

FILED

03/30/2021

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 21-0124

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 21-0124

JASON LEE NEWBERRY,

Petitioner,

v.

MONTANA THIRD JUDICIAL DISTRICT
COURT, HON. RAY DAYTON, Presiding,

Respondent.

FILED

MAR 30 2021

Bowen Greenwood
Clerk of Supreme Court
State of Montana

ORDER

Appearing as a self-represented litigant, Jason Lee Newberry petitions this Court for supervisory control over the Third Judicial District Court, Powell County, and the Honorable Ray Dayton in that court's cause number DV-2019-0033. Newberry contends that this civil action against the Department of Corrections, alleging medical neglect, has languished too long in District Court.

Supervisory control is an extraordinary remedy that is sometimes justified when urgency or emergency factors make the normal appeal process inadequate, the case involves purely legal questions, and one or more of the three following circumstances exist: the other court is proceeding under a mistake of law and is causing a gross injustice, constitutional issues of state-wide importance are involved, or the other court has granted or denied a motion for substitution of a judge in a criminal case. M. R. App. P. 14(3). Exercise of supervisory control is discretionary. The rule requires a petitioner serve a copy of the petition on the presiding judge. M. R. App. P. 14(6). Although Newberry served the Clerk of District Court, Newberry did not serve Presiding Judge Dayton.

Newberry contends that the Powell County District Court "has refused to address" numerous pending issues in the case. Newberry explains that on April 22, 2019, he

instituted the case by filing a Motion to Show Medical Neglect against the Governor, Director of the Department of Corrections (DOC), Warden, and several DOC personnel, alleging failure to provide proper medical treatment after Newberry fell on some icy steps. He states that he has suffered severe pain, has had trouble sleeping, walking, breathing, and that he cannot work. He provides the dates of his other filings along with several hundred pages of attachments.

Newberry mentions briefly that he has one case pending in federal court. In fact, it appears he filed virtually the identical claim in federal court. We take judicial notice of *Newberry v. State of Montana, et al.*, U.S. Dist. Ct., Helena Division, Cause No. CV 19-00050-H-DLC-JTJ. M. R. Evid. 201(c) and 202(b)(4). Newberry's civil case in federal court has the same parties and contains the same or similar allegations as the Powell County District Court case. On December 6, 2019, the Magistrate Judge issued a decision, allowing Newberry to file an amended complaint by January 6, 2020. As evidenced by a February 10, 2021 letter in Newberry's attachments, the Assistant Attorney General, Lindsey R. Simon, cites the federal case and addresses Newberry's claim under the Americans with Disabilities Act. Newberry's federal case is still active and pending in U.S. District Court. In the meantime, the Powell County District Court denied Newberry's motion for default judgment in March 2020 for failing to properly serve the defendants under M. R. Civ. P., Rule 4. It is not clear from the records before us that Newberry perfected service.

Under these circumstances, Newberry has not demonstrated that this Court should exercise supervisory control under the criteria of M. R. App. P. 14(3). He has not shown that the District Court is proceeding upon a mistake of law causing a gross injustice or has explained why his petition on the state court action presents an emergency situation when he has an active case pending on the same issues in federal court. We conclude that supervisory control is not warranted.

IT IS THEREFORE ORDERED that Newberry's Petition for a Writ of Supervisory Control is DENIED and DISMISSED.

The Clerk is directed to provide a copy of this Order to the Honorable Ray Dayton, Third Judicial District Court, Powell County; to Jill Paull, Clerk of District Court, Powell County, under Cause No. DV-2019-0033; to counsel of record; to Lindsey R. Simon, Attorney General's Office; and to Jason Newberry personally.

DATED this 30th day of March, 2021.

Beth Johnson
Jamie Danner
Angela Hatchett
Dick M. Sabben
Jim Rice

Justices