

Petition for Writ of Mandamus Denied and Memorandum Opinion filed April 22, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-00287-CR

IN RE WILLIAM F. KENT, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

MEMORANDUM OPINION

On April 2, 2010, relator 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 asked this court to compel the Honorable Kevin Fine, presiding judge of the 177th District Court of Harris County to release the results of DNA testing purportedly performed in cause numbers 601019 and 577703.

Relator was convicted in 1992 of burglary of a habitation with intent to commit sexual assault and aggravated sexual assault. *Kent v. State*, 879 S.W.2d 80, 82 (Tex. App.—Houston [14th Dist.] 1994, no pet.). Relator claims he filed a motion for DNA

testing in those cases in 2004, but that the trial court have failed to provide him with the results of that testing.

To be entitled to mandamus relief, a relator must demonstrate that the trial court clearly abused its discretion, and that relator has no adequate remedy by appeal. *In re Sw. Bell Tel. Co.*, 226 S.W.3d 400, 403 (Tex.2007). Consideration of a motion properly filed and before a trial court is ministerial. *White v. Reiter*, 640 S.W.2d 586, 594 (Tex. Crim. App. 1982). A district court may be compelled via mandamus to consider and rule on a pending motion presented to the court. *In re Christensen*, 39 S.W.3d 250, 251 (Tex. App.—Amarillo 2000, orig. proceeding). However, a trial court cannot be found to have abused its discretion until the complainant establishes that the court (1) had a legal duty to perform a non-discretionary act, (2) was asked to perform the act, and (3) failed or refused to do so. *O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 97 (Tex. 1992).

In this case, relator has filed no record in connection with his petition for writ of mandamus. Therefore, the court cannot determine whether a motion for DNA testing was filed, whether DNA testing was conducted, nor whether the trial court refused to disclose the results of any testing. Therefore, relator failed to establish that the trial court was asked to perform a ministerial act, or that the court failed or refused to do so.

Accordingly, we deny the petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Anderson, Frost, and Seymore.

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