



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-15-00223-CR

IN RE: LEE VERT SMITH

Original Mandamus Proceeding

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

Lee Vert Smith¹ has petitioned this Court for a writ of mandamus, seeking to have our Court compel a Bowie County District Court to rule on Smith's request for forensic DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure.² *See* TEX. CODE CRIM. PROC. ANN. art. 64.01–.05 (West 2006 & Supp. 2015). We will deny relief.

To be entitled to mandamus relief, the relator must show (1) that he has no adequate remedy at law and (2) that the action he seeks to compel is ministerial, not one 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). The relator is obligated to provide this Court with a record sufficient to establish his right to be granted mandamus relief. *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992) (orig. proceeding); *In re Pilgrim's Pride Corp.*, 187 S.W.3d 197, 198–99 (Tex. App.—Texarkana 2006, orig. proceeding); *see* TEX. R. APP. P. 52.3. Before mandamus may issue, the relator must show that the trial court had a legal duty to perform a ministerial act, was asked to do so, and failed or refused to act. *In re Villarreal*, 96 S.W.3d 708,

¹Smith was sentenced to twenty-five years' incarceration as the result of a plea bargain agreement pertaining to two charges of aggravated sexual assault of a child. We dismissed his appeals for want of jurisdiction. *See Smith v. State*, Nos. 06-08-00109-CR & 06-08-00110-CR (Tex. App.—Texarkana June 13, 2008, no pet.), available at <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=7/a2bbcd1-11e3-4b00-b621-1dc9f4d41b66&coa=coa06&DT=Opinion&MediaID=4ceff94d-3f75-43a0-b660-3e45f96002e8> and <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=74e99ef2-338a-4eb5-a328-4bf21de2fee5&coa=coa06&DT=Opinion&MediaID=9f263190-fb4f-4356-b029-5ece79949f1d>.

²We interpret Smith's petition for mandamus relief as addressing a request for DNA testing in the trial court, because that request is repeated several times in Smith's petition. However, the only document file-marked by the district clerk that accompanies Smith's petition is a request for appointment of counsel to seek DNA testing. As will be discussed, a proper request for DNA testing is a predicate to asking the trial court to appoint an attorney in seeking DNA testing.

710 (Tex. App.—Amarillo 2003, orig. proceeding); *see also In re Blakeney*, 254 S.W.3d 659, 662 (Tex. App.—Texarkana 2008, orig. proceeding) (“Showing that a motion was filed with the court clerk does not constitute proof that the motion was brought to the trial court’s attention or presented to the trial court with a request for a ruling.”).

The trial court is required to consider and enter a ruling on a properly filed motion within a reasonable period of time, once a ruling has been requested. *In re Greenwell*, 160 S.W.3d 286, 288 (Tex. App.—Texarkana 2005, orig. proceeding). To obtain mandamus relief here, Smith must establish that (1) the motion was properly filed and had been pending for a reasonable time; (2) he requested a ruling on the motion; and (3) the trial court has either refused to rule or failed to rule within a reasonable time. *See Blakeney*, 254 S.W.3d at 661. “However, if a reasonable time has not yet passed, the trial court’s failure to rule may not be a clear abuse of discretion.” *Greenwell*, 160 S.W.3d at 288.

There is no bright-line rule establishing what constitutes a reasonable time period. *Ex parte Bates*, 65 S.W.3d 133, 135 (Tex. App.—Amarillo 2001, orig. proceeding). The state of the trial court’s docket is a factor involved in considering whether a reasonable time has passed. *See id.* (citing *Stoner v. Massey*, 586 S.W.2d 843, 846 (Tex. 1979)). Although it is Smith’s burden to show entitlement to mandamus relief, the record contains no mention of the condition of the trial court’s docket. Therefore, we cannot say that the trial court has failed to rule on the motion, despite the passage of what might generally be considered a reasonable amount of time. *See In re Nash*, No. 06-11-00197-CR, 2011 WL 4452405, at *1 (Tex. App.—Texarkana Sept. 27, 2011, orig. proceeding) (mem. op.) (“Four weeks’ elapsed time is not unreasonable.”); *Greenwell*, 160 S.W.3d

at 288 (citing *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459, 460–61 (Tex. App.—Corpus Christi 1999, orig. proceeding) (“mandamus not available when only thirty days had passed”)); *Bates*, 65 S.W.3d at 136 (“[W]e cannot hold as a matter of law that the passage of seven weeks constitutes a *per se* unreasonable time period.”). While five years might well be unreasonable, as we explain below, there is nothing in the presented record showing that Smith has actually requested the trial court to order DNA testing.

Smith claims he filed a motion requesting DNA testing with the trial court five years ago. He has attached to his petition a file-stamped copy of a motion requesting the appointment of counsel to pursue that DNA testing. In the body of that motion, Smith said he “wishes to submit a motion pursuant to Chapter 64 requesting DNA testing and Defendant is indigent.” Although Smith presented us with a copy of that request, he has failed to present us with a motion wherein he requested the trial court to order DNA testing.

Smith has not established with a sufficient record that he has filed a motion for DNA testing with a trial court. Any ruling on a request for the appointment of counsel to assist an applicant in pursuing DNA testing is predicated on “inform[ing] the trial [court] that he or she wants to submit a motion” for DNA testing. *Gutierrez v. State*, 307 S.W.3d 318, 321 (Tex. Crim. App. 2010). The trial court then must “find that ‘reasonable grounds’ exist for the filing of a motion.” *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 64.01(c) (West Supp. 2015)). If the trial court then determines the applicant to be indigent, the court shall appoint counsel. TEX. CODE CRIM. PROC. ANN. art. 64.01(c); *Gutierrez*, 307 S.W.3d at 321.

Additionally, Smith's convictions were entered by the 5th Judicial District Court in Bowie County, Texas, and the file-stamped motion for the appointment of counsel is styled as having been filed with the 5th District Court. Despite this, Smith's petition seeks for us to mandamus action of the 102nd District Court. Smith offers no authority to reflect that a court other than the convicting court can entertain a request for DNA testing. *See* TEX. CODE CRIM. PROC. ANN. art. 64.01(a-1) ("A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence . . .").

Because Smith has not shown himself entitled to mandamus relief, we deny his petition.

Bailey C. Moseley
Justice

Date Submitted: January 13, 2016
Date Decided: January 14, 2016

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