

DZIUBA
RIGHT TO
CROSS-EX
HEARING
1/4

SCANNED

IN THE COURT OF APPEALS
EASTERN DISTRICT
STATE OF MISSOURI

DAWN DZIUBA)
Relator)
)
v.)
)
JUDGE COLLEEN DOLAN)
Respondent)

FILED
JUL 23 2015
LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

PETITION FOR WRIT

A. Statement of Facts

Relator is a defendant in the criminal cause of State of Missouri v. Dawn Dziuba, Cause No. 14SL-CRO5229. Respondent is Judge Colleen Dolan, judge of the Circuit Court of St. Louis County, in which that cause is pending.

The Missouri Court of Appeals, Eastern District, has jurisdiction to hear this matter and to grant Relief pursuant to Article V, §3 of the Constitution of the State of Missouri, and VAMR 84.23.

Relator is seeking the requested writ to challenge Judge Dolan's failure to hold a competency hearing pursuant to RSMo § 552.020 and Judge Dolan's failure to permit defendant an opportunity to cross-examine the examiner because the examiner's report was contested by the defendant's timely objection in that RSMo § 552.020.7 mandated that Judge Dolan is required to hold a hearing on the issue "if any such opinion is contested" and to have the defendant exercise "the right to summon and cross-examine the examiner who rendered such opinion and to offer evidence upon the issue." Judge Dolan entered a RSMo § 552.020 order on Sept. 19, 2014 for examination. Defendant objected and asserted there was no reasonable cause stated for such examination, thus the reasonable cause standard was not met. Defendant also objected on statutory, religious, and constitutional grounds, asserting her legal right to refuse such examination.

Defendant has asserted that she is competent and requested that the prosecution and defense both agree that defendant is competent so there is no dispute on this issue nor unnecessary delay in proceeding to trial; defendant filed motions for such on December 22, 2014. Defendant insists that she is already competent. Defendant does not have any mental disease nor defects.

Despite defendant's objection, defendant was forcibly moved against her will to St. Louis Metropolitan Psychiatric Center from December 31, 2014 to January 8, 2015, where she was coerced into answering questions by examiner Rachel Springman against her will in a coerced interview that she did NOT consent to do. Springman subsequently filed an erroneous and factually incorrect RSMo § 552.020 report on January 30, 2015.

Defendant timely filed an objection contesting the opinion of examiner Rachel Springman on February 9, 2015 as "Defendant's Objection to the RSMo § 552.020 Report as False and Motion in Limine."

Judge Dolan failed to hold any hearing on the contested opinion. Judge Dolan failed to permit the Defendant to exercise her right to cross-examine the examiner Springman and to present evidence

on the issue. An erroneous order was issued on February 24, 2015 that substantially prejudices the rights of the defendant because it contains factually incorrect statements.

The February 24, 2015 RSMo § 552.020 order currently reads (in first paragraph), "Cause Called. Defendant appears in person and by counsel, Stephen Reynolds. State of Missouri appears by Assistant Prosecuting Attorney." This quoted language contains factually incorrect statements. The truth is there was not a personal appearance by the defendant nor counsel for either party on February 24, 2015. The order is illegal because it contains factually incorrect statements about an alleged hearing that never actually happened on February 24, 2015, for this particular matter. Both Stephen Reynolds and Nicole Frankenburg confirm that they did not attend any proceeding on this particular matter on February 24, 2015. Evidence also indicates that defendant did not attend any proceeding on February 24, 2015, because she was in the St. Louis County jail the entire day. There was not a courtroom proceeding on February 24, 2015, for this particular matter. The order is false.

Judge Dolan has not offered an explanation for the erroneous factually incorrect statements in the February 24, 2015 RSMo § 552.020 order. Neither counsel for either party nor the defendant attended any proceeding for this particular matter on February 24, 2015. There never was any competency hearing and defendant never has any opportunity to cross examine the examiner on February 24, 2015, nor any other date.

Public Defender Stephen Reynolds speculated that the erroneous language in the false February 24, 2015 RSMO 552.020 order might have been from the form template used by the clerk for 552.020 orders in the court, but this is pure speculation. Neither Reynolds nor the Defendant have had the opportunity to confront the clerk or Judge Dolan on such an egregious error and to find out what actually happened. Because of the factually incorrect statements, quoted above, contained in the February 24, 2015 order, there is NO true order committing the Defendant to the Department of Mental Health. There was never any legal authority because the order is false, erroneous and illegal. The factually incorrect statements, which have never been corrected, are objectionable because they prejudice the substantive rights of the defendant. The defendant was denied her right to a hearing and cross-examination of the examiner.

B. Relief Requested

Relator is entitled to an order of mandamus ordering Judge Dolan to hold a competency hearing pursuant to RSMo § 552.020.7 and to order Judge Dolan to permit Defendant to exercise her right to cross-examine the examiner because the examiner's report was contested by defendant's timely objection, in that RSMo § 552.020.7 provides that, "If any such report is contested, the court shall hold a hearing on the issue. The court shall determine the issue of mental fitness to proceed and may impanel a jury of six persons to assist in making the determination. The report or reports may be received into evidence at any hearing on the issue but the party contesting any opinion therein shall have the right to summon and to cross examine the examiner who rendered such opinion and to offer evidence upon the issue." Relator is entitled to a writ of prohibition prohibiting Judge Dolan from proceeding further until Judge Dolan holds a competency hearing pursuant to RSMo § 552.020.7.

C. Suggestions in Support

The February 24, 2015 order is illegal because it contains factually incorrect statements and also because it violates due process and procedure, the constitutional requirements, and the statutory requirements under RSMo § 552.020.7, which required the court to hold a hearing when the RSMo § 552.020 report is contested, as it was in this case by defendant's February 9, 2015 motion titled, "Objection to the RSMo § 552.020 Report as False and Motion in Limine." Defendant's Objection to contest the report was timely filed within ten days of the report. Judge Dolan was obligated to hold a hearing on competency and to permit the defendant to exercise her right to cross-examine the examiner because the report was contested.

RSMo § 552.020 states, "If any such opinion is contested, the court shall hold a hearing on the issue. The court shall determine the issue of mental fitness to proceed and may impanel a jury of six persons to assist in making the determination. The report or reports may be received into evidence at any hearing on the issue but the party contesting any opinion therein shall have the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue."

Applying RSMo § 552.020.7 to the instant case, where the opinion of examiner Rachel Springman is contested, Judge Dolan was required to "hold a hearing on the issue" and to have the defendant exercise 'the right to summon and to cross-examine the examiner who rendered such opinion and to offer evidence upon the issue.'

The February 24, 2015 RSMo § 552.020 order is illegal because no hearing was held on that date and thus it violates the requirements of RSMo § 552.020.7 that, "If any such opinion is contested, the court shall hold a hearing on the issue." The defendant has not yet had the opportunity to exercise her right to cross-examine the examiner Rachel Springman, which violates the requirement of her "right to cross-examine" in RSMo § 552.020.7. A writ of mandamus is appropriate because Judge Dolan had a clear duty to hold a hearing and to respect defendant's right to cross-examine under RSMo § 552.020.7, and Judge Dolan failed to comply with this duty.

There was no hearing on this matter with either the defendant nor wither counsel for either party present, in contrast to what the February 24, 2015 order falsely and erroneously states. Thus, RSMo § 552.020 was violated. Judge Dolan clearly violated her duty to comply with RSMo § 552.020.7 with the factually incorrect statements in the February 24, 2015 order. Since this order is erroneous, there is no legal order committing the defendant to the Department of Mental Health.

Judge Dolan's failure to hold a hearing on this issue also violates Judge Dolan's ethical obligations regarding the defendant's right to be heard. Pursuant to Missouri Supreme Court Rule 2-2.6(A), "the judge shall accord every person who has a legal interest ... the right to be heard." Comment [1] states, "The right to be heard is an essential component of a fair and impartial system of justice, substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

As applied to the instant case, Judge Dolan clearly violated Defendant's right to be heard by issuing the erroneous February 24, 2015 order which contains factually incorrect statements. Defendant never had a right to be heard for a hearing on competency on February 24, 2015 nor any other date. Neither defendant nor counsel for either party attended a hearing on February 24, 2015. The rules of ethics were violated by the February 24, 2015 order falsely stating that defendant and her counsel were present when the truth is that neither attended any hearing on that date. This error is too egregious to overlook because it clearly violates both the judge's obligation to the defendant's right to be heard on this particular matter, as well as violates the judge's duties under RSMo § 552.020.7 to hold a hearing

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where any opinion is contested and to permit the defendant to exercise her right to cross-examine the examiner and to present evidence upon the issue.

Mandamus is appropriate to compel Judge Dolan to hold a competency hearing pursuant to RSMO §552.020.7 and to order Judge Dolan to permit Defendant to exercise her right to cross-examine the examiner who wrote the contested report, as well as to prohibit Judge Dolan from proceeding further until such competency hearing is held. A writ of mandamus will lie to compel a court to do that which it is obligated to do. See generally, Harvey v. Wells, 955 S.W.2d 546 (Mo. 1997) The proper course for an appeal by an aggrieved party without a final judgment is ordinarily by extraordinary writ. VAMS Const. Art 5 § 4. See generally, Transit Gas Co. ex. Rel. Pulitzer Publishing Co. v. Transit Gas Co. ex. Rel. Intervening Employees, 43 S.W.3d 293 (Mo. 2001). Mandamus will lie to issue a circuit court which refuses to perform duty within its jurisdiction VAMS Const. Art 5 § 4. See generally, State ex. Rel. Stewart v. McGuire, 838 S. W. 2d 516 (Mo. App. S.D. 1992). Mandamus will issue where administrative board or court has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it abused whatever jurisdiction may have been vested in it. See generally, State ex. Rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell, 426 S.W.2d 11 (Mo. 1968). Mandamus lies to compel a trial judge to grant a jury trial when a party is entitled to it as a matter of right and it has been denied, and hence mandamus was an appropriate remedy where relator contended that the circuit judge had exceeded jurisdiction in overruling the relator's request for a jury trial in a case pending before the circuit judge. See generally, State ex. Rel. Shaul v. Jones, 335 S.W.2d 468 (M. App. 1960)

D. Conclusion

Wherefore, defendant requests:

1. This Honorable Court must enter an order of mandamus ordering Judge Dolan to hold a Competency hearing pursuant to the judge's duty under RSMo § 552.020.7, and order Judge Dolan to permit the Defendant to exercise her right to cross examine the examiner because the examiner's report was contested, as is the duty under RSMo §552.020.7.
2. This Honorable Court must enter a writ of prohibition prohibiting Judge Dolan from proceeding further until Judge Dolan has complied with her duty under RSMO § 552.020 to hold this competency hearing and to permit the Defendant to cross-examine the examiner who wrote the contested report.
3. This Honorable Court must enter an order of mandamus ordering Judge Dolan to respect the Defendant's right to be heard on these matters.
4. This Honorable Court may dismiss all charges against the defendant with prejudice and the defendant may be immediately discharged.
5. Any other relief deemed proper.

Respectfully submitted,


Dawn Dziuba