



Connie Taylor, Clerk of Superior Court  
 Cobb County, Georgia

**IN THE SUPERIOR COURT OF COBB COUNTY  
 STATE OF GEORGIA**

KEITH DUNCAN,

Petitioner,

v.

CITY OF MARIETTA AND COBB  
 COUNTY, COBB COUNTY SHERIFF,  
 COBB COUNTY POLICE CHIEF,  
 MARIETTA POLICE CHIEF, COBB  
 COUNTY DA, AND MARIETTA POLICE  
 OFFICERS WISHON, BENITO, HENSON,  
 AND JC SCOTT

Case Number: 22-1-3042

Respondents.

**FINAL ORDER**

Petitioner filed the underlying Writ of Mandamus on May 3, 2022, against the City of Marietta, Cobb County, Marietta Police Chief Tim Cox,<sup>1</sup> Cobb County Sheriff Craig Owens, Cobb County District Attorney Flynn D. Broady Jr., Marietta City Police Officer Benito Wishon, Marietta Police Officer J.C. Scott Henson, and Marietta Police Officer Major King.

Petitioner alleges that Cobb County “illegally granted” a charge of felony kidnapping, assault, obstruction of justice and theft and “illegally granting” a charge of stalking. Petitioner alleges that the Cobb County District Attorney refused to report crimes that were allegedly committed against him and that Marietta Police failed to “re-open required police department theft reports showing [a] loss of everything [Petitioner] had earned.”

<sup>1</sup> Marty Ferrell is the current Chief of Police for the City of Marietta.

As an initial matter, Petitioner has failed to perfect service on any of the Respondents, despite having filed this Petition approximately 9 months ago and therefore, this alone is a sufficient basis to dismiss this action.

In addition, the Petition fails to state a claim upon which relief can be granted.

[A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. . . In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.

*Scouten v. Amerisave Mortgage Corp.*, 238 Ga. 72, 73 (2008) (quoting *Anderson v. Flake*, 267 Ga. 498, 501 (1997)); *see also* O.C.G.A. § 9-11-12(b)(6).

A mandamus action cannot be filed against the City of Marietta, and Cobb County. "Mandamus is an extraordinary legal remedy." *Clear Vision CATV Services, Inc. v. Mayor of Jesup*, 225 Ga. 757, 758 (1969). A writ of mandamus may only issue to compel a due performance of an official duty. O.C.G.A. § 9-6-20. "[T]he writ of mandamus is personal and issues to *the individual* to compel performance, and it does not reach the office but is directed against the officer to compel him to perform the required legal duty." *Bulloch County v. Ritzert*, 213 Ga 818, 818-819 (1958) (emphasis added); *see also Harper v. State Bd. of Pardons & Paroles*, 260 Ga 132, 133 (Ga. 1990) (per curiam) ("The writ of mandamus does not reach the office, but is a personal action against the official."). As noted by the Georgia Supreme Court:

What the writ of mandamus seeks to enforce is the personal obligation of the individual to whom it is addressed. The writ does not reach the office *nor can it be directed to the office*. It acts directly on the person of the officer or other respondent, coercing him in the performance of a plain duty. It is a personal action against the officer and not one in rem against the office.

*McCallum v. Bryan*, 213 Ga. 669, 670 (1957) (emphasis added) (citations omitted).

The unwavering requirement that the writ of mandamus be a separate, personal action against an official has not been satisfied as to Respondents City of Marietta and Cobb County in this case. Thus, this alone is also a sufficient basis to dismiss the City of Marietta and Cobb County.

Likewise, the Petition fails to state a valid claim against the Marietta Police Chief and Marietta Police Officers Benito Wishon, J.C. Scott Henson and Major King. Mandamus is an “extraordinary legal remedy” and may only issue upon the satisfaction of a two-prong test: (1) the applicant has a clear legal right to the relief sought; and (2) no other adequate legal remedy is available.<sup>2</sup> See *SJN Properties, LLC v. Fulton Cnty. Bd. of Assessors*, 296 Ga. 793, 800 (2015); see also *Bibb Cnty. v. Monroe Cnty.*, 294 Ga. 730, 734 (2014); *Clear Vision CATV Servs., Inc. v. Mayor of Jesup*, 225 Ga. 757, 758 (1969). Petitioner must satisfy both prongs to be entitled to the mandamus relief that he seeks.

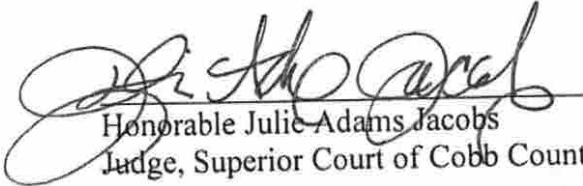
The law must not only authorize the act be done but must also require its performance. Petitioner fails to establish a clear legal right to any relief. Moreover, mandamus relief is not available to undo past acts. Mandamus is not the proper remedy to compel the “undoing of acts already done or the correction of wrongs already perpetrated, and this is so, even though the action taken was clearly illegal.” *Hilton Constr. Co. v. Rockdale County Bd. of Ed.*, supra, 245 Ga. at 540; see also *Atlanta Independent School Sys. v. Lane*, 266 Ga. 657(6), 469 S.E.2d 22 (1996); *Speedway Grading Corp. v. Barrow County Bd. of Commrs.*, 258 Ga. 693(1), (1988).

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<sup>2</sup> Because this Court finds that Petitioner failed to satisfy the first prong required to entitled him to mandamus relief, i.e. that he has a clear legal right to the relief sought, it is unnecessary to determine whether Petitioner had an adequate legal remedy to obtain the relief sought.

For all of the reasons stated herein, the Petition for Writ of Mandamus against all of the Respondents is hereby DISMISSED.

SO ORDERED, this 25<sup>ND</sup> day of February, 2023.

  
Honorable Julie Adams Jacobs  
Judge, Superior Court of Cobb County

**CERTIFICATE OF SERVICE**

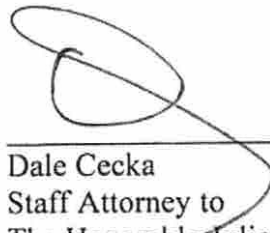
This is to certify that I have this day served a copy of the *Final Order* dismissing all claims for writ of mandamus via United States mail in a properly addressed envelope with adequate postage affixed thereto on:

Mr. Keith Duncan  
3469 Pin Oak Circle  
Atlanta GA 30340

And by electronic service on:

[dhaynie@hlw-law.com](mailto:dhaynie@hlw-law.com)  
[laura.murphree@cobbcounty.org](mailto:laura.murphree@cobbcounty.org)

This the 22<sup>nd</sup> day of February, 2023.



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Dale Cecka  
Staff Attorney to  
The Honorable Julie Adams Jacobs  
Judge, Cobb Judicial Circuit