IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-79,600-01

EX PARTE FRANKIE VARELA, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM ECTOR COUNTY

JOHNSON, J., filed a concurring statement.

CONCURRING STATEMENT

I join in the Court's disposition of this application for a writ of habeas corpus. In *In re Daniel*, 396 S.W.3d 545 (Tex. Crim. App. 2013), this Court determined that an application for a writ of habeas corpus pursuant to Code of Criminal Procedure Article 11.07 is not the proper remedy for the claim that Daniel asserted–that the district clerk had, many years after the entry of judgment, billed him for attorney's fees and that the district clerk had no authority to enter a bill of costs for attorney's fees in the absence of evidence of a material change in Daniel's financial status such that he was no longer indigent. Such a claim is one of the bases on which applicant now seeks relief.

We held in *Daniel* that any relief that was appropriate should be sought by way of an

application for a writ of mandamus.

> [W]e conclude, as did the convicting court in its initial recommendation, that the applicant's challenge to the "Bill of Cost" in no way implicates the fact or duration of his confinement pursuant to his conviction . . .; for this reason, it is not the proper subject of a statutorily governed post-conviction application for writ of habeas corpus. On the other hand, if the District Clerk's "Bill of Cost" has any validity at all, it could be only by virtue of the trial court's authority under Article 26.05(g), and questions of the validity of orders entered under the authority of this provision, we have held, constitute "criminal law matters" for purposes of our mandamus jurisdiction under Article V, Section 5(c), of the Texas Constitution. It has long been our practice with respect to pleadings in extraordinary matters to look to the substance of the pleading, not its denomination. Considering the substance of the present applicant's pleading, we will treat it as an application for writ of mandamus that asks us to compel the . . . District Clerk to amend the "Bill of Cost" . . ..
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> Before we may grant extraordinary relief on his application as a writ of mandamus, the applicant must fulfill two prerequisites. First, he must show that he lacks an adequate legal remedy. Because the District Clerk's "Bill of Cost" came nine years after the judgment of conviction was entered, long after the applicant could have challenged it in the course of an ordinary appeal, because it does not now constitute an independently appealable order, and because we have held today that it cannot be challenged in a post-conviction habeas corpus proceeding, we conclude that the applicant has satisfied the showing that he has no adequate legal remedy available. Second, he must show that he has a clear entitlement to the relief he seeks. In the apparent absence of an order from the trial court under Article 26.05(g) mandating the reimbursement of appointed attorney fees—not to mention the necessary finding that a previously indigent applicant has the present financial wherewithal to pay those appointed attorney fees—the District Clerk lacked any authority to assess attorney fees as part of the belated "Bill of Cost" . . .. Accordingly, we will conditionally grant mandamus relief and order the . . . District Clerk to delete the assessment of costs for attorney fees . . .from the "Bill of Cost" that was filed on that date, . . . while leaving intact those costs . . . that were expressly imposed by the trial court in the judgment.

Id. at 548-50. (Footnotes omitted.)

In *Daniel*, we treated the application as if it were an application for a writ of mandamus. In doing so, we made clear that future applications for such relief must be filed as an application for a writ of mandamus. Today, we dismiss applicant's habeas corpus claim as to the imposition of attorney's fees, but he may still seek relief through mandamus.

Filed: July 24, 2013
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