

Petition for Writ of Mandamus Denied and Memorandum Opinion filed December 6, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-01261-CR

IN RE MARK BURNS, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
177th District Court
Harris County, Texas
Trial Court No. 451214**

MEMORANDUM OPINION

On December 27, 2010, relator Mark Burns filed petition for writ of mandamus in this court. *See* Tex. Gov't Code §22.221; *see also* Tex. R. App. P. 52. In the petition, Burns asks this court to compel the Honorable Kevin Fine, presiding judge of the 177th District Court in Harris County, to grant his motion for expunction of a criminal record filed in cause number 451214 and order the prison parole division to correct its erroneous records.

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 that 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).

The mandamus record reveals that in 1986, Burns was indicted for sexual assault of a child in cause number 451214. On December 18, 1986, after the State reduced the charge to a Class A misdemeanor assault, Burns entered a guilty plea and was sentenced to probation for one year and assessed a \$500 fine. On December 9, 1987, the State filed a motion to revoke Burns's probation. On January 8, 1988, Burns entered a plea of true to violating his probation and was sentenced to 180 days in the Harris County Jail. The final judgment from the revocation of probation erroneously recited that Burns was convicted of felony sexual assault.

On January 22, 2010, the trial court granted Burns's motion for entry of a judgment nunc pro tunc to correct the error. The trial court ordered the judgment revoking Burns's probation to reflect that Burns entered a plea to misdemeanor assault. The court's order recites that the judgment nunc pro tunc supersedes the erroneous judgment. Burns included in our record correspondence from his counsel in which he was provided copies of the judgment nunc pro tunc.

Burns, who is incarcerated due to another unspecified conviction, asserts that the parole division has not deleted the erroneous judgment from its records. He complains that the parole division classified him as a sex offender and denied his parole on August 29, 2010. Therefore, on November 19, 2010, he filed a motion for expunction of records in the 177th District Court. To date, he has not received a ruling from the court.

Expunction is a statutory privilege governed by article 55.01 of the Texas Code of Criminal Procedure, which provides that an arrested person is entitled to have the records of an arrest expunged if (1) he was acquitted or pardoned; or (2) there was no indictment or the indictment was dismissed, and several other requirements are met, including that the applicant was not convicted. Tex. Code Crim. Proc. art. 55.01. The purpose of the expunction statute is to allow the record of a wrongful arrest to be expunged, not to allow a person who was arrested and pled guilty to expunge a record. *See Harris County Dist. Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991). Thus, the statute does not permit an expunction of records relating to a conviction unless the conviction was pardoned. *See* Tex. Code Crim. Proc. art. 55.01(a)(1) & 55.01(2)(B).

Burns is not entitled to expunction under these facts. Therefore, Burns has not established that the trial court had a legal duty to rule on his motion. Accordingly, Burns's petition is denied.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Seymore and Jamison.

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