

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2011-SC-000281-MR

WELLIE PAUL GRANT

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-000565-OA
ADAIR CIRCUIT COURT NO. 06-CR-00056

HONORABLE JAMES BOWLING,
SPECIAL JUDGE

APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Wellie Paul Grant appeals, as a matter of right, the decision of the Court of Appeals which denied his writ of prohibition, or in the alternative, a writ of mandamus, against the Honorable James Bowling, Special Judge, of the Adair Circuit Court. We conclude the Court of Appeals did not err in denying either writ and affirm.

The Appellant was indicted by an Adair County Grand Jury on July 11, 2006, for murder and first-degree fleeing and evading police. On November 27, 2007, Appellant was found incompetent to stand trial by the Adair Circuit Court, which also ordered Appellant hospitalized at Eastern State Hospital for a period. Appellant's commitment was extended after a hearing on March 4,

2009. Another competency hearing was held on January 21, 2011. It is this last competency hearing that is in issue in this case.

Two psychologists testified at the January 21, 2011, competency hearing. Dr. Donald Crowe from Eastern State Hospital testified on behalf of the Commonwealth in favor of competency and Dr. Robert Granacher testified on behalf of the Appellant in favor of incompetency. After the hearing, in an Order entered February 1, 2011, the trial court ruled that the Appellant:

is able to assist his counsel . . . [and] . . . has regained the degree of competency necessary to participate in a trial. However, the court agrees with Dr. Crowe that the [Appellant's] competency is tenuous and that the issue of competency might have to be re-visited once the [Appellant] is returned to the custody of the Adair [County] jail.

The trial court then set the matter for trial on May 18, 2011.

The Appellant filed an original action with the Court of Appeals, a petition for a writ of prohibition, to prohibit the trial court from enforcing the order finding the Appellant competent to stand trial; or in the alternative, for a writ of mandamus ordering the trial court to find Appellant incompetent to stand trial. A three-judge panel of the Court of Appeals denied Appellant's request by Order entered May 13, 2011, and Appellant timely filed his notice of appeal.

Before this Court, Appellant argues that the Court of Appeals erred in denying his request for a writ of prohibition or mandamus.

A writ of prohibition is an extraordinary remedy, available only in two instances: 1) when a "lower court is proceeding or is about to proceed outside its jurisdiction and there is no remedy through an

application to an intermediate court; or 2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise, and great injustice or irreparable injury will result.”

Ally Cat, LLC v. Chauvin, 274 S.W.3d 451, 456-57 (Ky. 2009) (quoting *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004)). The standard of review to be applied when reviewing a denial of a writ of prohibition depends on the class or category of writ. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). When the lower court is alleged to be acting outside its jurisdiction, the proper standard is *de novo* review because jurisdiction is generally a question of law. *Id.* When, as in our case, an appellant alleges that the lower court against which the writ was filed is acting within its jurisdiction but in error, the court with which the petition for a writ is filed only reaches the decision as to issuance of the writ once it finds the existence of the “conditions precedent” - no adequate remedy on appeal and great and irreparable harm. *Id.* If these conditions precedent are met,¹ then the decision to grant or deny the writ is discretionary with the reviewing court (here the Court of Appeals) and the Court of Appeals’ decision is reviewed by this Court for an abuse of discretion. *Id.*

In the case before us, no one questions that the circuit court was the proper court to determine competency matters in criminal actions. Therefore,

¹ Within this second class of writs there are the “certain special cases” and a few errors of law cases which would be *de novo* review but neither apply in our case. See *Grange Mut. Ins. Co.*, 151 S.W.3d at 810.

the circuit court had subject matter jurisdiction. The rulings by the trial court are alleged to have been made erroneously within its jurisdiction.

Appellant argued to the Court of Appeals that the trial court abused its discretion in finding that he was competent to stand trial because the medical evidence compelled a finding of incompetence, and without the writ, he has no adequate remedy on appeal. The Court of Appeals reviewed the expert testimony of both Dr. Crowe and Dr. Granacher before reviewing the trial court's findings. The Court of Appeals noted that while Dr. Crowe found Appellant competent, Dr. Granacher opined that Appellant was incompetent to stand trial. Dr. Crowe's opinion was based on his working with Appellant at Eastern State Hospital. He recognized that Appellant's competency was tenuous and that a change in environment (the transfer to the Adair County Jail during trial) may affect his competency. The trial court found the Appellant competent to stand trial but recognized the delicate situation, and the possible need to revisit competency once the Appellant was returned to the jail for trial.

The Court of Appeals reviewed the request for a writ and decided that this was a request for a writ of the second class, that is, acting within the trial court's jurisdiction but erroneously and without an adequate remedy on appeal. The Court of Appeals noted that the determination of competency to stand trial is a function of the trial judge, and if that finding was erroneous, there is an adequate remedy by appeal. Citing *Jackson v. Commonwealth*, 319 S.W.3d 347 (Ky. 2010), and *Jacobs v. Commonwealth*, 58 S.W.3d 435 (Ky.

2001), the Court of Appeals explained that the remedy is that “[u]pon conviction, a defendant may appeal from a trial court’s determination of competency.”² The Court of Appeals also noted that the trial court, in its February 1, 2011, Order, indicated that Appellant’s competency might have to be revisited, which is also a remedy if counsel believes the Appellant’s condition had deteriorated, citing *Pate v. Commonwealth*, 769 S.W.2d 46, 47 (Ky. 1989). The Court of Appeals denied the petition for the writ of prohibition and the alternative writ of mandamus for failure to show a lack of an adequate remedy on appeal if the trial court erred in holding the Appellant competent to stand trial.³

On appeal to this Court, Appellant contends that the Court of Appeals and the trial court abused their discretion in not finding the Appellant incompetent to stand trial; that the Appellant does not have an adequate remedy on appeal; that the medical evidence shows incompetency; and that the trial itself would be damaging to Appellant’s health.

We should first point out that the Court of Appeals did not find the Appellant was competent to stand trial. The Court of Appeals held that the trial court’s finding of competency could not be dealt with in this petition for a writ because the Appellant had failed to meet the prerequisites for considering a writ, namely, a showing of no adequate remedy by appeal and that a great

² In *Jackson*, 319 S.W.3d at 349, the Supreme Court reiterated that competency is based on the preponderance of evidence in the trial court and review is for clear error and will be reversed only if not supported by substantial evidence.

³ The *Hoskins* test applies to both writs of prohibition and mandamus. See *Cox v. Braden*, 266 S.W.3d 792, 795 (Ky. 2008).

injustice or irreparable injury will result if the writ is not granted. The Court of Appeals did not find the existence of the conditions precedent and would not address the merits of issuing the writ. *See Grange Mut. Ins. Co.*, 151 S.W.3d at 810.

This Court reviews the Court of Appeals' decision for clear error regarding the findings of fact. *Id.* In framing the case to this Court, the Appellant argues that the trial itself could have an adverse effect on the Appellant's competency, which could itself be irreparable injury, thus the writ should be granted to prevent irreparable injury. That may well be the case, however, both the trial court and the Court of Appeals recognized that possibility - the trial court's order finding the Appellant competent to stand trial also granted leave to revisit the Appellant's current competency at any time during the proceedings.

Procedurally, the function of an appeal to this Court is to review the Court of Appeals' decision finding no great and irreparable harm before exercising discretion as to whether to grant the writ. We review this original decision of the Court of Appeals for clear error and find none. *Id.*; *See also* CR 52.01. As stated in *Grange Mutual Insurance Company*, 151 S.W.3d at 810, in cases involving courts with subject matter jurisdiction, where there is an allegation that the trial court is acting erroneously, the petitioner generally must show there is not an adequate remedy by appeal *and* that if the writ is not given that the petitioner will suffer great and irreparable harm as a

prerequisite for considering the writ,⁴ in addition to the likelihood of success on the merits.⁵

It is clear in this case that the Appellant has a right to appeal the trial court's finding of competency at the conclusion of the trial in his matter of right appeal. There is no evidence of irreparable harm in waiting until after the trial to appeal competency. Appellant argues before this Court that the trial itself will cause irreparable harm or injury to the Appellant's competency. We disagree, in light of the trial court's order allowing the Appellant leave to request the competency issue be revisited at any time during the proceedings if the Appellant's competency deteriorates during the proceedings. The Appellant's remedy in this case is to wait and see if his condition *does* deteriorate during the proceedings, and if so, request the trial court revisit the competency issue at that time. *See Pate*, 769 S.W.2d at 47.

For the foregoing reasons, the Court of Appeals' denial of the petition for a writ of prohibition, or the alternative, a writ of mandamus, is affirmed.

Minton, C.J.; Cunningham, Noble, Schroder, Scott, and Venters, JJ., concur. Abramson, J., concurs in result only.

⁴ The prerequisite of no adequate remedy by appeal may be put aside in "certain special cases," where a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration. However, these cases are the rare exceptions. *Grange Mut. Ins. Co.*, 151 S.W.3d at 808 (citing *Bender v. Eaton*, 343 S.W.2d 799 (Ky. 1961)).

⁵ The likelihood of success on the merits was implicitly questionable to the Court of Appeals which noted there were two experts with conflicting opinions.

COUNSEL FOR APPELLANT:

Robert L. Bertram
Bertram & Wilson
1 Monument Square
P.O. Box 25
Jamestown, KY 42629

COUNSEL FOR APPELLEE:

James Lowell Bowling, Jr.
Special Judge, Adair Circuit Court
113 Wellington Drive
Middlesboro, KY 40965

COUNSEL FOR REAL PARTY IN INTEREST:

Jack Conway
Attorney General

Jeanne Deborah Anderson
Assistant Attorney General
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601-8204