

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**JESSE POWELL, APPELLANT
vs.
STATE OF MISSOURI, RESPONDENT**

DOCKET NUMBER WD78021

Date: June 23, 2015

Appeal from:

The Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

Appellate Judges:

Division Two: Anthony Rex Gabbert, P.J., Joseph M. Ellis, J. and Karen King Mitchell, J.

Attorneys:

Jesse Powell, Appellant Pro-se

Caroline M. Coulter, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

JESSE POWELL, APPELLANT

v.

STATE OF MISSOURI, RESPONDENT

WD78021

Cole County, Missouri

Before Division Two Judges: Anthony Rex Gabbert, P.J., Joseph M. Ellis, J. and Karen King Mitchell, J.

Appellant filed a writ of mandamus with the Circuit Court of Cole County in which he alleged that the DOC was unconstitutionally requiring him to serve his prison sentences in installments. The circuit court did not issue a preliminary order in mandamus as provided for in Rule 94.04, but rather issued a summons to the DOC. The DOC then filed suggestions in opposition to Appellant's writ petition. The circuit court subsequently issued its judgment and order denying Appellant's writ of mandamus. In its judgment, the circuit court expressly found that Appellant was not being unconstitutionally required to serve his sentences in installments. Appellant now appeals from the circuit court's denial of his writ petition.

DISMISSED

Division Two holds:

(1) Although we have the discretion to entertain an appeal on the merits in writ proceedings where the circuit court has issued a summons rather than a preliminary order in mandamus, we generally should decline to exercise that discretion because Rule 94 does not permit circuit courts to issue a summons in lieu of a preliminary order in mandamus.

(2) Generally, when the circuit court denies a petition for writ of mandamus without issuing a preliminary order, the petitioner's proper course of action is not to appeal the denial but to file the writ in a higher court. Because the circuit court denied Appellant's writ petition without issuing a preliminary order, Appellant's proper course of action was to file his writ in a higher court. Accordingly, we decline to entertain Appellant's appeal from the circuit court's denial of his writ petition.

Opinion by Joseph M. Ellis, Judge

Date: June 23, 2015

This summary is *UNOFFICIAL* and should not be quoted or cited.