

Circuit Court for Baltimore County
Case No. 03-K-07-002978

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 684

September Term, 2020

STEPHEN NIVENS

v.

STATE OF MARYLAND

Wells,
Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 7, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2011, Stephen Nivens, appellant, pleaded guilty to one count of second-degree sex offense and one count of first-degree burglary in the Circuit Court for Baltimore County. The court sentenced him to consecutive terms of 20 years' imprisonment.

On May 12, 2020, Mr. Nivens filed a Petition for Writ of Mandamus in his criminal case alleging that the conditions of his incarceration placed him at a heightened risk for contracting COVID-19. Specifically, he claimed that the Secretary of the Department of Public Safety and Correctional Services (the Secretary) and the Commissioner of Corrections (the Commissioner) had created an unsafe environment by failing to post bulletins and directives about social distancing; failing to insure that staff and inmates had access to adequate PPE; permitting inmates to engage in yard activities without social distancing; allowing inmates to eat meals without social distancing; failing to adequately test inmates and staff for COVID-19; and failing to release sufficient inmates to allow for social distancing. As relief, Mr. Nivens requested the court to reduce his sentence and issue an amended commitment order releasing him from custody. The court denied the petition without a hearing finding that there were “no cognizable grounds presented for the issuance of a Writ of Mandamus.”

The same day Mr. Nivens also filed an “Emergency Petition for Habeas Corpus Relief and/or For Reduction of Sentence Due to Exposure Risk to Coronavirus.” In that petition, he essentially raised the same claims as in his petition for writ of mandamus except that he also claimed that his continued incarceration during the pandemic violated his constitutional rights. He again requested the court to either modify his sentence or release him from his confinement so that he could be “assured of his personal health, which is

being disregarded by the State.” The court denied that petition without a hearing finding that appellant was “not being held or detained illegally or improperly” and that he had asserted “no timely grounds for revising or modifying his sentence.”

Mr. Nivens filed separate notices of appeal from each order which we consolidated into a single appeal.¹ The State has moved to dismiss the appeal as not allowed by law. For the reasons that follow, we shall grant the State’s motion to dismiss in part, deny the motion to dismiss in part, and otherwise affirm the judgments of the circuit court.

As an initial matter, the State contends that the appeal should be dismissed because the denial of a motion for modification of sentence and the denial of a habeas petition challenging the legality of confinement under a sentence of imprisonment are not appealable orders. We agree that the denial of a motion for modification of sentence pursuant to Maryland Rule 4-345 is not an appealable order unless the court concludes that it lacks jurisdiction to consider the motion, which it did not in this case. *See Hoile v. State*, 404 Md. 591, 615 (2008) (“[T]he denial of a motion to modify a sentence, unless tainted by illegality, fraud, or duress is not appealable.” (citations omitted)). Consequently, Mr.

¹ Mr. Nivens also filed an “Application for Leave to Appeal & Notice of Appeal” from the circuit court’s order denying his “Writ of Discovery for Jurisdiction.” That filing was initially treated as a notice of appeal and consolidated with this appeal. Because the “Writ of Discovery” was filed as part of Mr. Nivens’ petition for post-conviction relief, review of the court’s order denying that pleading can only be obtained by an application for leave to appeal. Therefore, we will not consider the propriety of that order in this appeal. Rather, we shall treat Mr. Nivens’ “Application for Leave to Appeal & Notice of Appeal” from that order as an application for leave to appeal, which has been docketed as Application No. 1502, Sept. Term 2020 (CSA-ALA-1052-2020).

Nivens may not appeal from the court’s order to the extent that it denied his motion for modification of sentence.

As to the denial of Mr. Nivens’ habeas petition, the State is correct that Maryland law prohibits a person who challenges the validity of his or her conviction or sentence by seeking the writ of habeas corpus to appeal to this Court. However, Section 7-107(b)(2)(ii) of the Criminal Procedure Article allows for direct appeals in any proceeding in which “a writ of habeas corpus is sought for a purpose other than to challenge the legality of a conviction of a crime or sentence of imprisonment for the conviction of a crime[.]” In reviewing this provision, the Court of Appeals has recognized that in “situations where the Post Conviction Procedure Act d[oes] not provide a remedy, and thus [i]s not a substitute for habeas corpus, the . . . statute provide[s] no reason for restricting appeals in habeas corpus cases.” *Gluckstern v. Sutton*, 319 Md. 634, 662 (1990). Thus, Maryland appellate courts have entertained appeals from rulings on habeas corpus petitions “when the petitioner challenged the legality of confinement based on collateral post-trial influences and not the legality of the underlying conviction or sentence, and where the UPPA did not otherwise provide a remedy.” *Simms v. Shearin*, 221 Md. App. 460, 473 (2015).

Here, Mr. Nivens’ habeas petition did not challenge the legality of his conviction or the legality of the sentence imposed by the court. Rather, it challenged the prison’s actions in responding to the COVID-19 pandemic, specifically claiming failure to implement certain policies recommended by the CDC and WHO violated his constitutional rights by placing him at a heightened risk for contracting COVID-19. Consequently, we hold that CP § 7-107 grants Mr. Nivens the right to appeal from the denial of his habeas petition.

Finally, we note that the State’s motion to dismiss did not address the court’s order denying Mr. Nivens’ petition for writ of mandamus. And, in any event, the denial of that petition constituted an appealable final judgment. Therefore, we shall grant the State’s motion to dismiss only as to the portion of the court’s order denying his motion for modification of sentence.

As to the merits, Mr. Nivens’ brief does not set forth any questions presented. Nor does it specifically address why the court erred in denying his petition for writ of mandamus or petition for writ of habeas corpus. Rather, the brief is styled a civil complaint raising a cause of action pursuant to 42 U.S.C. § 1983. Thus, any issues regarding the validity of the court’s orders denying his petitions are not properly before us. *See Klaunberg v. State*, 355 Md. 528, 552 (1999)(“ [A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.”).

Nevertheless, we note that the court did not err in denying either petition. As to the habeas petition, the Court of Appeals has held that “complaints of prisoners with regard to their treatment by correctional authorities,” including complaints regarding improper or inadequate medical treatment, “do not entitle [a] petitioner to relief under habeas corpus.” *See State v. McCray*, 267 Md. 111, 129-132 (1972) (collecting cases). Therefore, Mr. Nivens’ claims that the prison had failed to implement certain policies recommended by the CDC and WHO during the pandemic were not cognizable in a habeas petition.

As to the petition for writ of mandamus, the fundamental purpose of that writ is “to compel inferior tribunals, public officials, or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is

imperative and to the performance of which duty the party applying for the writ has a clear right.” *Town of La Plata v. Faison–Rosewick, LLC*, 434 Md. 496, 511 (2013). The Court of Appeals has observed that a writ of mandamus is only “appropriate where the relief sought involves the traditional enforcement of a ministerial act (a legal duty) by recalcitrant public officials, but not where there is any vestige of discretion in the agency action or decision.” *Balt. Cnty. v. Balt. Cnty. Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 570 (2014) (internal quotation marks and citation omitted). Here, Mr. Nivens did not request the court to compel the Secretary or the Commissioner to take any actions with respect to the alleged safety issues set forth his petition. Rather, the sole relief sought by Mr. Nivens was the modification of his sentence and his release from incarceration. However, neither the Secretary nor the Commissioner had the discretion, much less a legal duty, to order his release. Consequently, the court could not compel them to do so by means of a petition for writ of mandamus.

**STATE’S MOTION TO DISMISS
GRANTED IN PART AND DENIED IN
PART. JUDGMENTS OTHERWISE
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**