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# Supreme Court of Kentucky

2011-SC-000386-MR

JOHN CARLOS COMBS

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2011-CA-000600-MR  
PERRY CIRCUIT COURT NO. 10-CR-00001

HON. JOHN DAVID CAUDILL  
([SPECIAL] JUDGE – PERRY CIRCUIT COURT)  
AND COMMONWEALTH OF KENTUCKY

APPELLEES

## **MEMORANDUM OPINION OF THE COURT**

### **AFFIRMING**

John Carlos Combs filed a petition for writ of mandamus with the Court of Appeals, seeking an order to compel the Perry Circuit Court to grant his motion for payment of expert witness fees. The Court of Appeals denied Combs's petition; and he now appeals, arguing that (1) a writ of mandamus is appropriate because the trial court acted erroneously, he has no alternative adequate remedy, and great injustice and irreparable harm will result if his petition is denied; and (2) either the trial court must award him expert witness funds under Kentucky Revised Statutes (KRS) Chapter 31, or KRS Chapter 31 violates his due process and equal protection rights under the state and federal constitutions.

On review, this Court affirms.

## I. FACTUAL AND PROCEDURAL HISTORY.

The grand jury indicted Combs for murder, first-degree burglary, tampering with physical evidence, and third-degree terroristic threatening. The Commonwealth filed a notice of intent to seek the death penalty against Combs in connection with these charges.

Before Combs's indictment, the district court determined that Combs was needy and indigent; and he was originally represented by the Department of Public Advocacy (DPA).<sup>1</sup> But Combs's family later hired a private defense attorney to represent him and partially paid the fees for a venue expert and an expert psychologist. The family is unable to discharge the remaining balance of the expert witness fees. Nor can they pay the fees necessary for a mitigation expert, investigator, or a ballistics expert, all of whom Combs claims are necessary to prepare an effective and meaningful defense in his capital trial.

Combs filed a motion asking the trial court to declare him indigent for purposes of the costs associated with retaining expert witnesses. The trial court denied Combs's motion based on precedent from this Court in *Morton v. Commonwealth*.<sup>2</sup> And Combs filed a petition for a writ of mandamus, asking the Court of Appeals to require the trial judge to award him expert witness

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<sup>1</sup> Because this is a petition for writ, the Court does not possess the portion of the record necessary to verify that the district court found Combs indigent or that he was originally represented by the DPA. But the Commonwealth does not take issue with these facts. And in its order denying Combs's motion for expert witness fees, the circuit court agreed that Combs is indigent.

<sup>2</sup> 817 S.W.2d 218 (Ky. 1991).

fees.<sup>3</sup> The Court of Appeals denied the petition, finding that Combs has an adequate remedy on appeal for the trial court's alleged error.

## II. ANALYSIS.

When deciding a petition for writ, the Court must first determine whether this extraordinary remedy is appropriate.<sup>4</sup> If the remedy is not available, the petition must be dismissed.<sup>5</sup> And we review the Court of Appeals's denial of a writ of mandamus for abuse of discretion.<sup>6</sup> Only if a writ is appropriate will the Court look to the merits of the petitioner's claim and decide whether the trial court erred.<sup>7</sup>

### **The Writ of Mandamus is Not an Available Remedy.**

Combs argues that a writ of mandamus is available here because the trial court is acting erroneously, there is no adequate alternative remedy, and great injustice and irreparable injury will result if his petition is not granted. We disagree and find that a writ is inappropriate because Combs has an adequate remedy on appeal for the trial court's alleged error.

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<sup>3</sup> Combs also filed a motion for immediate relief under Kentucky Rules of Civil Procedure (CR) 76.36(4), asking the Court of Appeals to either require the trial court to award him expert witness fees or enjoin the Commonwealth and the trial court from proceeding with his trial until full adjudication of his petition for writ of mandamus. Before the court ruled on the emergency motion, the trial court continued Combs's trial. So the Court of Appeals dismissed the motion as moot.

<sup>4</sup> *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961).

<sup>5</sup> *Id.*

<sup>6</sup> *Estate of Cline v. Weddle*, 250 S.W.3d 330, 335 (Ky. 2008) (citation omitted).

<sup>7</sup> *Bender*, 343 S.W.2d at 801; See also *Hoskins v. Maricle*, 150 S.W.3d 1, 18 (Ky. 2004) (“[O]nly after determining that the prerequisites exist will the court decide whether an error occurred for which a writ should issue.”).

The writ of mandamus is an extraordinary measure that Kentucky courts “have always been cautious and conservative both in entertaining petitions for and in granting . . . . This careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of our circuit and other courts.”<sup>8</sup> Whether to issue a writ always lies in the Court’s discretion,<sup>9</sup> and there are limited circumstances in which the Court will do so.

A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.<sup>10</sup>

In the second class of writ, the “no adequate remedy” requirement is mandated; but the “great and irreparable harm” prerequisite is not. There are special cases in which this Court will entertain a writ “in the absence of a showing of specific great and irreparable injury to the petitioner, provided 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.”<sup>11</sup>

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<sup>8</sup> *Bender*, 343 S.W.2d at 800.

<sup>9</sup> *Hoskins*, 150 S.W.3d at 5 (citation omitted).

<sup>10</sup> *Id.* at 10 (citation omitted) (emphasis in original).

<sup>11</sup> *Bender*, 343 S.W.2d at 801 (emphasis in original).

Combs concedes the trial court acted within its jurisdiction by denying his motion for expert fees. But he argues a writ of mandamus is appropriate under the second class of writ because the trial court erred by denying his motion. And Combs claims that he lacks an alternative adequate remedy because the trial court's erroneous ruling was an interlocutory order that cannot be immediately appealed.<sup>12</sup> So determination of the issue would have to wait until after the trial court enters a final judgment in his criminal case. He argues that this remedy is inadequate because it will subject him, the court, counsel, and the public to a trial that will ultimately be reversed either on direct appeal or on a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for ineffective assistance of counsel. We disagree.

Inherent in Combs's argument is an admission that the trial court's alleged error could be remedied on direct appeal or on a collateral RCr 11.42 motion. And, in fact, this Court reviewed and rejected a similar claim of error brought on direct appeal in *Morton v. Commonwealth*.<sup>13</sup> There, the defendant argued that the trial court erred by requiring him to accept DPA representation in order to qualify for fee awards under KRS 31.110.<sup>14</sup> This Court held that relieving the defendant's retained counsel after the defendant sought and acquired indigency status did not violate his right to counsel.<sup>15</sup> In his petition for writ, Combs asks us to overrule *Morton*. But it is clear that his complaint

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<sup>12</sup> See KRS 23A.202(1).

<sup>13</sup> 817 S.W.2d 218 (Ky. 1991).

<sup>14</sup> *Id.* at 219.

<sup>15</sup> *Id.* at 220.

can be properly brought before the courts of the Commonwealth on appeal. Even when constitutional questions are involved, if there is an adequate remedy by appeal, the extraordinary remedy of a writ of mandamus may not be invoked.<sup>16</sup>

Judicial economy alone is not a sufficient reason to issue a writ of mandamus.<sup>17</sup> And writs of mandamus are not meant to short circuit the appellate process.<sup>18</sup> “Because [writs of mandamus] fall outside the regular appellate process, especially when they are used as de facto interlocutory appeals (an increasing, undesired trend), writ petitions also consume valuable judicial resources, slow down the administration of justice (even when correctly entertained), and impose potentially unnecessary costs on litigants.”<sup>19</sup> Contrary to Combs’s argument, granting his petition for writ would be detrimental to judicial economy. Combs has an adequate remedy through the

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<sup>16</sup> See *White v. Payne*, 332 S.W.3d 45, 50 (Ky. 2010) (citation omitted) (referring to a writ of prohibition).

<sup>17</sup> *Gilbert v. McDonald-Burkman*, 320 S.W.3d 79, 84 (Ky. 2010) (“Appellant is simply wrong to assert that . . . the second class of writs [can] be granted for reasons of judicial economy.”).

<sup>18</sup> This case is distinguishable from *Hodge v. Coleman*, 244 S.W.3d 102 (Ky. 2008), which held that a writ of mandamus is appropriate to decide whether defendants are entitled to state funds for travel expenses of witnesses for an evidentiary hearing on a claim of ineffective assistance of counsel. There, we stated that it would be “an unreasonable burden on the proper administration of justice” to require the defendants to raise the issue on direct appeal because denying the writ would prevent the defendants “from presenting witnesses on their behalf at the post-conviction hearing that we have already ordered.” *Id.* at 110. Here, this is not a post-conviction proceeding; and the trial court’s ruling does not prevent Combs from presenting expert witnesses at trial. If his family cannot afford to pay the expert witness fees, then Combs can accept DPA representation and the accompanying benefit of expert witnesses.

<sup>19</sup> *Gilbert*, 320 S.W.3d at 84 (citation omitted).

normal appellate process, and he must proceed accordingly in his quest for relief.

Because an adequate remedy for the trial court's alleged error exists on appeal, we affirm the Court of Appeals's denial of Combs's petition for a writ of mandamus. So we do not reach the merits of Combs's petition claiming the trial court erred by denying his motion seeking expert witness fees.

### **III. CONCLUSION.**

For the foregoing reasons, we affirm the decision of the Court of Appeals and deny Combs's petition for a writ of mandamus.

All sitting. All concur.



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