

NOTICE
Decision filed 02/14/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130290-U

NO. 5-13-0290

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> DETENTION OF JERRY LEE McCABE)	Appeal from the
)	Circuit Court of
(The People of the State of Illinois,)	Madison County.
)	
Petitioner-Appellee,)	
)	
v.)	No. 99-MR-621
)	
Jerry Lee McCabe,)	Honorable
)	James Hackett,
Respondent-Appellant).)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal must be dismissed where it is from a judgment that is not final and appealable.

¶ 2 The respondent, Jerry Lee McCabe, appeals *pro se* the denial of his "petition for a writ of mandamus relief." The State has filed a motion to dismiss the appeal for want of jurisdiction, arguing that the petition was in reality a motion for the appointment of counsel, the denial of which was nonfinal and nonappealable. This court ordered the motion to be taken with the case. We conclude that McCabe's document was in reality a simple motion to reconsider a previous order denying the appointment of an attorney, and

that the order denying the motion to reconsider was a nonfinal, nonappealable order. For that reason, this appeal must be dismissed.

¶ 3

BACKGROUND

¶ 4 In 1986, McCabe pleaded guilty to three counts of aggravated criminal sexual assault, and other felony offenses, and was sentenced to imprisonment. On December 17, 1999, shortly before he was scheduled to be placed on mandatory supervised release, the State filed a petition to have him committed as a sexually violent person pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 to 99 (West 1998)). On December 27, 1999, the circuit court held a hearing and determined that there was probable cause to believe that McCabe was a sexually violent person. See 725 ILCS 207/30 (West 1998). Since that finding of probable cause, McCabe has remained in custody, and the circuit court has dealt with the case on many occasions. However, a trial to determine whether McCabe is a sexually violent person (see 725 ILCS 207/35 (West 2012)) has never been held. Over the years, the circuit court appointed six different attorneys to represent McCabe in the commitment proceedings (725 ILCS 207/25(c)(1) (West 2012)), but McCabe accused each one of unprofessionalism, and the court granted each one leave to withdraw as counsel. On April 12, 2012, the court entered an order denying McCabe's request for the appointment of a seventh attorney. According to the court, McCabe had forfeited his right to appointed counsel by failing to cooperate with his six previous attorneys.

¶ 5 On April 26, 2013, McCabe filed *pro se* in the circuit court a "petition for a writ of mandamus," wherein he sought an order directing the circuit court to appoint counsel for

him. The named defendant was Judge James Hackett, the judge who had been presiding at the proceedings from their start. McCabe stated that he had a right to appointed counsel under the Act and a right to the effective assistance of counsel under the sixth amendment, that he had not waived those rights, and that "no valid legal authority" permitted Judge Hackett to deprive him of those rights. For relief, McCabe asked that "this Court enter an Order and Stay the Trial Court Proceedings and Grant his Petition For a Writ of Mandamus and Appoint Counsel for the Plaintiff throughout his Commitment Proceedings and Trial in this Case." On May 28, 2013, the circuit court denied the petition, explaining as follows:

"The matter is not properly presented as filed with this court, does not state a factual basis or legal basis for mandamus to issue, and seeks a remedy that this court cannot, and will not grant based upon prior rulings herein."

The court may have been referring to prior rulings denying McCabe's prior requests for the appointment of a seventh attorney. On June 5, 2013, McCabe filed *pro se* a notice of appeal from the order denying the petition, thus initiating the instant appeal.

¶ 6

ANALYSIS

¶ 7 Although a final judgment has not been entered in this case, this appeal represents the fourth time that the case has been before this court. McCabe has brought three previous appeals, each of which was dismissed for want of appellate jurisdiction.

¶ 8 In the instant appeal, McCabe asks this court to reverse the order denying his *mandamus* petition and to order Judge Hackett to appoint an attorney to represent him in the commitment proceedings. McCabe argues that he has a right to an attorney under section 25(c)(1) of the Act (725 ILCS 207/25(c)(1) (West 2012)), under the sixth and

fourteenth amendments to the United States Constitution (U.S. Const., amends. VI, XIV), and under article I, section 2, of the Illinois Constitution (Ill. Const., art. I, § 2). The State urges this court to affirm the circuit court's judgment. The State argues that the circuit court was correct to dismiss McCabe's *mandamus* petition because *mandamus* relief is appropriate only where a public officer has failed to perform a nondiscretionary official duty, but Judge Hackett exercised discretion when he refused to appoint a seventh attorney for McCabe. Furthermore, the State argues that Judge Hackett did not abuse that discretion, since McCabe had forfeited his right to counsel due to his own misbehavior.

¶ 9 In addition, as noted above, the State has filed a motion to dismiss on the ground that this court lacks jurisdiction. The State argues that McCabe's *mandamus* petition was actually nothing more than a motion for the appointment of counsel, that the circuit court treated it as such, and that the circuit court's denial of such a motion cannot qualify as a final and appealable order.

¶ 10 An examination of McCabe's "petition for a writ of mandamus" reveals that it is not truly a *mandamus* petition at all. In the document, McCabe essentially asked the circuit court to order itself to appoint a seventh attorney for him, despite its previous refusal to do so. Phrased in this manner, McCabe's request is obviously not a request for *mandamus* relief; it is a request that the circuit court reconsider its previous denial of McCabe's request for a seventh attorney. The document is a *mandamus* petition in name only. In reality, the document is nothing more than a motion to reconsider a previous order denying appointment of an attorney. The circuit court's order denying McCabe's "petition for a writ of mandamus" is actually an order denying the motion to reconsider.

¶ 11 The Illinois Constitution gives this court jurisdiction over final judgments of the circuit court. Ill. Const. 1970, art. VI, § 6. This court has jurisdiction over nonfinal judgments only as provided by supreme court rules. *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). A judgment or order is final and appealable if it terminates the litigation between the parties on the merits, and sets, fixes, or disposes of the rights of the parties, whether upon the entire controversy or upon some definite and separate part thereof, so that if the judgment or order is affirmed, the trial court need only execute it. *In re A.H.*, 207 Ill. 2d 590, 594 (2003). The circuit court's order denying McCabe's motion to reconsider certainly does not qualify as a final and appealable judgment or order. Therefore, this court lacks jurisdiction, and this appeal must be dismissed.

¶ 12 For the foregoing reasons, the State's motion to dismiss this appeal for want of appellate jurisdiction is granted.

¶ 13 Motion granted; appeal dismissed.