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DISTRICT IV

October 29, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP2221

State of Wisconsin ex rel. Jacob Sell v. Daniel Key
(L.C. # 2018CV49)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jacob Sell, pro se, appeals a circuit court order denying Sell's petition for a writ of mandamus. Sell contends that he was entitled to a writ of mandamus: (1) compelling Municipal

Judge Daniel Key to hear Sell's motion to disqualify Judge Key from Sell's municipal citation case; and (2) compelling the clerk of the circuit court to provide Sell with file-stamped copies of documents in the clerk's file. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We summarily affirm.

On May 1, 2018, Sell filed a petition for a writ of mandamus asserting the following. Sell received municipal citations in November 2016, and Judge Key was appointed to hear the case. Sell moved to disqualify Judge Key under WIS. STAT. § 757.19, arguing that Judge Key's representation of the mother of Sell's child in Sell's paternity case created the appearance of bias. Sell failed to appear at the citation hearing in March 2017, and Judge Key granted default judgment against Sell without addressing the motion to disqualify. Sell moved for a new hearing on the basis of a medical emergency, and Judge Key denied the motion without a hearing. In August 2017, Sell again moved to disqualify Judge Key. In September 2017, during a court session, Sell filed a motion for relief from the default judgment and also requested that the clerk of the circuit court, Cindy Jefson, provide Sell with copies of motions he filed in this matter. Jefson denied Sell's request for copies, stating that she did not have copies with her. Sell subsequently left phone messages with Jefson, requesting copies of motions he had filed, but the messages were not returned.

Sell sought a writ of mandamus in the circuit court compelling Judge Key to hold a hearing on the motion to disqualify; compelling Jefson to provide Sell with copies of motions Sell had filed; and compelling Judge Key to hear Sell's motion for relief from judgment. The circuit court

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

denied Sell's request to compel Judge Key to hold a hearing on the disqualification motion. The court determined that, because disqualification is discretionary, mandamus is not an appropriate remedy. The court also denied Sell's request to compel Jefson to provide Sell with copies from the record, explaining that there was no legal obligation for the clerk to provide the copies. The court granted Sell's request for a writ compelling Judge Key to hold a hearing on Sell's motion for relief from judgment under WIS. STAT. § 800.115.²

“For a writ of mandamus to issue, the petitioner for the writ must establish that: (1) he possesses a clear legal right to the relief sought; (2) the duty he seeks to enforce is positive and plain; (3) he will be substantially damaged by nonperformance of such duty; and (4) there is no other adequate remedy at law.” *State ex rel. Robins v. Madden*, 2009 WI 46, ¶10, 317 Wis. 2d 364, 766 N.W.2d 542. “We will uphold a circuit court’s grant or denial of a writ of mandamus unless the circuit court erroneously exercised its discretion.” *Hartland Sportsmen’s Club, Inc. v. City of Delafield*, 2020 WI App 44, ¶9, 393 Wis. 2d 496, 947 N.W.2d 214.

Sell argues that he was entitled to a writ of mandamus compelling Judge Key to hear his motion for disqualification. He contends that the circuit court erred by determining that a motion to disqualify is discretionary and not subject to mandamus. Sell argues that Judge Key’s representation of the mother of Sell’s child in a paternity case created the appearance of bias in Sell’s municipal citation case, requiring Judge Key’s disqualification under WIS. STAT. § 757.19.

² The court ordered Sell to submit a proposed writ of mandamus consistent with the court’s decision within ten days. However, Sell failed to submit the proposed writ within the time set by the court, and the court dismissed the writ action. Sell then moved for additional time, which the court granted, and it appears that Sell then timely submitted the proposed writ. Sell does not raise any issues on appeal arising from his request for a writ compelling a hearing on his motion for relief from judgment.

However, Sell does not explain, in his petition or in his brief in this court, why he had no other adequate remedy at law. See *Robins*, 317 Wis. 2d 364, ¶10 (petitioner must establish that he has no other adequate remedy at law to entitle petitioner to a writ of mandamus). Sell asserted in his petition that he timely sought relief from the default judgment in the municipal court. Indeed, the circuit court granted Sell’s request for a writ compelling Judge Key to hold a hearing on the motion for relief from judgment. Sell does not assert that he could not raise the disqualification issue at a hearing on the motion for relief from judgment under WIS. STAT. § 800.115 and, if necessary, on appeal. See WIS. STAT. § 800.14(1) (while a party is prohibited from appealing a default judgment in the municipal court, party may appeal municipal court’s decision on a motion for relief from the judgment under § 800.115). Because Sell failed to establish that he met the criteria for a writ of mandamus compelling Judge Key to hold a hearing on the disqualification motion, the circuit court properly denied Sell’s request.³

Sell also argues that he was entitled to a writ of mandamus compelling Jefson to provide Sell with copies of documents Sell had filed. He argues that Jefson was required to provide the copies that Sell requested under the public records law. He asserts that mandamus is an available remedy for a violation of the public records law under WIS. STAT. § 19.37. Jefson responds that mandamus is not an available remedy because Sell did not assert that he made any of his requests for copies in writing, as required to pursue a mandamus action to enforce a public records request.

³ As this court noted by prior order, Judge Key failed to file a respondent’s brief. We nevertheless affirm the circuit court’s decision that Sell is not entitled to a writ of mandamus compelling Judge Key to hold a hearing on Sell’s motion for disqualification, on grounds that Sell’s petition failed to establish the criteria necessary for the court to grant the writ. Additionally, we rely on a different reason than set forth by the circuit court. See *State v. Hurley*, 2015 WI 35, ¶29, 361 Wis. 2d 529, 861 N.W.2d 174 (“When reviewing a circuit court’s determination for erroneous exercise of discretion an appellate court may consider acceptable purposes for the [decision] other than those contemplated by the circuit court, and may affirm the circuit court’s decision for reasons not stated by the circuit court.” (quoted source omitted)).

See WIS. STAT. § 19.35(1)(h) (“A request may be made orally, but a request must be in writing before an action to enforce the request is commenced under s. 19.37.”); § 19.37 (providing for enforcement and penalties, including bringing an action for mandamus). Sell has failed to file a reply brief to dispute Jefson’s argument, which we take as a concession. See *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant’s failure to dispute respondent’s arguments in a reply brief may be taken as a concession). Because Sell failed to establish that he was entitled to a writ of mandamus under the public records law, the circuit court properly denied Sell’s request.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals