

Rel: 09/04/2009

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2009

1071528

Ex parte State of Alabama

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Jason Murphy)

(Elmore Circuit Court, CC-03-444;
Court of Criminal Appeals, CR-07-1265)

PARKER, Justice.

The State of Alabama petitions this Court for a writ of mandamus directing the Elmore Circuit Court to vacate a pre-trial order suppressing certain prosecutorial evidence. We deny the petition.

1071528

On July 29, 2003, Ronnie Holman was shot and killed outside his house in Titus, allegedly during a robbery. He was lured outside the house and then shot. The next day, Jason Murphy was arrested for snatching purses, and on August 11, 2003, Murphy and his brother were arrested for Holman's murder. Murphy was tried twice, and each trial ended in a mistrial.¹ This pretrial appeal by the State concerns an evidentiary issue in Murphy's third trial.

In the two earlier trials, the State was permitted to introduce evidence of Murphy's conviction for assault that stemmed from Murphy's shooting of Carlos King. In that incident, Murphy and some friends threw rocks and debris at King's home, breaking a window, to encourage King to come outside. King emerged from the house with a firearm, which he allegedly fired, and he was shot by Murphy, who used a .22-caliber revolver. King survived the gunshot wound. Murphy entered a plea of guilty to an assault charge and was convicted. In the current proceedings leading up to the third trial, the defense, as it had in the earlier murder trials,

¹The first trial ended in a mistrial on September 15, 2006; the second trial ended in a mistrial on September 28, 2007. Petition, at 6.

1071528

filed a motion in limine seeking to have the evidence of the assault conviction ruled inadmissible as evidence of a prior bad act. At a hearing on Murphy's motion in limine and all other pretrial motions on April 9, 2008, the State presented testimony from an inmate alleging that Murphy had told him that Murphy and others had thrown rocks and debris at Holman's house to lure him outside, just as they had done in the earlier incident when Murphy shot King, and argued that testimony concerning that earlier incident is admissible under an exception in Rule 404(b), Ala. R. Evid., to the general rule that evidence of other crimes is not admissible, i.e., evidence of other crimes is admissible as proof of, among other things, preparation, plan, and identity. Murphy challenges the veracity and bias of the inmate's testimony. Murphy's brief, at 1-2. Moreover, Murphy argues that there is no evidence indicating that any rocks were thrown at Holman's house. Kathy Holman, the victim's spouse, testified that she and Holman were watching television when they heard their dogs barking. She said that she and Holman went outside to see what the dogs were barking at. She testified that that is when Holman was shot.

1071528

On April 10, 2008, the trial court issued its order; that order states, in part:

"Upon argument being received, this Court modifies the previously made ruling concerning the reference to the Carlos King incident as referenced in the Motion [in limine]. This Court hereby rules that the reference to [Murphy's] previous incident wherein Carlos King was summon[ed] out of his residence and thereafter shot is not substantially similar so as to allow testimony of that incident in the prosecution in this Capital Murder case. This Court finds that the only similar facts are the dog barking and someone being shot outside their residence."

On April 23, 2008, the State filed a petition for a writ of mandamus with the Court of Criminal Appeals, which denied the petition on July 24, 2008, without an opinion. State v. Murphy (No. CR-07-1265, July 24, 2008), ___ So. 3d ___ (Ala. Crim. App. 2008). This petition followed.

After the State filed its petition, this Court issued its decision in Ex parte King, [Ms. 1071540, January 9, 2009] ___ So. 3d ___ (Ala. 2009). In supplemental briefs, both parties addressed the applicability of Ex parte King, a case that presents issues similar to those presented in this case. The procedural history of Ex parte King is as follows: The Court of Criminal Appeals had issued a writ of mandamus ordering the trial court to vacate its order denying the State's motion in

1071528

limine seeking to suppress certain evidence. State v. King, [Ms. CR-07-0693, July 25, 2008] ___ So. 3d ___ (Ala. Crim. App. 2008). King then petitioned this Court for a writ of mandamus seeking to have the order of the Court of Criminal Appeals vacated. She argued that by issuing the writ, the Court of Criminal Appeals had enabled the State to file an interlocutory appeal under the guise of mandamus relief. The State argued that the Court of Criminal Appeals had exercised its supervisory authority to avoid a "gross disruption in the administration of the criminal justice system," which, it argues, would result if its motion in limine was denied. Relying on Ex parte Nice, 407 So. 2d 874 (Ala. 1981),² this

² "'The Court of Criminal Appeals has authority to issue such remedial and original writs as are necessary to give it a general superintendence and control of the circuit courts in criminal matters, over which it has exclusive appellate jurisdiction.' Ex parte Nice, 407 So. 2d 874, 876 (Ala. 1981). However, '[m]andamus cannot be used as a substitute for appeal, when no appeal is authorized by law or court rule' Nice, 407 So. 2d at 879 (emphasis omitted). Instead, mandamus 'is appropriate in exceptional circumstances which amount to judicial usurpation of power.' Nice, 407 So. 2d at 878 (emphasis omitted). Moreover, 'mandamus can be used to prevent a gross disruption in the administration of criminal justice.' Nice, 407 So. 2d at 879 (emphasis omitted). Thus, when the trial court has acted without lawful authority, the State has been afforded mandamus relief. See, e.g., State v. Blane,

1071528

Court agreed with King and issued the writ directing the Court of Criminal Appeals to vacate its order issuing the writ to the trial court. In regard to the allegation of an impending "gross disruption in the administration of the criminal justice system," we stated:

"If the trial court allows the jury to consider the evidence the State seeks to keep out, it will be acting within its lawful authority, and the State will have no right of appellate review. Such an outcome would reflect the ordinary and proper administration of criminal justice, not a disruption thereof."

Ex parte King, ___ So. 3d at ___.

Because "'[m]andamus cannot be used as a substitute for appeal when no appeal is authorized by law or court rule ..., '" Ex parte King, ___ So. 3d at ___ (quoting Nice, 407 So. 2d at 879), the Court of Criminal Appeals correctly denied the State's petition for a writ of mandamus seeking to vacate the

985 So. 2d 384 (Ala. 2007) (directing circuit court to vacate order expunging criminal record); D.B.Y. v. State, 910 So. 2d 820 (Ala. Crim. App. 2005) (directing trial court to reinstate juvenile's probation and direct that juvenile undergo sexual-offender risk assessment before being released from probation)."

Ex parte King, ___ So. 3d at ___ .

1071528

decision of the trial court granting Murphy's motion in limine and suppressing evidence of Murphy's assault conviction.

Moreover, the State's petition in the Court of Criminal Appeals was untimely. Rule 15.7(b), Ala. R. Crim. P., provides that the notice of appeal in such a case should be filed within seven days after the entry of the order being challenged. The State filed its petition in the Court of Criminal Appeals 13 days after the trial court signed the order as to which the State sought a writ of mandamus.³ See Rule 21(a), Ala. R. Civ. P. The State's filing was six days late.

"In Alabama, the State has a limited right to appeal in a criminal case. See §§ 12-12-70, 12-22-90, and 12-22-91, and Rule 15.7, Ala. R. Crim. P. The State can appeal a pretrial ruling holding a statute unconstitutional, suppressing evidence, dismissing the charges, quashing an arrest or search warrant, or granting a habeas corpus petition and ordering an individual released from custody. Rule 15.7 governs pretrial appeals by the State, and it provides for an appeal to the Court of Criminal Appeals from a pretrial order of the circuit court ['suppressing a confession or admission or other evidence']."

³The State does not present to this Court the date the order was entered into the State Judicial Information System or argue that the filing of its petition for a writ of mandamus was timely on that basis. See Rule 58(c), Ala. R. Civ. P.

1071528

State v. Adams, [Ms. 1070920, March 6, 2009] ___ So. 3d ___, ___ (Ala. 2009). Rule 15.7(a), Ala. R. Crim. P., specifically governs appeals by the State of pretrial orders suppressing evidence. Rule 21, Ala. R. App. P., governs petitions for a writ of mandamus.

"Rule 21(a), Ala. R. App. P., provides that '[t]he presumptively reasonable time for filing a petition [for a writ of mandamus] seeking review of an order of a trial court shall be the same as the time for taking an appeal.' Rule 15.7, Ala. R. Crim. P., allows only seven days for the only appeal the State can take from an order granting a motion [in limine]."

Ex parte Thomas, 828 So. 2d 952, 954 (Ala. 2001). Thus, the petition to the Court of Criminal Appeals was not filed within the presumptively reasonable time.

The State requests that this Court consider the petition to the Court of Criminal Appeals as timely filed under Rule 21, Ala R. App. P., which provides that a petition may be filed outside the presumptively reasonable time for "good cause" shown. The State argues that it had good cause for its late filing in the Court of Criminal Appeals because, it says, it was unaware until April 16, 2008, that the trial court had signed the order granting Murphy's motion in limine on April 10, 2008. Petition, at 8 n.3. "[I]t is generally held in

1071528

Alabama that a party is under a duty to follow the status of his case ... and that, as a general rule, no duty rests upon either the court or the opposing party to advise that party [of that status].'" Hart v. City of Priceville, 631 So. 2d 301, 302 (Ala. Crim. App. 1993) (quoting Ex parte Weeks, 611 So. 2d 259, 262 (Ala. 1992)). We note that, on April 16, 2008, when the State says it became aware of the trial court's April 10 order, there was still one day remaining for the State to file a timely petition for a writ of mandamus in the Court of Criminal Appeals.

The Alabama Rules of Appellate Procedure provide for the possibility that there may be extraordinary circumstances for an untimely mandamus petition: "If a petition is filed outside [the] presumptively reasonable time, it shall include a statement of circumstances constituting good cause for the appellate court to consider the petition notwithstanding that it was filed beyond the presumptively reasonable time." Rule 21(a)(3), Ala. R. App. P.

"The 'Committee Comments to Amendments to Rule 21(a) and 21(e)(4) Effective September 1, 2000,' set forth the following factors for an appellate court to consider in determining whether good cause exists for the court to consider an untimely petition for a writ of mandamus:

""[T]he prejudice to the petitioner of the court's not accepting the petition and the prejudice to the opposing party of the court's accepting it; the impact on the timely administration of justice in the trial court; and whether the appellate court has pending before it other proceedings relating to the same action, and as to which the jurisdiction of the appellate court is unchallenged.'"

Ex parte Fiber Transp., L.L.C., 902 So. 2d 98, 101 (Ala. Civ. App. 2004). The State has provided this Court neither a discussion of the factors that are to be considered nor any legal arguments for considering the State's petition. Inasmuch as the State has provided no legal argument or justification for its untimely filing, we have no basis upon which we may determine whether there was good cause for the untimeliness.

Because ""[m]andamus cannot be used as a substitute for appeal, when no appeal is authorized by law or court rule ..., "" Ex parte King, ___ So. 3d at ___, and because the filing of the State's petition in the Court of Criminal Appeals was untimely and the State has not provided an acceptable statement of circumstances constituting good cause for this Court to consider that petition as timely filed, notwithstanding that it was filed beyond the presumptively

1071528

reasonable time of seven days (see Rule 15.7(b), Ala. R. Crim. P.), the petition for a writ of mandamus is denied.

PETITION DENIED.

Cobb, C.J., and Woodall, J., concur.

Smith and Shaw, JJ., concur in the result.