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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 23-325

JAY FOLSE

Petitioner,

V.

Appeal from a final order of the
Intermediate Court of Appeals (22-ICA-87)

G. Russell Rollyson Jr.,

John McCuskey Jr.,

Respondents.

DYh]h]cbYffg'6f]YZ

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ASSIGNMENTS OF ERROR

1) The Intermediate Court of Appeals erred by concluding that the action should have been brought as a petition for a writ of mandamus.
2) The Intermediate Court of Appeals erred by not ordering the tax deeds to be issued.

STATEMENT OF THE CASE

This is an appeal from the Intermediate Court of Appeals. In the circuit court, the Petitioner sought to compel issuance of tax deeds to two properties purchased by him at the tax auction. The Petitioner also asked to compel any notices to redeem that the court may find necessary to be issued before issuing a tax deed. The Circuit Court dismissed the case *sua sponte* after incorrectly concluding that the action needed to be brought as a writ of mandamus as opposed to a proceeding under WV Code § 11A-3-60. The ICA came to the same conclusion that the Circuit Court did and affirmed the decision.

SUMMARY OF ARGUMENT

The ICA incorrectly concluded that the underlying action needed to be brought as a mandamus petition. Bringing the action as a mandamus petition would actually be prohibited as it is specifically authorized to be brought pursuant to WV Code § 11A-3-60. The ICA erroneously relied on *Lemley v. Phillips*, 113 W. Va. 812, 169 S.E. 789 (W. Va. 1933) to make that conclusion. They failed to realize that that applicable statute was changed after *Lemley* in a substantial manner.

The ICA also should have granted the relief to have the tax deeds issued. The tax deeds to the two properties are not being issued based on a mistaken understanding of

the law that actual notice of the notice to redeem is required on interested parties. In this situation, the whereabouts of the owners are unkown and the owners are therefore not entitled to notice.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner wishes this Court to consider calling this case for Rule 19 or Rule 20 oral argument. This case should be decided on a signed opinion.

ARGUMENT

1) The underlying action was properly brought under WV Code § 11A-3-60 and not as a petition for a writ of mandamus.

The Intermediate Court of Appeals held that the correct method for the Petitioner to obtain the relief of obtaining a tax deed is to file a petition for a writ of mandamus and not a petition pursuant to WV Code § 11A-3-60. They based this conclusion on a misunderstanding of the legal standard to obtain a writ of mandamus. They also misapplied the holding in *Lemley v. Phillips*, 113 W. Va. 812, 169 S.E. 789 (W. Va. 1933) to this matter.

In order for the Petitioner to obtain a writ of mandamus, the general rule is that the writ of mandamus will not issue unless three elements coexist — (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and, (3) the absence of another adequate remedy at law. See *State ex rel. Zagula v. Grossi*, 149 W. Va. 11, 138 S.E.2d 356; *State ex rel. McDaniel v. Duffield*, 149 W. Va. 19, 138 S.E.2d 351; *State ex rel. Bronaugh v. City of Parkersburg*, 148 W. Va. 568, 136 S.E.2d 783;

State v. Arthur, 142 W. Va. 737, 98 S.E.2d 418; *Damron v. Ferrell*, 149 W. Va. 773, 776-77; *Kucera v. City of Wheeling*, 158 W. Va. 860, 215 S.E.2d 216.

The first two elements are not in question. The Petitioner concedes that those two elements are met. However, the third element of having another adequate remedy at law is not met. The Petitioner has an alternative remedy at law under WV Code 11A-3-60 which provides for compelling issuance of a tax deed and notices to redeem. The Petitioner would not have been allowed to bring the underlying action as a petition for a writ of mandamus for that reason.

The ICA additionally relied on *Lemley v. Phillips* to conclude that the underlying action had to be brought as a petition for a writ of mandamus. This reliance is misplaced as *Lemley* is not controlling of this case.

In *Lemley*, a tax lien assignee filed a petition for a writ of mandamus against the county clerk to compel issuance of notices to redeem and the tax deed. The Court in *Lemley* held that the action was properly brought as a mandamus action because the statute at the time provided only for issuance of a tax deed and not issuance of notices to redeem. The ICA mistakenly believed that the statute only had stylistic changes to the applicable statute. In actuality, after *Lemley*, the legislature added onto the statute to allow a tax lien purchaser to compel issuance of notices to redeem in addition to tax deeds. The ICA's reliance on *Lemley* is misplaced for that reason.

Additionally, the reliance on *Lemley* is misplaced because the Petitioner did not seek the same relief as the petitioner in *Lemley*. The Petitioner only sought issuance of tax deeds in the alternative, if the circuit court found that the notices were not sufficient. In this case, the circuit court did not find that the notices to redeem were not sufficient.

Another reason why the ICA's reliance on *Lemley* is misplaced is because it was not from a state auditor's sale as in this instant matter but rather a Sheriff's sale. Although this distinction is meaningless, this Court previously made that distinction in *Folse v. Rollyson* No. 21-0340 (W. Va. 2021). In *Folse,* this Court concluded that *Rollyson v. Jordan*, 205 W. Va. 368, 518 S.E.2d 372 (W. Va. 1999) was not controlling as *Rollyson* involved a property sold at a Sheriff's sale. This Court should stay consistent with its previous logic.

2) The Petitioner is entitled to the tax deeds.

As with many previous cases, the Respondents continue to incorrectly assert that the legal standard is, in effect, actual notice of the notice to redeem on the delinquent owner of the property. Despite the fact that the Petitioner has researched the whereabouts of the owners and is unable to locate them in order to be served, the Respondents insist on requiring them to be notified before the tax deed is issued. The Petitioner's efforts in researching the whereabouts of the owner and making multiple attempts at notifying them through certified mail and a process server go above and beyond constitutionally required due process.

The legal standard is not actual notice but rather reasonable diligence on the part of the tax lien purchaser to notify individuals whose legal interest and whereabouts are reasonable ascertainable from public records. *Button v. Chumney*, CIVIL ACTION NO. 1:13CV232, (N.D.W. Va. Jun. 27, 2014) ("The issue on summary judgment is whether the tax sale purchaser, Kevin Chumney ("Chumney"), exercised reasonably diligent efforts to provide notice to redeem in accordance with West Virginia law and constitutional due process.") ("To this end, West Virginia law requires tax lien

purchasers, through the deputy commissioner, to notify individuals of their right to redeem the property before title is transferred. And efforts undertaken by the purchaser to identify these individuals must be "reasonably diligent.") (emphasis added). Judge Irene Keeley relied on *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005) to evaluate the legal and factual issues in Button.

The Respondents' policy is to require personal service to be accomplished on every individual identified by the tax lien purchaser before a tax deed is issued. They base this policy on the decision in *O'Neal v. Wisen*, CIVIL ACTION NO. 5:16-cv-08597 (S.D.W. Va. Aug. 1, 2017). In *O'Neal,* the Plaintiff sued the same Respondents under 42 USC § 1983 claiming that their policies of not properly notifying them violated their rights under the due process clause. At the time, the policy of the Respondents was to issue tax deeds when the only method of service was certified mail, no personal service attempts were made, and the whereabouts of the individual to be notified were knows. This policy violated the due process clause when the whereabouts of the individual were known but there are no further attempts to notify the individual after certified mail was returned as undeliverable. The facts surrounding these properties in the case *sub judice* are distinct from those in *O'Neal* as personal service was attempted and the whereabouts of certain individuals are unknown.

In *O'Neal,* the house subject to the tax lien sale was occupied by family members of the owner. The tax lien investor in *O'Neal* requested that notice go out to the owner at a PO Box, not the address of the occupied house. The certified and regular mail delivered to the PO Box was returned as unclaimed and undeliverable. No further attempts at notifying the owners or occupants were made. This violated the due process

clause in accordance with the holding in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006).

In *Jones* the plaintiff also sued under 42 USC § 1983 for lack of notice of an impending tax sale. Like in *O'Neal,* the subject house was occupied. Other shared facts between the two cases include that the whereabouts of the individual were known, certified mail was returned to the sender, personal service was not attempted, and regular first-class mail, not certified mail, was not sent to the occupied houses.

The holding of *Jones* was described by the Court in *O'Neal* as "that additional reasonable steps, if available, must be taken when an actor is aware that notice has failed." *Id.* However, this holding has only been applied in situations where the whereabouts of the owner are known.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court held that notice must be reasonably calculated under the circumstances to inform interested parties of a pending action and give them an opportunity to respond. Notice by publication may be insufficient if the names and addresses of the parties are known. In *Mullane,* the only method of notice of an impending action used to notify the affected individual was publication. Despite the fact that the whereabouts of the individual were known, the government never used the mail or personal service to attempt notice on the individual.

The holding in *Mullane* was expanded in *Jones* to require follow-up efforts to be made when certified mail was returned as undeliverable. However, in *Jones,* the house was owner occupied and regular mail sent to the house would have likely resulted in notice being achieved. The factual situation for the properties in question in the case *sub*

judice are distinct from those in *Jones* as none of the houses are occupied and sending mail to the house subject to the tax sale would not likely result in notifying anyone.

A) The follow-up notification efforts satisfied the Due Process Clause even if not necessary

In *O'Neal,* the follow up efforts suggested were "sending notice by both certified and regular mail, posting notice on the property, and sending notice addressed to "occupant."" *Id.* relying on *Jones*. In each one of these properties, there were additional efforts made even if not necessary as the whereabouts of the individual are unknown. These additional efforts include personal service, posting on the house subject to the tax sale, multiple certified mailings, and actual notice delivered to the owner by the Petitioner personally.

B) Significant Public Policy Concerns Arise from not Issuing Tax Deeds

The Respondents' policy of not issuing tax deeds where one of the owners or interested parties cannot be served the notice to redeem has serious public policy concerns. The stated policy of the tax sale scheme is, in part, "[t]o provide for the transfer of delinquent and non-entered lands to those that will make beneficial use of said lands who are more responsible to, or better able to bear, the duties of citizenship than were the former owners" WV Code § 11A-3-1. If the Respondents are to continue their policy of not issuing tax deeds where actual notice is not achieved, then property will never be able to be transferred to new owners. Under the current policy, delinquent owners will never lose their property for failure to pay taxes as long as they can successfully dodge service. They can simply refuse to sign a certified letter, refuse to answer the door for a process server, or leave the area without updating their address

leading to this situation. This has created an absurd situation where property owners don't have to pay property taxes and tax lien purchasers are forced to lose their purchase money.

This policy also violates another element of the legislative intent of the tax sale scheme. That element being "to permit deputy commissioners of delinquent and nonentered lands to sell such lands without the necessity of proceedings in the circuit courts" WV Code §11A-3-1. Previous to the current tax sale scheme, tax lien purchasers were required to have a Circuit Court judge approve the notification efforts before a tax deed was issued. The legislature did away with this system considering that tens of thousands of tax liens are sold every year. It is not feasible for the Circuit Courts to approve upwards of 30,000 tax deeds annually.

CONCLUSION

The ICA's order should be reverse. This Court should issue the tax deeds to the Petitioner and clarify that this action was properly brought under WV Code § 11A-3-60

Signed:___*/s/ Jay Folse*___

Jay Folse, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2023 true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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Signed: ____*/s/ Jay Folse*____

Jay Folse, Pro Se