

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 2093R

RUSSELL PAYTON

VERSUS

**JERRY PATRICK, "DIRECTOR,"
LOUISIANA STATE POLICE CRIME LAB**

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 558,545, Division "D"
Honorable Janice Clark, Judge Presiding**

**Russell Payton
Angola, LA**

**Plaintiff-Appellee
In Proper Person**

**Faye Dysart Morrison
Baton Rouge, LA**

**Attorney for
Defendant-Appellant
Department of Public Safety and
Corrections, Office of State Police,
Louisiana State Police Crime
Laboratory**

Crain, J. concurs with reasons. by TMH
BEFORE: PARRO, HIGGINBOTHAM, AND CRAIN, JJ.

Judgment rendered DEC 30 2014

PARRO, J.

This case arises out of prisoner Russell Payton's request for public records concerning his criminal conviction from the Department of Public Safety and Corrections, Office of State Police, Louisiana State Police Crime Laboratory (the Crime Lab). It is presently before this court on a remand from the Louisiana Supreme Court, dated January 27, 2014, reversing this court's judgment of August 17, 2012, and ordering this court to review the merits of a timely appeal by the state. State ex rel. Payton v. State, 12-2094 (La. 1/27/14), 130 So.3d 953.

BACKGROUND

In a letter to the Crime Lab dated September 18, 2002, Payton made his first request for certain of his criminal records and test results. Although the Crime Lab believed he was not entitled to the records under the provisions of LSA-R.S. 44:31.1,¹ it gave all the requested records to his mother on or about May 22, 2003. His requests for additional records were denied under the authority of LSA-R.S. 44:31.1, because he did not meet the statutory requirements for classification as a "person."

In August 2007, Payton filed a petition for writ of mandamus/injunctive or declaratory relief in the Nineteenth Judicial District Court (19th JDC), seeking the requested records. The district court signed a judgment on April 17, 2008, granting an exception raising the objection of no cause of action on its own motion and giving him leave to amend his petition. He did so, and after review of the supplemental petition, the court again dismissed his claims on the basis of no cause of action in a judgment signed November 17, 2008. The Crime Lab was not served with Payton's petition or the

¹ Louisiana Revised Statute 44:31.1 states the following concerning a person's entitlement to public records:

For the purposes of this Chapter, person does not include an individual in custody after sentence following a felony conviction who has exhausted his appellate remedies when the request for public records is not limited to grounds upon which the individual could file for post conviction relief under Code of Criminal Procedure Article 930.3. Notwithstanding the provisions contained in R.S. 44:32, the custodian may make an inquiry of any individual who applies for a public record to determine if such individual is in custody after sentence following a felony conviction who has exhausted his appellate remedies and the custodian may make any inquiry necessary to determine if the request of any such individual in custody for a felony conviction is limited to grounds upon which such individual may file for post conviction relief under Code of Criminal Procedure Article 930.3.

court's judgment.² Payton did not appeal the November 17, 2008 judgment. Instead, he applied to this court for a supervisory writ concerning it. This court denied the writ on the grounds that the judgment was final and appealable. Payton v. Louisiana State Police Crime Laboratory, 08-2644 (La. App. 1st Cir. 1/12/09) (unpublished writ action).

However, Payton did not file an appeal. Rather, he filed a request for a supervisory writ concerning this court's January 12, 2009 order with the Louisiana Supreme Court,³ which granted the writ and ordered the Crime Lab "to provide relator with an estimate of the costs of reproducing public records relator has requested and to which relator is entitled." State ex rel. Payton v. State, 09-0351 (La. 11/25/09), 21 So.3d 952. This order was sent by facsimile to the Crime Lab on January 13, 2010, and was the first notice to the Crime Lab of any of Payton's legal filings in any court. Interpreting the phrase, "and to which relator is entitled," as limiting the court's order to providing cost estimates only for records to which Payton was entitled, the Crime Lab responded in a letter to the supreme court that he was not entitled to any records, due to the statutory constraints of LSA-R.S. 44:31.1, and for that reason, there were no costs of production.

Payton filed an application with this court for a supervisory writ concerning the supreme court's order, seeking to enforce it. This court denied the writ, informing him that any requests to enforce the supreme court's order must be filed in the 19th JDC. Payton v. Patrick, 10-0099 (La App. 1st Cir. 4/12/10)(unpublished writ action).

Payton also filed an application for a writ of mandamus in the 19th JDC, seeking enforcement of the supreme court's order.⁴ This pleading, which was filed on February 10, 2010, was served on the Crime Lab in May 2010—the first time it received **service**

² The district court had original jurisdiction, rather than appellate jurisdiction, over this case. However, it appears the district court was following the service of process requirement as outlined in LSA-R.S. 15:1178 and 15:1188, whereby it would not have ordered service of the inmate's petition, since it had been determined that the inmate had not stated a valid cause of action. However, those statutes are not applicable to this matter.

³ Because the record before this court does not contain a copy of Payton's application for a supervisory writ to the supreme court, this court had no information concerning the filing date of that pleading.

⁴ Apparently, Payton had filed his application for a supervisory writ with this court at or about the same time that he filed his application for a writ of mandamus in the 19th JDC.

of any pleadings in the case.⁵ Attached to the motion was a copy of Payton's original petition from August 2007. On June 14, 2010, the Crime Lab filed a timely answer to the petition and sent Payton a letter, informing him that under LSA-R.S. 44:31.1, he was not eligible for any of the records he sought. He then filed an application in the 19th JDC for enforcement of the supreme court's order and for constructive contempt of court, seeking civil penalties from the Crime Lab for its failure to comply with the supreme court's order. A commissioner in the 19th JDC⁶ reviewed this pleading and found:

[T]he defendants have failed to demonstrate that they should not be required to comply with the order issued by the Supreme Court on November 25, 2009. Any argument or defenses available to the defendants should have been raised with the Supreme Court and may not be raised at this time. The defendants do not show that they have complied with the prior court order at issue in this matter.

Following this recommendation, in a judgment signed September 29, 2010, the district court granted the request to enforce the supreme court's order and gave the Crime Lab ten days from the date of the judgment to file a notice of compliance. On October 12, 2010, the Crime Lab timely filed a notice of compliance with the court, providing the cost estimate and stating that all of the documents had been provided to Payton's mother in May 2003. After briefs were submitted on the issues of contempt of court and civil penalties, the commissioner recommended that a civil fine in the amount of \$1200 be imposed on the Crime Lab and that it pay all court costs. On August 18, 2011, the court signed a judgment to that effect against the Crime Lab. The judgment was amended to correct a clerical error on October 12, 2011, and the Crime Lab filed an appeal with this court.

In a judgment dated August 17, 2012, this court found that the November 17, 2008 judgment was final and appealable, and, since no appeal had been filed, all of the subsequent proceedings in this case were unauthorized and without legal effect.

⁵ Although the record does not contain proof of service, it does contain the commissioner's service order, dated May 21, 2010, ordering service on the Crime Lab.

⁶ The office of commissioner of the 19th JDC was created by LSA-R.S. 13:711. Commissioners may hear and recommend disposition of any civil or criminal matter that may be assigned by rule of court or by any judge of the court. See LSA-R.S. 13:713(A) through (C). The commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. See LSA-R.S. 13:713(C)(5).

Therefore, we vacated the August 18, 2011 and October 12, 2011 judgments of the district court and dismissed the appeal. Payton v. Patrick, 11-2093, 2012 WL 3555306 (La. App. 1st Cir. 8/17/12)(unpublished). Payton applied for a supervisory writ to the supreme court, which granted the writ, stating:

Granted. The court of appeal's judgment is reversed and this case is remanded for consideration of the state's appeal on the merits. Relator timely sought review of the court of appeal's prior order in Payton v. Louisiana State Police Crime Laboratory, 08-2644 (La. App. 1 Cir. 1/12/09), and this Court, exercising its plenary supervisory authority over the lower courts in this state, La. Const. art. 5, § 5(A), gave relator the relief he requested in the district court by ordering the Louisiana State Police Crime Laboratory to provide him with a cost estimate for reproducing the criminal records and test results relating to his case. State ex rel. Payton v. State, 09-0351 (La. 11/25/09), 21 So.3d 952. Because the court of appeal's judgment dismissing his writ did not become final before this Court granted limited relief, the subsequent proceedings leading to a judgment of \$1200 in relator's favor were not without legal effect, and they remain subject to review on timely appeal by the state.

State ex rel. Payton v. State, 130 So.3d at 953-54.

DISCUSSION

That brings us to the current situation in this case. As previously noted, this court had no information in the record concerning the filing date of Payton's application to the supreme court for a supervisory writ regarding this court's writ denial concerning his right to appeal the November 17, 2008 judgment. Payton v. Louisiana State Police Crime Laboratory, 08-2644 (La. App. 1st Cir. 1/12/09)(unpublished writ action). Therefore, until this remand from the supreme court, we were unaware that a timely review had been requested by Payton before this court's writ denial became final. Accordingly, we concluded that all subsequent pleadings and actions that occurred after the November 17, 2008 judgment became final were unauthorized and without legal effect. Payton v. Patrick, 11-2093, 2012 WL 3555306 (La. App. 1st Cir. 8/17/12) (unpublished). Having now been corrected on this point, we have received briefs from the Crime Lab on its appeal of the civil penalty and costs imposed on it by the 19th JDC. We have also received a brief from Payton.

The Crime Lab's briefs point out what this court has already observed in this case, namely, that the Crime Lab was not served with any of the pleadings in this case

until after the supreme court's order for it to produce an estimate of the costs of production for all records to which Payton was entitled. Only when Payton filed his application for a writ of mandamus in the 19th JDC, seeking enforcement of this order, was the Crime Lab served with this pleading and a copy of Payton's original pleading from August 2007. This service was made in May 2010. The Crime Lab argues that without service ever having been made on it, the supreme court's order at the heart of the award of civil penalties was without jurisdiction over it and, therefore, without legal authority. As a result, the Crime Lab maintains it had no legal obligation to comply with the order, and the failure to comply cannot result in civil penalties or court costs.

Jurisdiction over the person is the legal power of the court to render a personal judgment against a party to an action or proceeding. LSA-C.C.P. art. 6; Imperial v. Hardy, 302 So.2d 5, 7 (La. 1974). Louisiana Code of Civil Procedure article 6(A) states that the exercise of this jurisdiction requires:

- (1) The service of process on the defendant, or on his agent for the service of process, or the express waiver of citation and service under Article 1201.
- (2) The service of process on the attorney at law appointed by the court to defend an action or proceeding brought against an absent or incompetent defendant who is domiciled in this state.
- (3) The submission of the party to the jurisdiction of the court by commencing an action or by the waiver of objection to jurisdiction by failure to timely file the declinatory exception.

The record in this case shows that none of the above requirements to achieve personal jurisdiction over the Crime Lab was accomplished in this case until May 21, 2010, when the commissioner ordered service to be made on the Crime Lab. The first appearance the Crime Lab made in this case was its answer to the original petition, which was filed on June 14, 2010.

A judgment rendered against a defendant who has not been served with process and has not entered a general appearance is an absolute nullity. See LSA-C.C.P. arts. 1201(A) and 2002(A)(2); Adair Asset Mgmt, LLC/US Bank v. Honey Bear Lodge, Inc., 12-1690 (La. App. 1st Cir. 2/13/14), 138 So.3d 6, 11; River City Fed. Sav. Bank (Cadle Co.) v. Video Assocs, Inc., 01-2453 (La. App. 1st Cir. 11/8/02), 835 So.2d 781, 783-84,

writ denied, 02-2966 (La. 4/25/03), 842 So.2d 396; Avants v. Kennedy, 02-0830 (La. App. 1st Cir. 12/20/02), 837 So.2d 647, 654, writ denied, 03-0203 (La. 4/4/03), 840 So.2d 1215; Barrios v. Barrios, 95-1390 (La. App. 1st Cir. 2/23/96), 694 So.2d 290, 294, writ denied, 96-0743 (La. 5/3/96), 672 So.2d 691. In the absence of evidence of proper citation and service of process informing the defendant of the claim against him, in strict compliance with the law, all subsequent proceedings are absolutely null. Tunnard v. Simply Southern Homes, L.L.C., 07-0945 (La. App. 1st Cir. 3/26/08), 985 So.2d 166, 168; Rivers v. Groth Corp., 95-2509 (La. App. 1st Cir. 9/27/96), 680 So.2d 762.

Payton's February 10, 2010 application for writ of mandamus was an attempt to enforce the supreme court's order of November 25, 2009. No court, including the supreme court, had personal jurisdiction over the Crime Lab until May 2010. As such, Payton's pleading was an attempt to enforce an absolutely null judgment by imposition of civil penalties for contempt of court and court costs. An absolutely null judgment is not subject to enforcement. Therefore, we again vacate the district court's judgments of August 18, 2011, and October 12, 2011.

CONCLUSION

For these reasons, the August 18, 2011 and October 12, 2011 judgments are vacated. All costs of this appeal are assessed to Russell Payton.

JUDGMENTS VACATED.

RUSSELL PAYTON

STATE OF LOUISIANA

VERSUS

COURT OF APPEAL

**JERRY PATRICK, "DIRECTOR,"
LOUISIANA STATE POLICE CRIME LAB**

FIRST CIRCUIT

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CRAIN, J. concurs.

I concur in vacating the August 18, 2011 and October 12, 2011 judgments. While I agree that the supreme court's November 25, 2009 order was issued prior to any service of citation or pleadings on the defendant, Louisiana Code of Civil Procedure article 2003 recognizes that a null judgment may be enforced against a defendant who voluntarily acquiesces in the judgment or otherwise fails to attempt to enjoin its enforcement. In the present case, the defendant's first opportunity to object to the execution of the supreme court's order was in response to the plaintiff's "Application for Writ of Enforcement of Court Order and Constructive Contempt of Court" filed on June 28, 2010. The defendant has steadfastly urged the nullity of the supreme court's order on jurisdictional grounds since that time. Therefore, the present record does not support a finding of acquiescence under Article 2003.