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MANDAMUS PROCEEDINGS AGAINST PUBLIC OFFICIALS: STATE OF NEW MEXICO EX REL. BIRD v. APODACA

New Mexico Governor Jerry Apodaca attempted to temporarily transfer the state highway engineer, James A. Bird, to the State Parks and Recreation Commission. As a result of this attempt Bird brought a mandamus proceeding before the New Mexico Supreme Court in *State of New Mexico ex rel. Bird v. Apodaca*¹ to obtain an order directing the Governor to “cease, desist and refrain from removing or transferring” Bird or from interfering with Bird’s activities as state highway engineer.² In a close and ardently contested 3-2 decision the court issued a peremptory writ of mandamus. This note analyzes the holding’s effect on mandamus proceedings against public officials in New Mexico.³ The discussion first considers whether the original mandamus proceeding was properly brought before the supreme court rather than the district court. An inquiry follows into whether the issuance of a peremptory rather than alternative writ was proper.

CONCURRENT JURISDICTION OF THE DISTRICT COURT AND SUPREME COURT

The requirements of and procedure for a writ of mandamus are set out in New Mexico statutes.⁴ The writ “may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.”⁵ The New Mexico Constitution provides that the “Supreme Court shall have original jurisdiction in . . . mandamus against all state officers;” and, that “district courts . . . shall have power to issue writs of . . . mandamus.”⁶ In addition, the district courts are given “exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the Supreme Court has exclusive original jurisdiction.”⁷ Since the

1. 91 N.M. 279, 573 P.2d 213 (1977).

2. *Id.* at 281, 573 P.2d at 215.

3. For an excellent and comprehensive survey of mandamus in New Mexico, see Dumars & Browde, *Mandamus in New Mexico*, 4 N.M. L. Rev. 155 (1974).

4. N.M. Stat. Ann. §§ 44-2-1 to 14 (1978).

5. N.M. Stat. Ann. § 44-2-4 (1978).

6. N.M. Const. art. VI, § 13.

7. N.M. Stat. Ann. § 44-2-3 (1978).

district and supreme courts have concurrent jurisdiction for mandamus, when can mandamus be brought in the supreme court? The supreme court is a court of review and prerogative writs should not be used as substitutes for review.⁸ Supreme Court Rule 12 requires that an original petition which could have been brought in the district court set forth "the circumstances making it necessary or proper to seek the writ in the Supreme Court."⁹ The usual standard in New Mexico is "whether the particular case is of such public importance to the state as to require original consideration by the high court."¹⁰ The supreme court may also hear the petition if "requiring an appeal would be so futile as to result in grave injustice."¹¹ The greatest dissension in *Bird v. Apodaca* concerned whether or not the public importance to the state test was met.

Justice McManus, writing for the majority, devoted only one sentence to public importance to the state: "[W]hen issues of sufficient public importance are presented which involve a legal and not a factual determination, we will not hesitate to accept the responsibility of rendering a just and speedy disposition."¹² Since it is not explicitly stated in the opinion it must be assumed by implication that the majority believed that depriving Bird of his power, but not his salary,¹³ as state highway engineer for at most three months¹⁴ elevated Bird's petition to the heights of sufficient public importance. Justices Sosa and Payne, in separate dissenting opinions, strongly disagreed. Acknowledging that extensive newspaper coverage of the dispute between Bird and Governor Apodaca indicated "great public interest," Justice Payne observed that "[p]ublic interest . . . does not of itself rise to the status of public importance."¹⁵ Justice Sosa went even further and opined that the case

8. *Baca v. Burks*, 81 N.M. 376, 378, 467 P.2d 392, 394 (1970); *State ex rel. Owen v. Van Stone*, 17 N.M. 41, 44, 121 P. 611, 612 (1912).

9. N.M. R. App. P. (Civ.) 12(a)(1) (1978).

10. *Dumars & Browde, Mandamus in New Mexico*, 4 N.M. L. Rev. 155, 157 (1974) citing to *State ex rel. Chavez v. Evans*, 79 N.M. 578, 446 P.2d 445 (1968); *State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n*, 79 N.M. 357, 443 P.2d 850 (1968); *State ex rel. Shell Petroleum Corp. v. Worden*, 44 N.M. 400, 103 P.2d 124 (1940).

11. *Baca v. Burks*, 81 N.M. 376, 378, 467 P.2d 392, 394 (1970).

12. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977). Reference is made to *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974).

13. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977).

14. Bird would be deprived of his power as state highway engineer for at most three months because the Highway Department Organization Act took effect on March 31, 1978. This Act replaced the state highway engineer with a chief highway administrator whose appointment must be consented to by the governor. *Id.* at 281, 573 P.2d at 215.

15. *Id.* at 289, 573 P.2d at 223 (Payne, J., dissenting). Justice Sosa remarked that: "All the attention placed on the squabble has not itself elevated it to the position of a legal battle which is ripe for appellate review and one which requires our immediate attention in any extraordinary manner." *Id.* at 286, 573 P.2d at 220.

involved "a potential 'hot potato' within the executive branch,"¹⁶ and urged that "[w]e must never become embroiled in a political fracas."¹⁷ The possibility that other bases for sufficient public importance were considered by the majority can only be theorized. One possibility is that any delay in the mandamus proceeding would have very harmful effects on the Highway Department itself. Nowhere were such arguments advanced by petitioner¹⁸ and, even if they were, they "could only be supported by factual considerations not properly before this court."¹⁹ Justice Payne stated:

[A]t the time the petition was filed the conflict did not interfere with the orderly conduct of business at the State Highway Department so as to justify invoking the original jurisdiction of this Court. The Department did not close its doors and the employees of the Department continued to perform their normal duties in their usual way. Even in the absence of the State Highway Engineer who has undoubtedly been absent for vacations or other reasons, the Department has functioned normally.²⁰

Although the majority does not so state, it also appears to apply the secondary standard for supreme court consideration of the petition. This secondary standard involves a determination that "requiring an appeal would be so futile as to result in grave injustice."²¹ Justice McManus states that "[t]he delays inherent in proceeding in district court and a subsequent appellate review would render the question moot before a final resolution could ever be had."²² Strong arguments against this rationale are presented by Justice Payne. Not only could the district court have provided identical relief, but even if it had refused relief, there is the possibility that "an appeal would possibly protract the litigation and delay an ultimate resolution, but so it is in any case."²³ There is always a danger that a case will become moot before being reviewed and "[t]his has never before had us stumbling over ourselves in order to reach a quick decision."²⁴ Absent a showing that a delay would prevent Bird from being remedied for any personal damage, pursuing

16. *Id.* at 288, 573 P.2d at 222 (Sosa, J., dissenting).

17. *Id.* at 287, 573 P.2d at 221.

18. *Id.* at 289, 573 P.2d at 223 (Payne, J., dissenting).

19. *Id.* at 290, 573 P.2d at 224. The issues involved must involve legal and not factual determinations. *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 354 P.2d 975 (1974).

20. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 289, 573 P.2d 213, 223 (1977) (Payne, J., dissenting).

21. *Baca v. Burks*, 81 N.M. 376, 378, 467 P.2d 392, 394 (1970).

22. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977).

23. *Id.* at 289, 573 P.2d at 223 (Payne, J., dissenting).

24. *Id.* at 287, 573 P.2d at 221 (Sosa, J., dissenting).

mandamus in the district court was a plain, speedy and adequate remedy.²⁵ Since Bird's transfer to the Parks and Recreation Commission would not affect either his salary or his tenure, it is difficult to imply grave injustice.²⁶

The inescapable conclusion is that either the mandamus proceeding was improvidently allowed to be brought before the supreme court or that the "public importance to the state" test and the "grave injustice" test have been so depreciated as to become meaningless. Can petitioners who show that they would lose the enjoyment of some authority or power, even though no pecuniary loss was suffered, now use *Bird v. Apodaca* as precedent to obtain supreme court attention if they can also show that possible mootness would result should they pursue the ordinary procedure of first going to the district court? Perhaps an additional requirement would be that a dispute of great public interest is involved. Surely this is not the intent of Supreme Court Rule 12 or of the well established policy of judicial restraint. "[O]ur system of appellate review requires litigants to develop their case fully in lower courts thereby bringing out all the facts and legal issues which allow us to take a judicious look at what has occurred below. Now, the majority has seen fit to dispense with judicial restraint."²⁷

PEREMPTORY V. ALTERNATIVE WRIT OF MANDAMUS

A writ of mandamus can be either alternative or peremptory.²⁸ "The alternative writ shall . . . command [respondent to] . . . do the act required to be performed, or show cause before the court . . . why he has not done so."²⁹ "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases the alternative writ shall be first issued."³⁰

The alternative writ is the usual writ sought since the peremptory writ is issued *ex parte* and grants final relief without any prior notice or opportunity to be heard. Although the New Mexico Supreme Court held in an early case that issuance of a peremptory writ did not contravene due process of law, more recent cases expanding the concept of due process have so undercut that earlier ruling as to

25. *Id.* at 289, 573 P.2d at 223 (Payne, J., dissenting).

26. *Id.* at 282, 573 P.2d at 216.

27. *Id.* at 286, 573 P.2d at 220 (Sosa, J., dissenting).

28. N.M. Stat. Ann. § 44-2-6 (1978).

29. *Id.*

30. N.M. Stat. Ann. § 44-2-7 (1978).

render use of the peremptory writ constitutionally suspect and inadvisable.³¹

Although *Bird* was allowed to orally argue before the court, the issuance of a peremptory writ precluded the Governor from presenting his arguments.³² Since a New Mexico statute on its face gives the Governor authorization to transfer state employees,³³ it is not "clear" or "apparent" that he cannot transfer *Bird*.³⁴ The Governor, therefore, should have been given the opportunity to orally argue against mandamus. Justice Payne adds that in order to determine whether or not there are "factual disputes which need resolution" before the court exercises jurisdiction, the oral arguments and briefs of both parties should be analyzed.³⁵ "We should only act in such cases when there are *no* factual differences to interfere with the legal issues involved. We have no such assurance in this case."³⁶ An alternative writ, therefore, should have been issued.

CONCLUSION

Bird v. Apodaca reflects a policy expansion by the New Mexico Supreme Court concerning when it will originally consider mandamus petitions. The established "public interest to the state" test and the "grave injustice" test were abandoned in *Bird* for a more liberal yet poorly enunciated standard. Mandamus petitioners who can show that they would lose the enjoyment of some authority or power can use *Bird* as precedent to obtain supreme court attention if they can also show that possible mootness would result should they pursue the ordinary procedure of going first to the district court. Perhaps a dispute of great public interest is also required. This

31. Dumars & Browde, *Mandamus in New Mexico*, 4 N.M. L. Rev. 155, 161-62 (1974). The early New Mexico Supreme Court case which held that a peremptory writ did not contravene due process of law was *Board of County Commissioners v. Fourth Judicial District*, 29 N.M. 244, 259, 223 P. 516, 520 (1924). The more recent cases tending to broaden due process protection include *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Montoya v. Blackhurst*, 84 N.M. 91, 500 P.2d 176 (1972).

32. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 288, 573 P.2d 213, 222 (1977) (Sosa, J., dissenting); *id.* at 289, 573 P.2d at 223 (Payne, J., dissenting).

33. N.M. Stat. Ann. § 10-7-1 (1978) states:

The governor is further authorized, subject to the approval of the state board of finance, to transfer, temporarily from one office, department or institution to another office, department or institution, such employees as in his judgment may be necessary or convenient at any time to further the economical and efficient conduct of the state government and without regard to the appropriation out of which such employee may be paid. . . .

34. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 288, 573 P.2d 213, 222 (1977) (Sosa, J., dissenting).

35. *Id.* at 289, 573 P.2d at 223.

36. *Id.*

unnecessary policy expansion is repugnant to the doctrine of judicial restraint.

By issuing a peremptory rather than alternative writ of mandamus, the supreme court precluded Governor Apodaca from presenting oral arguments although it heard petitioner's arguments. In light of recent United States Supreme Court decisions which have expanded due process requirements,³⁷ the New Mexico Supreme Court should not have issued a peremptory writ.

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37. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).