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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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Ex parte T.M.F.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(In re: Ex parte T.M.F.)

(In re: Ex parte I.W.)

v.

T.F.))

(Jefferson District Court, DR-18-500939;
Court of Civil Appeals, 2180428)

SELLERS, Justice.

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T.M.F. petitions this Court for a writ of certiorari to review the March 5, 2019, order of the Court of Civil Appeals denying his petition for a writ of mandamus, Ex parte T.M.F. (No. 2180428, March 5, 2019), ___ So. 3d ___ (Ala. Civ. App. 2019) (table); T.M.F. sought a writ of mandamus directing the Jefferson District Court to vacate its order denying his motion for a change of venue in an underlying case involving a petition for protection from abuse from Jefferson County to Mobile County and to enter an order transferring the case to Mobile County. We dismiss the petition for a writ of certiorari.

Rule 21(e), Ala. R. App. P., sets forth the procedures for seeking review of decisions of the Courts of Appeals granting or, as in this case, denying a petition for a writ of mandamus. Rule 21(e) states, in relevant part:

"(1) A decision of a court of appeals on an original petition for writ of mandamus or prohibition or other extraordinary writ (i.e., a decision on a petition filed in the court of appeals) may be reviewed de novo in the supreme court, and an application for rehearing in the court of appeals is not a prerequisite for such review. If an original petition for extraordinary relief has been denied by the court of appeals, review may be had by filing a similar petition in the supreme

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court (and, in such a case, in the supreme court the petition shall seek a writ directed to the trial judge). ...

"....

"(3) Without regard to whether the court of appeals has issued an opinion, rehearing may be sought in the court of appeals, but if a rehearing is sought, then review in the supreme court shall be by petition for writ of certiorari pursuant to Rule 39[, Ala. R. App. P]."

(Emphasis added.)

Rather than filing a petition for a writ of mandamus in this Court seeking de novo review of the issue before the Court of Civil Appeals in denying his petition for a writ of mandamus, T.M.F. filed a petition for a writ of certiorari pursuant to Rule 39, Ala. R. App. P. However, under Rule 21(e), Rule 39 comes into play only if T.M.F. had first sought a rehearing in the Court of Civil Appeals. Because T.M.F. did not file an application for rehearing in the Court of Civil Appeals, his only avenue for seeking review in this Court would be filing a petition for a writ of mandamus. Rule 21(e); see also generally State v. Lewis, 907 So. 2d 1020 (Ala. 2005). Accordingly, the petition for a writ of certiorari is dismissed.

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PETITION DISMISSED.

Bolin, Shaw, Mendheim, and Stewart, JJ., concur.

Parker, C.J., and Wise, Bryan, and Mitchell, JJ., concur
in the result.

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PARKER, Chief Justice (concurring in the result).

I agree that T.M.F.'s petition should be dismissed. However, I disagree with the conclusion of the main opinion that mandamus is the exclusive avenue for seeking review of the Court of Civil Appeals' decision on a mandamus petition where the losing party has not filed an application for rehearing. This exclusive view lacks a clear basis in the Alabama Rules of Appellate Procedure and contradicts the plain language of those Rules.

As a threshold matter, Rule 39 allows certiorari review in this procedural context. Rule 39 provides generally for certiorari review of "decisions" of the Court of Civil Appeals, without limiting such decisions to those on appeals or otherwise excluding mandamus decisions. See Rule 39(a) (1), (b), (b) (3), Ala. R. App. P.

In turn, although Rules 21 and 39 allow mandamus review in this context, they do not expressly exclude certiorari review. This nonexclusivity is apparent from the use in those rules of permissive rather than mandatory language to describe mandamus review.

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As a contrasting example, if the losing party below applies for rehearing, then certiorari is the exclusive avenue for review because Rule 21(e)(3) uses mandatory language: "[I]f a rehearing [of a court of appeals' mandamus decision] is sought, then review in the supreme court shall be by petition for writ of certiorari pursuant to Rule 39" (Emphasis added.)

If the losing party does not apply for rehearing, however, Rule 21(e)(1) describes mandamus review using permissive language:

"A decision of a court of appeals on an original petition for writ of mandamus ... may be reviewed de novo in the supreme court If an original petition for extraordinary relief has been denied by the court of appeals, review may be had by filing a similar petition in the supreme court If an original petition has been granted by the court of appeals, review may be had by filing in the supreme court a petition for writ of mandamus"

(Emphasis added.) Similarly, Rule 39(j) cross-references Rule 21(e) using permissive language: "A party aggrieved by a decision of a court of appeals on a petition for a writ of mandamus ... is entitled to review in the Supreme Court as provided in Rule 21(e)." (Emphasis added.) Therefore, Rules

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21(e)(1) and 39(j) do not exclude certiorari review. See also Ed R. Haden, Practice Guide: Alabama Appellate Practice § 9.06 (LexisNexis Matthew Bender 2018) ("Rule 21(e) review by writ is an alternative to review by a petition for certiorari under Rule 39, Ala. R. App. P. If an application for rehearing is filed with the court of appeals, however, the 14-day period of Rule 21(e)(2) will run and review will have to be by a petition for certiorari. See Rule 21(e)(3), Ala. R. App. P." (emphasis added)).

Moreover, under the exclusive view taken by the main opinion, an application for rehearing becomes a prerequisite to certiorari review in this context. This outcome contradicts the plain language of Rule 39(b)(1): "The filing of an application for rehearing in the Court of Civil Appeals is not a prerequisite to review by certiorari in the Supreme Court."

Although the main opinion cites State v. Lewis, 907 So. 2d 1020 (Ala. 2005), that case does not support the exclusive view. Lewis, applying Rule 21(e)(3), held that certiorari is the exclusive avenue if the party seeking review has applied for rehearing in the court of appeals.

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Id. at 1021. It did not hold the converse -- that certiorari is not an avenue if the party seeking review has not applied for rehearing.

Because the Alabama Rules of Appellate Procedure allow certiorari review in this context, I disagree with the reasoning in the main opinion for dismissing T.M.F.'s petition. Nevertheless, the petition should be dismissed because it fails to comply with certain procedural requirements for certiorari review in Rule 39. Therefore, I concur in the result.

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BRYAN, Justice (concurring in the result).

I agree with the main opinion to the extent that it holds that, under the circumstances presented in this case, where no application for rehearing was filed in the Court of Civil Appeals, T.M.F. should have filed a petition for a writ of mandamus seeking de novo review of the Court of Civil Appeals' decision to deny his request for mandamus relief. See Rule 21(e), Ala. R. App. P. However, I do not believe that anything in Rule 21, Ala. R. App. P., or Rule 39, Ala. R. App. P., forbids this Court from electing to treat an improperly filed petition for a writ of certiorari as a petition for a writ of mandamus if the improperly filed petition for a writ of certiorari otherwise meets the requirements of Rule 21. One such requirement is that the petition contain "[a]n appendix including copies of any order or opinion or parts of the record that would be essential to an understanding of the matters set forth in the petition." Rule 21(a)(1)(E), Ala. R. App. P.

In the present case, I must conclude that T.M.F. is not entitled to relief -- whether his petition is treated as a petition for a writ of certiorari or as a petition for a

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writ of mandamus -- because he failed, pursuant to both Rule 39(d)(5)(C), Ala. R. App. P., and Rule 21(a)(1)(E), to place any facts before this Court. With no facts properly before this Court, there is nothing we can review. Accordingly, I concur in the judgment to dismiss T.M.F.'s petition under these circumstances.