

DENY; and Opinion Filed May 14, 2018.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-18-00499-CV

IN RE JEROME JOHNSON, Relator

**Original Proceeding from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause No. F01-53637-IH**

MEMORANDUM OPINION

Before Justices Francis, Evans, and Schenck
Opinion by Justice Evans

In this original proceeding, relator seeks a writ of mandamus directing the trial court to rule on a motion for appointment of counsel to assist relator in seeking new DNA testing under Chapter 64 of the code of criminal procedure. Relator asserts that he filed the motion on October 22, 2017 and the trial court has failed to rule on the motion. We deny the petition because relator has not provided a record to establish his right to relief.

To establish a right to mandamus relief in a criminal case, the relator must show that the trial court violated a ministerial duty and there is no adequate remedy at law. *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013) (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.); *see also In re Hogg–Bey*, No. 05–15–01421–CV, 2015 WL 9591997, at *1–2 (Tex. App.—Dallas Dec. 30, 2015, orig. proceeding) (mem. op.). A trial court has a reasonable time within which to consider a motion and to rule. *In re Craig*, 426 S.W.3d 106, 106–07 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding); *In re Sarkissian*, 243 S.W.3d 860, 861 (Tex. App.—Waco 2008, orig. proceeding). Accordingly, to be entitled to mandamus relief compelling a trial court to rule on a motion, 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 or refused to do so. *In re Keeter*, 134 S.W.3d 250, 252–53 (Tex. App.—Waco 2003, orig. proceeding); *In re Villarreal*, 96 S.W.3d 708, 710 (Tex. App.—Amarillo 2003, orig. proceeding); *In re Molina*, 94 S.W.3d 885, 886 (Tex. App.—San Antonio 2003, orig. proceeding).

It is relator’s burden to provide the 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). Rules 52.3 and 52.7 require the relator to provide “a certified or sworn copy” of certain documents, including any order complained of, any other document showing the matter complained of, and every document that is material to the relator’s claim for relief that was filed in any underlying proceeding. TEX. R. APP. P. 52.3(k)(1)(A), 52.7(a)(1). Rule 52.3 also requires the relator to certify that he has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence in the appendix or record. TEX. R. APP. P. 52.3(j).

Relator’s petition for writ of mandamus is not certified as required by rule 52.3(j) and does not include a certified or sworn copy of the trial court’s docket sheet or other proof that establishes relator filed the motion for appointment of counsel, requested a hearing and/or ruling on the motion, and the trial court has failed to act on relator’s requests within a reasonable time. TEX. R.

APP. P. 52.3(j), 52.3(k)(1)(a), 52.7(a). As such, relator has not established a violation of a ministerial duty and is not entitled to mandamus relief.

Accordingly, we deny relator's May 2, 2018 petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(a) (the court must deny the petition if the court determines relator is not entitled to the relief sought).

/David Evans/
DAVID EVANS
JUSTICE

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