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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:

2020AP91 State of Wisconsin ex rel. Adam Christopher v. Custodian of Records (L.C. # 19CV1196)

Before Blanchard, Kloppenburg, and Graham, 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).

Adam Christopher, pro se, appeals a circuit court order that dismissed Christopher's petition for a writ of mandamus. 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 April 8, 2019, Christopher filed a petition for a writ of mandamus in Jackson County Circuit Court. Christopher asserted that he made a public records request to the Department of Corrections (DOC), and that DOC issued a final decision denying his request on March 1, 2019. On April 30, 2019, the Jackson County Circuit Court transferred Christopher's petition to the Dane County Circuit Court, explaining that Dane County was the proper venue for Christopher's action.

On July 9, 2019, the Dane County Circuit Court dismissed Christopher's petition on grounds that Christopher had failed to provide a proposed writ with his petition. On August 26, 2019, the circuit court granted Christopher's motion for reconsideration because Christopher established that he had submitted the proposed writ to Jackson County with his petition. The circuit court signed the proposed writ on August 28, 2019. Christopher served the writ on the Wisconsin Department of Justice on September 25, 2019.

Respondent DOC Custodian of Records moved to quash the writ on grounds the writ was not served within ninety days of DOC's March 1, 2019 denial of Christopher's public records request.[2] *See* WIS. STAT. §§ 19.37(1m) (inmate has ninety days from public records denial to

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

[2] Christopher argues that DOC wrongly calculated his deadline to serve the writ as May 30, 2019. He argues, instead, that his deadline should have been calculated as July 9, 2019. DOC responds that Christopher has not properly preserved this argument for appeal because he raised it for the first time in an improperly filed motion for reconsideration. For purposes of this opinion we will assume, without deciding, that Christopher's deadline to serve the writ was July 9, 2019.

"commence" mandamus action challenging the denial); and 801.02(5) (mandamus action may be "commenced" by service and filing of the writ). Christopher opposed the motion, arguing for equitable tolling of the time to serve the writ. The circuit court declined to apply equitable tolling, and granted the motion to quash the writ. Christopher moved for reconsideration, and then, thirty-three days after filing his motion and without hearing from the circuit court in response to his motion, he appealed.

Christopher argues that equitable tolling applies to the time for him to serve the writ. He argues that he was prevented from timely serving the writ when Dane County Circuit Court dismissed his petition on July 9, 2019, and that, by the time the court reinstated his action on August 26, 2019, his ninety days to serve the writ had passed. He argues that his filing in the wrong county caused only "a few days" of delay, while the court's erroneous dismissal caused more than a month delay, and that the delay in issuing the writ was too attenuated from his filing in the wrong county to prevent equitable tolling. He argues that he served the writ on September 25, 2019, within thirty days of receiving it from the circuit court on August 28, 2019. He contends that his failure to serve the writ within ninety days of March 1, 2019, was due to circumstances beyond his control, and that equitable tolling should therefore apply. *See* ***State v. Zimbal***, 2017 WI 59, ¶66, 375 Wis. 2d 643, 896 N.W.2d 327 ("We have employed equitable tolling when a required act is dependent on a prior necessary act of another over whom the person seeking equitable tolling has no control.").

DOC responds that equitable tolling is not warranted because Christopher's failure to meet the ninety-day deadline for serving the writ was attributable to Christopher's decision to file his petition in Jackson County despite the fact that Dane County was the proper venue for the petition. DOC cites Christopher's statement to the circuit court that he chose to file in Jackson

County because of problems he had encountered with the prisoner litigation staff attorney in Dane County. It argues that Christopher knowingly chose the wrong venue, causing the events that prevented him from being able to timely serve the writ, and thus he is not entitled to equitable tolling. It also argues that Christopher chose the writ method of commencing his mandamus action, despite the fact that there were two other methods of service available under WIS. STAT. § 801.02(5) that did not require service of a signed writ. It contends that Christopher's decision to commence his action by the writ method, together with his choice to file his petition in the wrong county, defeat any claim for equitable tolling.

We conclude that Christopher is not entitled to equitable tolling of the ninety-day period to serve the writ. Christopher's public records request was denied on March 1, 2019, and Christopher filed his petition for a writ of mandamus in Jackson County on April 8, 2019. However, because Jackson County was not the proper venue for the writ action, the issuance of a writ was delayed while Jackson County transferred the action to Dane County. Issuance of the writ was delayed further because the transfer—which was necessitated by Christopher's decision to file in the wrong county—resulted in an incomplete file being before the Dane County Circuit Court, leading to the dismissal and subsequent reinstatement of the action. Ultimately, then, the delay in the issuance of a writ can be traced to Christopher's decision to file his action in the wrong county in the first instance. Because Jackson's own actions caused the delay in his obtaining the writ, equitable tolling is not warranted. *See, e.g.*, ***State ex rel. Walker v. McCaughtry***, 2001 WI App 110, ¶¶11-26, 244 Wis. 2d 177, 629 N.W.2d 17 (generally, equitable tolling doctrines apply if circumstances beyond the prisoner's control prevent timely filing).

Next, Christopher contends that his mandamus action was properly commenced under the alternative method for commencing a mandamus action by filing a complaint. *See* WIS. STAT.

§ 801.02(5) (mandamus action "may be commenced … by filing a complaint" if the complaint and an order signed by the court are served upon the defendant in the time specified in the order). He argues that he satisfied the statutory criteria to commence the mandamus action by filing a complaint because his pleading "demanded and specified the remedy," and that he obtained an "order" in the form of the writ signed by the judge and served the "order" on the respondent by the only date in the order, which was the October 31, 2019 status conference. Christopher argues that, by serving the petition and writ on the respondent by the date set in the order for a status conference, he timely served the "complaint" and "order" as required under § 801.02(5). He argues that his decision to style the pleading as a "petition" rather than as a "complaint" was a technical error that did not cause prejudice, relying on ***State ex rel. Department of Natural Resources v. Walworth County Board of Adjustment***, 170 Wis. 2d 406, 418, 489 N.W.2d 631 (Ct. App. 1992), and that the circuit court should have liberally construed the pleading as a complaint, relying on ***Amek Bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983).

DOC responds that Christopher stated in the circuit court that he had pursued the writ method of commencing his mandamus action, and that Christopher therefore conceded that his pleading was not a complaint with the mere technical defect of being styled as a petition. DOC also argues that Christopher has failed to meet his burden to establish that the label of the pleading was a mere technical defect. *See* ***American Fam. Mut. Ins. Co. v. Royal Ins. Co. of Am.***, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992) (burden is on complainant to prove that a pleading's defects are merely technical). It contends that ***Walworth County*** is distinguishable because, in that case, the complainant filed a summons along with a pleading styled as a petition, such that it was reasonable to conclude that the pleading was intended as a complaint. *See* ***Walworth County***, 170 Wis. 2d at 416-17 ("[T]he fact that the appeal was commenced by

service of a summons and petition rather than a summons and complaint is precisely that kind of hypertechnical defect that the law chooses to ignore unless there is prejudice."). It points out that, here, Christopher did not file a summons along with his pleading. DOC also points out that commencing a mandamus action by the complaint and order method under WIS. STAT. § 801.02(5), which does not require a summons, still requires the complainant to obtain and serve an order within the time set by the order.

We conclude that Christopher has not established that he commenced his mandamus action either by the complaint and summons method or by the complaint and order method. Christopher does not dispute that he did not file a summons, nor does he argue that a summons was not necessary for commencing an action under the complaint and summons method. As to the complaint and order method, we are not persuaded that the writ was a sufficient "order" under WIS. STAT. § 801.02(5). To commence an action by the complaint and order method, the complainant must obtain and serve an order within the time specified for service in the order. ***Id.*** We do not agree with Christopher's assertion that the "order" specified a time for service by stating that a status hearing was scheduled for October 31, 2019. Accordingly, Christopher has not established that he properly commenced the action by either complaint method.

Finally, in the alternative, Christopher contends that he was not required to follow the requirements to commence a mandamus action under WIS. STAT. § 801.02(5), but rather that he had the option of following the "common law" mandamus procedure. He argues that the use of "may" in § 801.02(5) as to the procedures by which a mandamus action "may be commenced" is permissive, such that the common law procedure remains available, and that § 801.02(5) did not alter the common law method for commencing a mandamus action. He contends that he

complied with the common law requirements for commencing a mandamus action by filing the petition and writ in the circuit court and then promptly serving the respondent.

DOC responds that the statutory methods supersede the common law. It argues that a complainant is required to follow one of the three statutory methods to commence a mandamus action, as set forth in ***Walworth County***, 170 Wis. 2d at 415-16 (setting forth statutory methods for commencing mandamus action).

We conclude that Christopher has not established that he could commence his mandamus action by a method other than those set forth in WIS. STAT. § 801.02(5). As the Wisconsin Supreme Court explained in ***Walworth County***, 170 Wis. 2d at 416-17, there are three methods for commencing a mandamus action: complaint and summons; complaint and order; or writ. Because Christopher failed to properly follow any of those methods, the circuit court did not err by dismissing his writ action.

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