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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2009

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Ex parte Albert Wilding

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Albert Wilding)

(Montgomery Circuit Court, CC-08-1115;
Court of Criminal Appeals, CR-08-0024)

PARKER, Justice.

Albert Wilding petitions this Court for a writ of mandamus directing the Court of Criminal Appeals to vacate its order reversing the order of the Montgomery Circuit Court setting bail for Wilding, who was indicted for capital murder.

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State v. Wilding (No. CR-08-0024, Dec. 10, 2008), ___ So. 3d ___ (Ala. Crim. App. 2008) (table). We grant the petition and issue the writ.

Background

The Court of Criminal Appeals responded to Wilding's petition with a concise statement of the case:

"In August 2008, Albert Wilding was indicted for murdering his wife, Judie Wilding, for pecuniary gain, a capital offense as defined by § 13A-5-40(a)(7), Ala. Code 1975.¹ Judge Gene Reese denied bail at Wilding's initial appearance hearing. In September 2008, Wilding filed a habeas corpus petition in the Montgomery Circuit Court requesting that bail be set in his case. Judge Charles Price held a hearing and on October 7, 2008, set bail at \$100,000. The State then filed a mandamus petition with the Court of Criminal Appeals requesting that we direct Judge Price to set aside his October order because, it argued, Judge Price applied the incorrect legal standard when ruling on the validity of Wilding's bail request. On December 10, 2008, we issued an order granting the State's petition and directed Judge Price to set aside his October 1, 2008, order. State v. Wilding, (CR-08-0024, December 10, 2008).

"On December 16, 2008, Wilding filed a petition for a writ of mandamus in the Alabama Supreme Court requesting that the Supreme Court direct this Court to vacate its order granting the State's mandamus petition.

" _____

"At Judie Wilding's death, Albert Wilding was the beneficiary of an \$800,000 life insurance

policy."

Court of Criminal Appeals' response to Wilding's petition, at 3.

Standard of Review

The State provided a succinct discussion of the standard for reviewing a petition for a writ of mandamus:

"To successfully obtain the issuance of a writ of mandamus, [a petitioner] is required to demonstrate that there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' Ex parte Bloodsaw, 648 So. 2d 553, 554 (Ala. 1994). The writ of mandamus 'is a drastic and extraordinary remedy[,] ' Ex parte Head, [958 So. 2d 860, 865 (Ala. 2006)], and the burden of showing entitlement to the writ lies with the petitioner. Ex parte Taylor, 720 So. 2d 1054, 1058 (Ala. Crim. App. 1998)."

State's answer and brief, at 24-25. Further, a decision of a court of appeals on an original petition for a writ of mandamus is reviewed by this Court de novo. Rule 21(e)(1), Ala. R. App. P.

Analysis

The arguments presented by both parties address the burden of each party in presenting evidence to the trial court in a bail hearing for a defendant under indictment for a

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capital offense. The issue in this mandamus petition, however, is not the correctness of setting bail, but whether the State used the proper procedure to challenge Wilding's bail. As Wilding correctly noted in his petition, "the State was incorrect to file a Petition of Mandamus/Prohibition in the Court of Criminal Appeals when [§ 12-22-90(b), Ala. Code 1975], gives a right to appeal." Petition, at 19. Section 12-22-90(b), Ala. Code 1975, provides:

"(b) The district attorney or other prosecuting officer or attorney may take an appeal on behalf of the state to the appropriate appellate court when, on habeas corpus, ... any person held in custody under an indictment by the grand jury charging him with a capital offense is admitted to bail. In all such cases the judgment must be stayed pending the appeal."

This Court has held that such an appeal is the State's exclusive remedy.¹

¹In State v. J.M.W., 936 So. 2d 555 (Ala. Crim. App. 2005), a writ of mandamus issued where the State challenged the authority of the trial court to set bail for a defendant held under a rendition warrant in an extradition proceeding. The Alabama Court of Criminal Appeals decided that "[o]nce a rendition warrant has been issued, an individual has no statutory right to bail in Alabama. Therefore, [there was] no legal basis under § 15-9-43, Ala. Code 1975, on which to grant bail in this case." 936 So. 2d at 563. The Court of Criminal Appeals stated that mandamus is "'appropriate to compel an official action in vacating an order granting bail when such an order was without legal warrant.'" 936 So. 2d at 558 (quoting State ex rel. Russell v. Jones, 31 Ala. App. 208,

"Appeals in habeas corpus proceedings are governed exclusively by § 369, Title 15, Code of 1940, as amended, Pocket Part [now § 12-22-90, Ala. Code 1975]; Thomas v. State, 34 Ala. App. 160, 37 So. 2d 245 [(1948)]; McTyre v. State, 258 Ala. 637, 64 So. 2d 601 [(1953)]. It has been held by this court that without express statutory authority no appeal lies in favor of the petitioner in such a proceeding. Thomas v. State, 215 Ala. 1, 109 So. 607 [(1926)]."

Bradley v. State, 265 Ala. 463, 464, 92 So. 2d 10, 11 (1957).

Where the petitioner has another adequate remedy at law, the issuance of a writ of mandamus is improper. This Court has said:

"Mandamus will not be granted where petitioner has an adequate remedy by appeal. Ex parte Carroll, 272 Ala. 353, 131 So. 2d 676 [(1961)], and cases there cited.

"The fact that a party has lost the right of appeal by failure to pursue the statutory remedy is not ground for issuing mandamus to compel an annulment of the judgment, Jenkins v. State, 24 Ala.

209, 14 So. 2d 590, 591 (1943) (emphasis omitted)). In this case, the Montgomery Circuit Court had the authority to set bail, and the State had the opportunity to appeal the setting of bail. Conversely, this Court refused to allow the State to appeal the setting of bail in State v. Berkstresser, 137 Ala. 109, 34 So. 686 (1903). That case is distinguished from this case because the bail in Berkstresser was set by a probate judge to a person who had been charged with homicide, but who had not yet been indicted. The statute under which the State appealed applied only in circumstances where bail was granted to a person under indictment. Because there was no statutory authority under which the State could appeal, this Court dismissed the appeal.

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App. 185, 132 So. 437 [(1931)], and mandamus is not available as a substitute for an appeal, Ex parte McElroy, 241 Ala. 554, 4 So. 2d 437 [(1941)].' Denson v. First National Bank of Birmingham, 276 Ala. 146, 149, 159 So. 2d 849, 851 [(1964)]."

State v. Cobb, 288 Ala. 675, 678, 264 So. 2d 523, 526 (1972).

Here, the State had the opportunity to file an appeal under § 12-22-90(b), Ala. Code 1975, and that opportunity precludes review by a petition for the writ of mandamus.

Conclusion

Because the State had available an adequate remedy, which is an exclusive remedy, the issuance of a writ of mandamus by the Court of Criminal Appeals was improper. Consequently, we direct the Court of Criminal Appeals to vacate its order directing the Montgomery Circuit Court to set aside its order setting bail for Wilding.

PETITION GRANTED; WRIT ISSUED.

Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, and Murdock, JJ., concur.

Shaw, J., recuses himself.*

*Justice Shaw was a member of the Court of Criminal Appeals when that court considered this case.