THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0464, Koleta Nygn & a. v. Manchester District Court, the court on March 16, 2012 issued the following order:

The petitioners, Koleta Nygn and Shawn Varney, appeal an order of the Superior Court (Tucker, J.) granting the Manchester District Court's motion to dismiss. We affirm.

On March 23, 2011, Nygn was arraigned in Manchester District Court on a class A misdemeanor charge of simple assault. Although she applied during the arraignment for a court-appointed attorney, she did not have an attorney appointed for the arraignment or bail hearing. Nygn pleaded not guilty, and the court set cash or surety bail that would convert to personal recognizance if she submitted to a mental health evaluation and was committed to a residential mental health program. Nygn denies having a mental health condition and has not been evaluated. She allegedly made inculpatory statements during the proceeding.

On the same day, Varney was arraigned in Manchester District Court on six class A misdemeanor charges. He also applied for a court-appointed attorney but did not have an attorney appointed for the arraignment or bail hearing. Varney pleaded not guilty to each charge, and the court set bail at $10,000 cash or surety.

In April 2011, the petitioners filed a petition for writ of mandamus, requesting that the superior court "order the Manchester District Court to provide court-appointed counsel for indigent defendants for and at Class A misdemeanor arraignments." The petitioners argued that the court "should issue the writ of mandamus because [each] remain[s] in jail pending a misdemeanor trial as a result of unconstitutional, uncounseled arraignments" and because "the practice of uncounseled arraignments in Manchester District Court and other District Courts continues and will continue even if the petitioners in this case are released pending trial." According to the petition,

> What happened to the petitioners in Manchester District Court at their arraignments is constitutionally and statutorily infirm because 1) the petitioners have a state and federal right to counsel at this "critical stage" of a criminal proceeding; 2) the petitioners have a state and federal procedural due process right to counsel aimed at protecting a liberty interest (pre-trial commitment) at an

arraignment; and 3) the petitioners also have a statutory right to counsel from the initial appearance before the Court at every stage of the proceedings until the entry of final judgment.

The respondent filed a motion to dismiss the petition, arguing that the petitioners have not met any of the requirements for mandamus relief. First, the respondent argued, the petitioners "have no 'apparent right to the relief requested'" because they "do not seek any relief for themselves, but rather for other indigent defendants," for which they lack standing. Second, the respondent argued, the petitioners "have not shown that 'no other remedy will afford full and adequate relief,'" because the petitioners could have appealed the district court's rulings in their own criminal cases.

Following a hearing, the trial court granted the motion to dismiss. In its order the court stated:

> The petitioners have been arraigned, so a writ of mandamus directing the appointment of counsel prior to arraignment would not affect their present circumstances. Both petitioners have other means by which to obtain relief, such as a request for review of the district court bail order, see RSA 597:6-e, and a motion to suppress any arguably incriminating statements either may have made in violation of the right to counsel. Accordingly, the court declines to issue the writ to the extent the petition is grounded on events pertaining to the petitioners.
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> To the extent the petition is based on how future arraignments without counsel will impact the rights of others, dismissal is warranted because a petitioner has no standing to request relief based on an alleged violation of another person's constitutional right.

The petitioners have appealed, arguing that the trial court erred in concluding: (1) that they were not entitled to a writ of mandamus; (2) that they did not have standing to challenge the district court's practice of conducting uncounseled arraignments; and (3) that the issue is moot.

In reviewing a motion to dismiss, our standard of review is whether the allegations in the petitioners' pleadings are reasonably susceptible of a construction that would permit recovery. J & M Lumber & Constr. Co. v. Smyjunas, 161 N.H. 714, 724 (2011). We assume the petitioners' pleadings to be true and construe all reasonable inferences in the light most favorable to them. Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611 (2010). We need not assume the truth of statements in the petitioners' pleadings, however, that are merely conclusions of law. Id. We then engage in a threshold inquiry that tests

the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss. Id.

Mandamus is an "extraordinary remedy." Mitchell v. Sullivan County Super. Ct., 116 N.H. 141, 141 (1976) (per curiam). "A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily or in bad faith." Petition of Cigna Healthcare, 146 N.H. 683, 687 (2001). A writ of mandamus will issue "only where the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief." Id.; see Rockhouse Mt. Property Owners Assoc. v. Town of Conway, 127 N.H. 593, 602 (1986) (mandamus may be issued only when no other remedy is available and adequate). The requirement that the party seeking issuance of the writ must have no other adequate remedy to obtain the desired relief is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380-81 (2004).

The petitioners argue that "[m]andamus is the appropriate relief in this case because [they] are seeking relief from a structural flaw in which Manchester District Court fails to provide appointed counsel at arraignment for those indigents charged with Class A misdemeanors. They do not seek to correct the result of the arraignment, be it the amount of bail set, the conditions for bail, or the possible use of their potentially inculpatory statements at a future proceeding."

To the extent that the petitioners seek relief for individuals other than themselves, we agree with the trial court that they lack standing to do so. See Gill v. Gerrato, 156 N.H. 595, 599 (2007) (defendants lack standing to assert rights of non-parties). We further agree with the trial court that the requested writ of mandamus would not provide any relief to these petitioners. As to relief for any alleged harm suffered as a result of being arraigned without the assistance of counsel, the petitioners have an adequate remedy by appeal. The petitioners have made no claim that they cannot adequately obtain review of their uncounseled arraignments on direct appeal. The requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a fundamental tenet of mandamus practice. See Bois v. Manchester, 104 N.H. 5, 8 (1962); Carrick v. Langtry, 99 N.H. 251, 253 (1954). Furthermore, mandamus will not lie to compel a general course of conduct or the performance of continuous duties. See Dean v. Gober, 524 S.E.2d 722, 725 (Ga. 1999). Accordingly, relief in the nature of mandamus is not available to the petitioners.

We note that the parties do not dispute the well-established right of indigent defendants to representation by appointed counsel at arraignment. Given the potential systemic procedural issues involved in assuring the availability of such representation, we are referring this matter to the Supreme Court's Advisory Committee on Rules.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

Eileen Fox,
Clerk

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