant did have an adequate remedy by appeal from the allegedly erroneous denial of his motion to proceed in forma pauperis. CR 73.02(1)(b) ("If the motion to proceed in forma pauperis is denied, the party shall have ten days within which to pay the filing fee or to appeal the denial to the appropriate appellate court."). "[T]he . . . way to review the trial court's denial of the right to appeal in forma pauperis is not by writ of mandamus, but by appeal.

Immediately and automatically, when the notice of appeal from the order denying the right to appeal in forma pauperis is filed, the appellate court should stay the running of time on further steps related to the initial, underlying appeal, until this matter of appeal in forma pauperis can be determined." Bush v. O'Daniel, 700 S.W.2d 402, 405 (Ky. 1985). Because Appellant had a remedy by appeal, the Court of Appeals did not abuse its discretion in denying Appellant's petition for a writ of mandamus.

Accordingly, the decision of the Court of Appeals is AFFIRMED.

All concur, except McAnulty, J., not sitting.

ATTORNEY FOR APPELLANT:

Elsworth Samuels
#075936
Western Kentucky Correctional Complex
374 New Bethel Church Road
Fredonia Ky 42411

ATTORNEY FOR APPELLEE:

Paul W. Rosenblum
100 W. Main St.
LaGrange Ky. 40031

Raymond F. Debolt, Jr.
Assistant Attorney General
700 Capital Avenue, Suite 118
Frankfort Ky. 40601

Amy V. Barker
Justice & Public Safety Cabinet
Office of Legal Services
P.O. Box 2400
Frankfort Ky. 40602-2400

Jeffrey Thomas Middendorf
Justice and Public Safety Cabinet
Office of Legal Services
Second Floor
125 Holmes Street
Frankfort Ky. 40601