

Petition for Writ of Mandamus Denied and Memorandum Opinion filed February 9, 2010



In The

Fourteenth Court of Appeals

NO. 14-10-00080-CR

IN RE RUBEN HERNANDEZ, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS**

MEMORANDUM OPINION

January 28, 2010, relator, Ruben Hernandez filed a petition for writ of mandamus in this Court. *See* Tex. Gov't Code Ann. §22.221 (Vernon 2004); *see also* Tex. R. App. P. 52. In the petition, relator asks this Court to compel the Honorable Herb Ritchie, presiding judge of the 337th District Court of Harris County, to rule on his motions to review the trial/appellate record.¹

To be entitled to mandamus relief, a relator must show that he has no adequate remedy at law to redress his alleged harm, and what he seeks to compel is a ministerial

¹ Relator names the Honorable Don Strickland as the respondent. However, the Honorable Herb Ritchie is the presiding judge of the 337th District Court. This court previously affirmed relator's conviction for capital murder and sentence of life imprisonment. *See Hernandez v. State*, No. 14-07-00124-CR, 2008 WL 2262046 (Tex. App.—Houston [14th Dist.] May 29, 2008, pet. ref'd), *cert. denied*, ___ U.S. ___, 129 S. Ct. 2164 (2009).

act, not involving a discretionary or judicial decision. *State ex rel. Young v. Sixth Judicial Dist. Court of Appeals at Texarkana*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding). Consideration of a motion that is properly filed and before the court is a ministerial act. *State ex rel. Curry v. Gray*, 726 S.W.2d 125, 128 (Tex. Crim. App. 1987) (orig. proceeding) (op. on reh'g). A relator must establish that the trial court (1) had a legal duty to rule on the motion; (2) was asked to rule on the motion; and (3) failed to do so. *In re Keeter*, 134 S.W.3d 250, 252 (Tex. App.—Waco 2003, orig. proceeding). A relator must show that the trial court received or was asked to rule on the motion. *In re Villarreal*, 96 S.W.3d 708, 710 (Tex. App.—Amarillo 2003, orig. proceeding).

Relator alleges that he has filed two motions to review the trial/appellate record for the purpose of preparing an application for writ of habeas corpus. Relator claims his first motion, along with a request for a hearing, has been pending for over two years. This motion does not have a certificate service showing when he purportedly mailed it to the trial court. The certificate of service on the second motion indicates that it was mailed in March 2009. Neither motion bears the file stamp of the Harris County District Clerk. Therefore, relator has not demonstrated that the motions were actually filed, and are pending, in the trial court. Relator also has not shown, even if his motions were filed in the trial court, that the court received, was aware of, or was asked to rule on the motions. *See id.* Filing something with the district clerk does not mean the trial court is aware of it. *Id.* at n.2. Nor is the clerk's knowledge imputed to the trial court. *Id.*

Moreover, relator has not paid the filing fee or filed an affidavit of indigence. *See In re Grable*, No. 14-04-00779-CV, 2004 WL 1946136, at *1 (Tex. App.—Houston [14th Dist.] Sept. 2, 2004, orig. proceeding) (mem. op.) (“[W]e are not required to rule on matters unless a filing fee has been paid or a proper affidavit of indigence has been

filed.”); *see also* Tex. R. App. P. 20. (requiring relator to file affidavit of indigence with petition in order to proceed without advance payment of costs).

Relator has not established his entitlement to the extraordinary relief of a writ of mandamus. Accordingly, we deny relator’s petition for writ of mandamus.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

Do not publish – TEX. R. APP. P. 47.2(b).