

Deny and Opinion Filed March 28, 2016



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00211-CV

IN RE KIRBY TERENCE EMBRY, Relator

Original Proceeding from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. W-0101623-P

MEMORANDUM OPINION

Before Justices Bridges, Evans, and Whitehill
Opinion by Justice Bridges

In this petition for writ of mandamus, relator requests that we order the trial court to rule on his “Motion Requesting Court Records.” Relator was convicted of three aggravated robberies and one robbery. *Embry v. State*, No. 05-02-01473-CR, 2002 WL 31166159, at *1 (Tex. App.—Dallas Oct. 1, 2002, no pet.). Punishment, enhanced by two prior felony convictions, was assessed at fifty-five years’ confinement in each case and was imposed on April 5, 2002. *Id.* We dismissed relator’s appeal for want of jurisdiction because his pro se notice of appeal was untimely. *Id.* Relator now complains that his failure to timely appeal was due to ineffective assistance of counsel and he contends he requires transcripts and court records from his criminal case “to assist him in resolving the controverted issues, and filing his Direct Appeal.” The mandamus record does not reflect that relator has been granted an out of time appeal by the Texas Court of Criminal Appeals.

Mandamus relief is appropriate in a criminal case only when a relator establishes (1) that he has no adequate remedy at law to redress his alleged harm, and (2) that what he seeks to compel is a ministerial act, not a discretionary or judicial decision. *In re Allen*, 462 S.W.3d 47, 49 (Tex. Crim. App. 2015) (orig. proceeding). A trial court has a ministerial duty to rule upon a properly filed and timely presented motion. *See State ex rel. Young v. Sixth Judicial Dist. Court of Appeals*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding). To be properly filed and timely presented, a motion must be presented to a trial court at a time when the court has authority to act on the motion. *See In re Timms*, No. 05-16-00129-CV, 2016 WL 542112, at *1 (Tex. App.—Dallas Feb. 11, 2016, orig. proceeding) (mem. op, not designated for publication); *In re Hogg–Bey*, No. 05–15–01421–CV, 2015 WL 9591997, at *1 (Tex. App.—Dallas Dec. 30, 2015, orig. proceeding) (mem. op, not designated for publication).

After its plenary jurisdiction expires, a trial court has special or limited jurisdiction to ensure that a higher court’s mandate is carried out and to perform other functions specified by statute, such as finding facts in a habeas corpus setting, or determining entitlement to DNA testing. *State v. Patrick*, 86 S.W.3d 592, 594 (Tex. Crim. App. 2002). In this case, the trial court’s plenary jurisdiction has expired and the mandamus record does not show that the trial court presently has special jurisdiction over any aspect of relator’s case. As a result, the trial court does not have a ministerial duty to rule on relator’s motion. *In re Smith*, 366 S.W.3d 268, 270–71 (Tex. App.—Tyler 2012, orig. proceeding)

We deny the petition for writ of mandamus.

/David L. Bridges/

DAVID L. BRIDGES
JUSTICE