

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE §
PETITION OF FREDERICK W. § No. 229, 2014
SMITH, JR. FOR A WRIT §
OF MANDAMUS §

Submitted: May 14, 2014

Decided: May 29, 2014

Before **STRINE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

ORDER

This 29th day of May 2014, upon consideration of the petition of Frederick W. Smith, Jr. for an extraordinary writ of mandamus, it appears to the Court that:

(1) The petitioner, Frederick W. Smith, Jr., seeks to invoke the original jurisdiction of this Court, pursuant to Supreme Court Rule 43, to issue a writ of mandamus directing the Superior Court and the Department of Justice to release him from prison. The State of Delaware has filed an answer and motion to dismiss Smith's petition. After careful review, we find that Smith failed to seek leave of the Court before filing his petition as required by this Court's September 10, 2009 order¹ and that his petition manifestly fails to invoke this Court's original jurisdiction. Accordingly, the petition must be dismissed.

¹ *Smith v. State*, 2009 WL 2888258, at *2 (Del. Sept. 10, 2009), *cert. denied*, 559 U.S. 942 (2010).

(2) In November 1993, a Superior Court jury convicted Smith of two counts of unlawful sexual intercourse in the second degree and single counts of unlawful sexual penetration in the third degree and assault in the third degree. These convictions were confirmed on direct appeal.² Since then, Smith has filed numerous unsuccessful motions and petitions seeking state postconviction, state habeas, and federal habeas relief.³

(3) By order dated September 10, 2009 (“September 10, 2009 Order”), this Court concluded that “Smith’s excessive and repetitious filings constitute[d] an abuse of process of this Court” and “enjoined [him] from filing any future claims in this Court concerning his 1993 convictions without first seeking leave of court.”⁴ Smith was also required to file an affidavit containing the 10 *Del. C.* § 8803(e) certifications with any future motion to proceed *in forma pauperis* in any matters before this Court concerning his 1993 convictions.

² *Smith v. State*, 669 A.2d 1 (Del. 1995).

³ *E.g.*, *State v. Smith*, 2012 WL 3096697 (Del. July 30, 2012); *State v. Smith*, 2011 WL 880849 (Del. Mar. 10, 2011); *Smith v. State*, 2011 WL 704329 (Del. Feb. 28, 2011); *Smith v. State*, 2009 WL 2888258 (Del. Sept. 10, 2009); *Smith v. State*, 2009 WL 563521 (Del. Mar. 5, 2009); *Smith v. State*, 2007 WL 3087390 (Del. Oct. 23, 2007); *Smith v. State*, 2006 WL 1650948 (Del. June 13, 2006); *Smith v. State*, 2005 WL 2679442 (Del. Oct. 18, 2005); *Smith v. State*, 2005 WL 625961 (Del. Mar. 14, 2005); *Smith v. State*, 2002 WL 451827 (Del. Mar. 22, 2002); *Smith v. State*, 1997 WL 328626 (Del. June 4, 1997); *State v. Smith*, 1996 WL 33347485 (Del. Super. Ct. Oct. 2, 1996); *State v. Smith*, 1996 WL 33347486 (Del. Super. Ct. July 18, 1996); *Smith v. Carroll*, 2004 WL 1588293 (D. Del. July 12, 2004).

⁴ *Smith v. State*, 2009 WL 2888258, at *2 (Del. Sept. 10, 2009).

(4) On May 5, 2014, Smith filed a petition for a writ of mandamus concerning his 1993 convictions. The petition was based on out-of-court statements Smith had challenged in prior filings.⁵ The State answered and moved to dismiss Smith's petition on the grounds that it was barred by the September 10, 2009 Order and that Smith had failed to show he was entitled to issuance of a writ of mandamus.

(5) Smith's mandamus petition must be dismissed. First, Smith did not request leave of the Court to file the petition as required by the September 10, 2009 Order. If Smith had requested leave to file the petition, his request would have been denied because the petition falls squarely within the category of filings deemed excessive, repetitious, and abusive in the September 10, 2009 Order. Second, Smith failed to demonstrate that he was entitled to issuance of a writ of mandamus. A writ of mandamus will only issue if the petitioner can show: (i) a clear right to the performance of a duty; (ii) that no other adequate remedy is available; and (iii) the Superior Court has arbitrarily failed or refused to perform its duty.⁶ This Court lacks jurisdiction to issue a writ of mandamus to the Department

⁵ *E.g.*, *Smith v. State*, 669 A.2d 1, 6-7 (Del. 1995); *Smith v. State*, 2002 WL 451827 (Del. Mar. 22, 2002).

⁶ *In re Bordley*, 545 A.2d 619, 620 (Del. 1988).

of Justice⁷ and Smith has not shown that the Superior Court arbitrarily failed or refused to perform a duty owed to him.

(6) Despite the September 10, 2009 Order, Smith has continued to burden the courts of this State with excessive and repetitious filings. In the affidavit accompanying his latest petition, Smith swore that the claims sought to be litigated had never been disposed of before in any court and that he had no reason to believe the claims were foreclosed by controlled law. This Court, however, held on direct appeal that the out-of-court statement challenged by Smith here should not have been admitted pursuant to 11 *Del. C.* § 3507, but that the error did not deprive Smith of a fair trial because the State had a strong case against Smith even without that statement.⁸ Smith's latest claim is thus legally frivolous and inconsistent with his affidavit. In the future, the Clerk of the Court is directed to refuse any filing from Smith unless the filing is accompanied by the required filing fee or the filing is accompanied by a completed motion to proceed *in forma pauperis*, with an affidavit containing the 10 *Del. C.* § 8803(e) certifications, and that motion is first granted by the Court. Smith is on notice that he risks the forfeiture of good time pursuant to 10 *Del. C.* § 8805(a) if he files more complaints found to be factually frivolous, malicious, or legally frivolous pursuant to 10 *Del. C.* §§ 8803(b) or (c).

⁷ *In re Hitchens*, 600 A.2d 37, 38 (Del. 1991).

⁸ *Smith v. State*, 669 A.2d 1, 6-7 (Del. 1995).

NOW, THEREFORE, IT IS ORDERED that the petition for the issuance of a writ of mandamus is DISMISSED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice