

Petition for Writ of Mandamus Denied and Memorandum Opinion filed June 25, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-00503-CR

IN RE SEAN HUSTON BROWN, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS**

MEMORANDUM OPINION

Relator Sean Huston Brown 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, Brown asked this court to compel the Honorable Clifford J. Vacek, presiding judge of the 400th District Court of Brazoria County, to enter a nunc pro tunc judgment modifying Brown's judgment of conviction to reflect additional pre-sentence jail time credit. We deny the petition.

Brown was charged with murder and arrested on July 12, 2006. Brown's co-defendant subsequently testified that Brown was not involved in the murder, but that Brown helped burn the corpse. The State then indicted Brown for tampering with evidence on December 17, 2007. On March 4, 2008, Brown entered a guilty plea to tampering with evidence pursuant to a plea bargain agreement. The trial court sentenced appellant to confinement in the Texas Department of Criminal Justice for ten years in accordance with the terms of the plea agreement. The judgment of conviction awarded

credit of 78 days for time served from the indictment on December 17, 2007, to the date of sentencing on March 4, 2008. It is undisputed that Brown has been in custody since his arrest on July 12, 2006.

To obtain mandamus relief in a criminal matter, the relator must establish that the act sought to be compelled is ministerial rather than discretionary in nature and that there is no other adequate remedy at law. *State ex rel. Hill v. Fifth Court of Appeals*, 34 S.W.3d 924, 927 (Tex. Crim. App. 2001). An act is not ministerial if a judge must exercise discretion or resolve conflicting legal claims. *Id.* at 927.

A nunc pro tunc order is appropriate to correct clerical errors in the judgment the trial court actually rendered, but not errors that were the result of judicial reasoning. *Collins v. State*, 240 S.W.3d 925, 928 (Tex. Crim. App. 2007). The failure to award jail time credit in accordance with a mandatory statutory duty is a clerical error that may be corrected by a nunc pro tunc order. *Ex parte Ybarra*, 149 S.W.3d 147, 148 (Tex. Crim. App. 2004). If the trial court fails to issue a nunc pro tunc order to award mandatory jail time credit, relief may be sought by petition for writ of mandamus.¹ *Id.* at 149; *see also In re Daisy*, 156 S.W.3d 922, 924 (Tex. App.—Dallas 2005, orig. proceeding).

At his plea hearing, Brown's counsel stated on the record that he was aware that Brown would receive only 78 days credit for the time in custody after the indictment for evidence tampering. He stated that "I think he should get credit for the 20 months, and I'm going to have to figure out a way to effectuate that under the law, because [the Assistant District Attorney] is of the opinion he's entitled to credit for time in custody on the case to which he pleads, which is 78 days."² Counsel informed the court, "I'm just

¹ Generally, before the Court of Criminal Appeals will entertain a claim concerning the denial of pre-sentence jail time credit, an applicant must first attempt to correct the omission in the judgment by way of a motion for a nunc pro tunc judgment, followed by a petition for writ of mandamus to the appropriate court of appeals. *Ex parte Deeringer*, 210 S.W.3d 616, 617 -618 (Tex. Crim. App. 2006).

² Article 42.03 requires the trial court to give credit on the defendant's sentence for the time that the defendant has spent "*in jail for the case.*" Tex. Code Crim. Proc. Ann. art. 42.03, § 2(a)(1) (Vernon

bringing that to you because I think it's something you may have to deal with down the road. Having said that, it is not affecting the plea in this case today.” After argument from the State, counsel concluded, “I understand what you’re saying on it, and we’re still going to proceed with it.” The court then proceeded to accept Brown’s plea.

A defendant may affirmatively waive his right to pre-sentence jail time credit by entering into a plea bargain with the state if the record supports that a waiver occurred. *Collins*, 240 S.W.3d at 929 (citing *Ex parte Olivares*, 202 S.W.3d 771, 772-73 (Tex. Crim. App. 2006)). This record indicates that Brown accepted the plea knowing that he would receive only 78 days credit. However, because it is apparent from the record of the plea hearing that Brown disputed the amount of jail time credit and noted his intention to raise the issue of additional jail time credit at a later date, the record does not clearly support waiver of that right.

Brown filed a motion for judgment nunc pro tunc in the trial court, and the State filed a response in opposition. The trial court denied the motion by written order. There is no record from any hearing on the nunc pro tunc motion included in our mandamus record. *See* Tex. R. App. P. 52.7 (requiring inclusion of properly authenticated transcript from any hearing or a statement that no testimony was adduced).

In his motion for nunc pro tunc judgment, Brown cited *Beltran v. State*, 99 S.W.3d 807 (Tex. App.—Houston [14th Dist.] 2003, pet. ref’d). *Beltran* was convicted of capital murder while in prison for another murder. *Id.* at 809. After *Beltran*’s capital murder conviction was reversed, he was re-indicted and convicted of murder based on the same occurrence. *Id.* This court affirmed his conviction, and on the State’s cross-appeal, we held that jail-time credit for time served after the capital murder reversal and before the new murder indictment was improper. *Id.* at 812. This court did not disturb the unchallenged award of credit for time served before reversal of the capital murder conviction. *Id.*

Supp.2009) (emphasis added).

Brown also argued in the nunc pro tunc motion that he was entitled to credit for time served before the evidence tampering indictment because it arose out of the same criminal episode. *See* Tex. Penal Code § 3.01 (Vernon 2003). He argued that his arrest was for involvement in a criminal episode and the State elected to wait until months later to charge him with another crime committed during the same criminal episode. Therefore, he contends he should receive jail time credit from the time of his arrest.

The State responded to the motion and cited to *Phillips v. State*, 64 S.W.3d 458 (Tex. App.—Houston [1st Dist.] 2001, no pet.). After the State moved to revoke Phillips’s community supervision for theft, he was arrested for aggravated robbery. *Id.* at 462. The court held that because Phillips’s confinement was not the result of the pending motion to revoke community supervision, the trial court had discretion whether to award Phillips jail time credit on the theft case when it revoked his community supervision. *Id.* at 462.

In the motion for nunc pro tunc judgment in this case Brown did not request correction of a clerical error in the calculation of jail time credit. Instead, the court was required to weigh and resolve conflicting legal claims. *See State ex rel. Hill*, 34 S.W.3d at 927. The trial court did not have a ministerial duty to award the requested credit. Because the trial court was required to make a determination regarding whether Brown was entitled to additional jail time credit, no ministerial act was implicated. *See Collins*, 240 S.W.3d at 929.

Because the act sought to be compelled is not ministerial, Brown has not established that he is entitled to mandamus relief. Accordingly, we deny his petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Anderson, Frost, and Seymore.

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