2017 IL App (1st) 162017-U

FOURTH DIVISION
September 7, 2017

No. 1-16-2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 12045
	)	
CARL HEMPHILL,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment affirmed over defendant's claim that the trial court erred in dismissing his "petition of mandamus," that was filed in his underlying criminal proceedings.

¶ 2 Defendant, Carl Hemphill, is currently serving concurrent 40, 10, 10, and 10 year terms of imprisonment imposed on his 2003 convictions for, respectively, first degree murder, aggravated kidnapping, armed robbery, and attempted armed robbery. Although the facts are not pertinent to this appeal, this court discussed the evidence supporting those convictions, and ultimately affirmed defendant's convictions and sentences, in the Rule 23 order entered in defendant's direct appeal. See *People v. Hemphill*, No. 1-03-0895 (2005) (unpublished order

under Supreme Court Rule 23). Thereafter, this court affirmed the summary dismissal of defendant's 2006 *pro se* post-conviction petition (*People v. Hemphill*, No. 1-06-3481 (2010) (unpublished order under Supreme Court Rule 23)) and denial of his 2010 petition for leave to file a successive post-conviction petition. (*People v. Hemphill*, 2013 IL App (1st) 110654-U). In this appeal, defendant challenges the circuit court's dismissal of his "petition of mandamus" seeking relief under the Freedom of Information Act (FOIA) that defendant filed under the case number for his criminal proceedings.

¶ 3 The record shows that on October 5, 2012, defendant filed a FOIA request with the Chicago Police Department (CPD), seeking "all arrest reports, investigative reports, and other miscellaneous documents regarding Case No. 99-CR-12045." CPD responded to defendant on March 12, 2013. CPD gave defendant a two-page general offense case report and his arrest report, but denied access to the other requested documents. CPD informed defendant of its determination that his request was "unduly burdensome under section 5 ILCS 140/3(g)" because it was "a repeated request for the same records that were previously provided and that were properly denied *** in 2005." Nonetheless, "the responsive reports were reviewed again," and CPD determined that the records and information related to an investigation that "remain[ed] cleared/open," and were exempt from production "pursuant to 5 ILCS 140/7(1)(b) and 5 ILCS 140/7(1)(d)."

¶ 4 Defendant sought review of CPD's decision by the Public Access Bureau of the Office of the Attorney General (PAB). On May 6, 2013, an Assistant Attorney General at the PAB sent a letter to the FOIA officer at CPD, informing the officer of the review, and the determination that "further inquiry into this matter [wa]s necessary to confirm that CPD has complied with its obligations under FOIA in responding to this FOIA request." The PAB requested that CPD

"provide this office a detailed explanation of the legal and factual basis supporting the FOIA exemption it has asserted in denying portion of the FOIA request" as well as "copies of all records responsive to the FOIA request, including copies of records withheld and unredacted records for our confidential review."

¶ 5 On June 20, 2013, CPD responded to the PAB's request, attaching "unredacted copies of the records withheld from" defendant. CPD maintained that it was exempt from providing the information under sections 7(1)(d)(i) and 7(1)(d)(vii) of FOIA (5 ILCS 140/7(1)(d)(i); 7(1)(d)(vii) (West 2012)), because "despite defendant's arrest and prosecution ***, the criminal investigation of the incident *** remains open as an active investigation." CPD further stated that the "release of confidential law enforcement information to [defendant] would compromise the Department's ongoing criminal investigation and any future prosecution(s)." CPD also claimed exemptions under section 7(1)(b) for private information; section 7(1)(d)(iv) for information disclosing the identities of witnesses; and section 3(g) for a repeated request (5 ILCS 140/7(1)(b); 7(1)(d)(iv); 3(g) (West 2012)).

¶ 6 On September 4, 2013, the PAB issued a determination "conclud[ing] that the Chicago Police Department must disclose records requested by" defendant. The PAB found that CPD's claimed exemptions based on defendant's previous FOIA request, and based on an "ongoing criminal investigation" did not apply in this case. The PAB did find, however, that CPD was entitled to redact certain information including "private information," and information "identifying any complainant or individual who provided confidential information and did not testify in open court[.]" The PAB "determined that resolution of this matter does not require the issuance of a binding opinion" and that "[t]his correspondence shall serve to close this matter."

¶ 7 On October 4, 2013, defendant mailed a letter to CPD "request[ing] a follow-up" and asking how long it would take for CPD to "decide on releasing" the "documentation into [his] custody." On the same day, defendant also mailed a letter to the PAB, attaching the letter sent to CPD and informing the PAB that CPD had not yet provided the requested records.

¶ 8 On May 6, 2016, defendant, *pro se*, filed a petition for leave to file a petition for *mandamus*, an application to sue or defend as a poor person, and a petition for *mandamus*. All of the foregoing pleadings were brought under defendant's original criminal case number—09 CR 12045—and listed defendant as the plaintiff and CPD as defendant. In the petition for *mandamus*, defendant stated that CPD had failed to "perform specific ministerial duties" over defendant's "clear entitlement to performance of" those duties. Specifically, defendant complained that CPD had failed to release "all police reports" that "the Attorney General and F.O.I.A. officer" had "order[ed]" them to release. In support, defendant attached the correspondence described above.

¶ 9 On May 18, 2016, the trial court considered defendant's petition for *mandamus* in open court. The trial court noted that defendant was "asking for a mandamus order from me as well as appointment of counsel for the city's failure to comply with his freedom of information request concerning the case that he was convicted of." The court found that defendant was "certainly in the wrong for[u]m for that" and that the court was "not in a position to hold the city or to issue any mandamus order to the city" for his FOIA request. The trial court denied the motion, stating that defendant "needs to go elsewhere for his remedy." This appeal followed.

¶ 10 In this court, defendant challenges the trial court's denial of his petition for *mandamus*. He contends that the trial court "short-circuited" the *mandamus* procedure, when it denied defendant's petition on the court's own motion. Defendant asks this court to reverse and remand

the denial of his petition, because the trial court did not "give notice to [defendant], thereby denying him the ability to amend and cure any defects in his pleadings." The State responds that the circuit court properly dismissed his *mandamus* petition, because it "was improperly filed as a post-judgment petition," because he was "improperly using the mandamus petition to compel the Chicago Police Department to perform a discretionary act, and because he "failed to follow the procedure outlined" by FOIA. Defendant did not file a reply brief.

¶ 11 In the trial court, defendant purported to bring a petition for writ of *mandamus*. *Mandamus* is an extraordinary remedy used to compel a public officer to perform nondiscretionary official duties. *McFatridge v. Madigan,* 2013 IL 113676, ¶ 17. In order to obtain a *mandamus* remedy, the plaintiff must establish a clear right to the requested relief, a clear duty of the public officer to act, and clear authority of the public officer to comply with the order. *Id*. A writ of *mandamus* is appropriate when used to compel compliance with mandatory legal standards but not when the act in question involves the exercise of a public officer's discretion. *Id*. We consider *de novo* the issue of whether the complaint stated a cause of action for *mandamus. Newsome v. Illinois Prison Review Board*, 333 Ill. App. 3d 917, 918 (2002), citing *Toombs v. City of Champaign*, 245 Ill. App. 3d 580, 583 (1993); see also *McFatridge*, 2013 IL 113676, ¶ 16 ("Our review of the circuit court's dismissal order is *de novo."*).

¶ 12 In the present case, defendant sought *mandamus* relief to compel CPD to release documents that he had requested pursuant to FOIA. FOIA recognizes that "it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government." 5 ILCS 140/1 (West 2014). Section 3(a) of FOIA provides that a public body "shall make available to any person for inspection or

copying all public records," except as otherwise provided by the Act. 5 ILCS 140/3(a) (West 2014).

¶ 13 A person whose FOIA request is denied may file a request for review with the Attorney General's Public Access Counselor, who "shall determine whether further action is warranted." 5 ILCS 140/9.5 (a), (c) (West 2014). The Counselor may resolve a request for review by mediation, by issuing a binding opinion, or "by a means other than the issuance of a binding opinion." 5 ILCS 140/9.5(f) (West 2014). Only binding opinions are subject to administrative review. 5 ILCS 140/11.5 (West 2014); 5 ILCS 140/9.5(f)(West 2014).

¶ 14 Based on our *de novo* review of the record, we conclude that defendant cannot state a claim for *mandamus*. As defendant acknowledges, the PAB issued a nonbinding opinion in response to defendant's request for review, and, as a result, "it failed to confer a clear ministerial duty on the Chicago Police Department." However, *mandamus* "lies to compel an action by an officer that is *purely ministerial and not discretionary*." (emphasis added) *Newsome*, 333 Ill. App. 3d at 918. Because defendant admits that the activity that he sought to compel was not merely ministerial, he cannot use the extraordinary remedy of *mandamus* to compel CPD to act.

¶ 15 Defendant also had the option to proceed under section 11 of FOIA, which allows "[a]ny person denied access to inspect or copy any public record by a public body" to file in the circuit court a "suit for injunctive or declaratory relief." 5 ILCS 140/11(a) (West 2014). Defendant claims that the "attachments filed with his Petition for Mandamus indicate a clear intent to seek relief under both the Freedom of Information and Mandamus Acts." We disagree. Defendant's petition for *mandamus* relief contained no request for either administrative review, or declaratory or injunctive relief under FOIA. In fact, other than a single reference to a FOIA officer, defendant did not cite FOIA, or make any attempt to comply with its procedures.

¶ 16 The petition that defendant filed was not a suit for injunctive or declaratory relief naming CPD as defendant. Instead, defendant improperly filed a "petition for mandamus" in his original criminal proceedings. However, the claim that he attempted to bring is not a criminal action. Defendant is not challenging his underlying conviction by seeking the release of information under FOIA. Instead, defendant sought to bring an action against CPD for *mandamus* relief. In these circumstances, the trial court correctly dismissed defendant's petition, finding that he was in the wrong forum, and that the criminal division was not the appropriate division of the circuit court to hear his claim.

¶ 17 Apparently acknowledging the defects in his pleading, defendant relies primarily on *People v. Ross*, 367 Ill. App. 3d 890 (2006), to contend that the court was required to notify him and give him an opportunity to amend or argue in support of his pleading. Defendant asserts that "[i]f he had been given a chance to amend his petition he could have added his right to relief under *** FOIA." We disagree.

¶ 18 Our supreme court has stated that "a trial court may, on its own motion, dispose of a matter when it is clear on its face that the requesting party is not entitled to relief as a matter of law." *People v. Vincent*, 226 Ill. 2d 1, 12 (2007). In *Vincent*, the supreme court affirmed the trial court's *sua sponte* dismissal of an inmate's petition for relief brought under section 2–1401 of the Code (735 ILCS 5/2–1401 (West 2002)) without a response from the State or giving the claimant notice. *Id.*, at 12–13. The supreme court affirmed the *sua sponte* dismissal, explaining that:

> "Illinois pleading requirements and well-settled principles of civil practice and procedure permit the trial [court] to have acted *sua sponte* in this case. Our recognition [in] this [regard] is based on long-recognized legal precepts, and is, in our view, more preferable than creating exceptions based solely on the criminal-

> defendant status of the petitioner [citation] or on arbitrary notions of docket control [citation]." *Id.*, at 13–14.

¶ 19 Likewise, in *Bilski v. Walker*, 392 Ill. App. 3d 153, 156 (2009), the fourth district appellate court analyzed *Vincent*, and recognized that its holding was not limited to actions under section 2–1401 of the Code. Instead, *Vincent* made clear that "a trial court has authority under the principles of civil practice and procedure to *sua sponte* dismiss the type of claim presented in this case—namely, a frivolous lawsuit." *Id*. The fourth district thus concluded that "the *Vincent* precepts apply here, even though this claim was ostensibly brought under section 1983." *Id*., citing *Vincent*, 226 Ill. 2d at 12. For the same reasons, we conclude that *Vincent* applies here, where defendant purported to bring a civil action for *mandamus* relief. See *Mason v. Snyder*, 332 Ill. App. 3d 834, 842 (2002) ("trial courts have the authority to *sua sponte* order stricken *mandamus* petitions the courts find to be frivolous and without merit.")

¶ 20 To the extent that *Ross* conflicts with the more recent precedent from our supreme court cited above, we question its ongoing validity. Nonetheless, even if *Ross* is still good law, we find it to be distinguishable from the case at bar. The defendant in *Ross* requested certain documents from CPD, which denied much of the request. *Ross*, 367 Ill. App. 3d at 890. Ross then filed a petition for *mandamus*, claiming that CPD had failed to perform its duty to produce the requested records. *Id*. Although Ross properly named himself as plaintiff and the City of Chicago Department of Police as defendant, the clerk of the court assigned the petition to Ross's criminal case, effectively treating it as a post-conviction petition. The trial court then, *sua sponte* and without notice to either party, dismissed the petition with prejudice. Ross appealed, arguing that the court erred in dismissing the petition without notice, and that if he had received notice, he

could have amended his petition to state a claim for administrative review of the denial of his request under the FOIA.

¶ 21 Another division of the First District appellate court reversed and remanded, concluding that:

> "when a trial court finds a *mandamus* petition insufficient to state a claim for *mandamus* relief or for relief from a judgment, the court must first notify the petitioner of its intention to dismiss the petition as insufficient, just as the court would need to notify the petitioner before recharacterizing the petition. The petitioner then should have the opportunity to withdraw or amend his pleading and to argue in court for the sufficiency of the petition. If the trial court fails to follow proper procedures for its own motion to dismiss, and the procedural defect prejudices the petitioner, we must reverse. But this court will not reverse the judgment if the trial court committed only harmless error by dismissing a petition with patently incurable defects." (internal citation omitted) *Ross*, 367 Ill. App. 3d at 893.

¶ 22 The court found that the "trial court failed to follow proper procedures when it failed to allow Ross a chance to amend the petition or otherwise respond" and that "the procedural error prejudiced Ross because Ross may have had valid grounds for administrative review of the denial of his request for certain documents in the possession of the Department."

¶ 23 In this case, by contrast, defendant's petition for *mandamus* was not inaccurately assigned to the criminal proceeding by the clerk of the court, but instead, defendant himself filed the petition under his criminal case number. See *People v. Hawkins*, 181 Ill. 2d 41, 58 (1998)

("[T]he law is understandably reluctant to aid litigants responsible for the very errors of which they complain.").

¶ 24 More importantly, however, the court in *Ross* found that it was possible for Ross to amend his petition "to state a valid claim for administrative review of the denial of his request for certain documents under [FOIA]" and that Ross may have had "valid grounds for administrative review." For the reasons we set out above, we do not find defendant's petition to be similarly salvageable. See *Owens v. Snyder*, 349 Ill. App. 3d 35, 45 (2004) ("We agree with the trial court's conclusion that plaintiff did not demonstrate anything close to a clear, affirmative right to relief, the *sine qua non* for mandamus. There was nothing plaintiff could do to make it any better. He simply was off the track and could not get back on. We do not believe the legislature intended to require judges and clerks to jump through useless hoops aimed toward impossible goals. *** This judge apparently saw the plaintiff's complaint for what it was—a totally deficient claim for mandamus relief"); *Ross*, 367 Ill. App. 3d at 895 (2006) (O'Malley, J., specially concurring) ("if the appellate court is capable of recognizing that defendant's petition is fatally flawed and not amendable to successful amendment, there is no reason that the trial court cannot be trusted to do the same without useless procedural machinations.").

¶ 25 Although defendant contends that he "may have valid grounds for administrative review of the denial of his request for certain documents in the possession of" CPD, as stated previously, only binding opinions by the PAB are subject to administrative review. 5 ILCS 140/11.5 (West 2014); 5 ILCS 140/9.5(f)(West 2014); see also *Fagel v. Department of Transportation*, 2013 IL App (1st) 121841, ¶ 24 ("Because the [Public Access Counselor]'s ruling in the case at bar was not a binding opinion under the statute, it was not subject to administrative review under section 11.5 of FOIA.") The record shows that the PAB issued a nonbinding opinion in regards to

defendant's document request, and thus, he cannot have "valid grounds for administrative review" like the defendant in *Ross*.

¶ 26 With that said, defendant is not without remedy for CPD's alleged violations of FOIA, but he must comply with the procedures set out under FOIA when seeking that remedy. As pointed out above, the remedy is to proceed under section 11 of FOIA, which allows "[a]ny person denied access to inspect or copy any public record by a public body" to file in the circuit court a "suit for injunctive or declaratory relief." 5 ILCS 140/11(a) (West 2014). We express no opinion as to whether defendant will be ultimately successful bringing suit under section 11, but that is the avenue available to him should he choose to proceed.

¶ 27 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 28 Affirmed.