

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 1, 2018
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2018-SC-000185-MR

DATE 11/26/18 Kim Redmon, DC

FRANCIS PAYNE

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2017-CA-1964-OA
HANCOCK CIRCUIT COURT NO. 08-CR-00020

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In 2009, Francis G. Payne was indicted on first-degree sexual abuse (two counts), first-degree unlawful imprisonment, and kidnapping. He was subsequently convicted on the sexual abuse and the kidnapping charges and sentenced to twenty years in prison. On appeal, this Court reversed the kidnapping conviction. *Payne v. Commonwealth*, 2009-SC-000373-MR, 2010 WL 1641117 (April 22, 2010). On remand, the Hancock Circuit Court re-sentenced him to ten years' imprisonment on the remaining two first-degree

sexual abuse convictions. Payne subsequently challenged his convictions, unsuccessfully, in a RCr¹ 11.42 appeal, No. 2012-CA-423.

Eight years after his original convictions, Payne filed a Petition for Writ of Mandamus in the Court of Appeals. The Court of Appeals denied his Petition on grounds that Payne had an adequate remedy to address his concerns via direct appeal and RCr 11.42. This appeal followed. We agree with the Court of Appeals and affirm.

Payne, filing *pro se*, appears to argue that this Court should grant his Petition for Writ because he was re-sentenced to two consecutive sentences instead of two concurrent sentences on his first-degree sexual abuse convictions, and the original indictment in his case was signed with the incorrect date. This Court has limited the instances in which it will grant a Petition for Writ.

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.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004).

Payne has had two previous appeals. During those two previous appeals he could have raised the issues regarding his indictment, conviction and sentence which he now raises in this Petition. Mandamus cannot be used to

¹ Kentucky Rules of Criminal Procedure.

circumvent the normal appellate procedure. *Nat'l Gypsum Co. v. Corns*, 736 S.W.2d 325, 326 (Ky. 1987). Therefore, nothing he argues in his Petition justifies the extraordinary relief granted by a Writ of Mandamus. Accordingly, his Petition for a Writ of Mandamus is DENIED, and the opinion of the Court of Appeals is AFFIRMED.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Francis Gerard Payne, Pro se

COUNSEL FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Todd Dryden Ferguson
Assistant Attorney General