

Petition for Writ of Mandamus Denied and Memorandum Opinion filed November 18, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-01073-CR

IN RE THOMAS FLORENCE, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS**

MEMORANDUM OPINION

On November 3, 2010, relator Thomas Florence filed petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. §22.221; *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Lonnie Cox, presiding judge of the 56th District Court in Galveston County, to rule on unidentified motions, petitions, and written requests concerning his indictment for sexual assault, pending under cause number 10CR1217.

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 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). A relator must establish 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); *In re Villarreal*, 96 S.W.3d 708, 710 (Tex. App.—Amarillo 2003, orig. proceeding) (relator must show that trial court received, was aware of, and was asked to rule on motion).

Relator asserts that he seeks a ruling from the trial court on his claims that the allegations in the indictment against him are false and there is no evidence to support them. In the pretrial setting, there is neither constitutional nor statutory authority for a defendant to test, or for a trial court to determine, the sufficiency of evidence to support or defeat an element alleged in the indictment. *See Woods v. State*, 153 S.W.3d 413, 415 (Tex. Crim. App. 2005). A motion to quash, like any pretrial motion, cannot be used to argue that the prosecution is unable to prove one of the elements of the crime. *Lawrence v. State*, 240 S.W.3d 912, 916 (Tex. Crim. App. 2007); *Woods*, 153 S.W.3d at 415. Therefore, it does not appear that the trial court would have a legal duty to rule on the motions.

Moreover, relator has not provided this court with copies of the motions on which he seeks a ruling. It is relator's burden to provide this court with a record sufficient to establish his right to relief. *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992); Tex. R. App. P. 52.3(k), 52.7(a). He has not established that the motions were properly filed and that the trial court was asked to rule on them but failed to do so.

Accordingly, relator's petition is denied.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Yates and Frost.

Do Not Publish — Tex. R. App. P. 47.2(b).