

Petition for Writ of Mandamus Denied and Memorandum Opinion filed September 15, 2011.



In The

Fourteenth Court of Appeals

NO. 14-11-00786-CR

IN RE DENNIS JOE PHARRIS, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
351st District Court
Harris County, Texas
Trial Court Cause No. 1031225**

MEMORANDUM OPINION

On September 12, 2011, relator filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221; *see also* Tex. R. App. P. 52. Relator asks this court to compel the Honorable Mark Kent Ellis, presiding judge of the 351st District Court of Harris County, to enforce a plea bargain agreement.

Background

Relator was charged with theft in three different cause numbers: 1031225, 1210228, and 1210229. On April 14, 2010, relator entered into a plea agreement with the

State in cause number 1031225. In that case, relator agreed to 43 months' confinement in exchange for a reduction in the charge. The trial court accepted relator's plea and entered judgment in cause number 1031225. On May 17, 2010, the trial court held a hearing on cause numbers 1210228 and 1210229. Relator and the State had reached an agreement in cause number 1210228 in which relator agreed to plead guilty and either admit he committed theft by deception or pay \$135,000 in restitution to the victim in cause number 1210228. In exchange, the State agreed to dismiss the charge in cause number 1210229. At a hearing on relator's application for writ of habeas corpus, the prosecutor testified that there were two different plea bargain agreements, one in cause number 1031225, and the other in cause numbers 1210228, 1210229, and 0991356 ("one of the old cases that needed to be dismissed"). The State gave relator a deadline on which to pay the restitution and reserved the right to rescind the agreement if it were unable to verify the funds. At the writ hearing, the prosecutor testified that the State wanted to ensure that the funds being used for restitution were not stolen.

According to the prosecutor's testimony at the writ hearing, the prosecutor determined that relator had acquired the money for restitution through theft or deception and refused to accept the plea. Therefore, trial on cause numbers 1210228 and 1210229 was set for March, 2011, but later rescheduled to September 16, 2011. Relator filed an application for pretrial writ of habeas corpus alleging that jeopardy attached when the trial court accepted the plea in cause number 1031225, and trial on cause numbers 1210228 and 1210229 was prohibited by double jeopardy. The trial court denied relator's pretrial writ, which relator appealed, and this court docketed as cause number 14-11-00266-CR.

Mandamus Standard

To be entitled to mandamus relief in a criminal case, a relator must show that he has no adequate remedy at law to redress his alleged harm, and that 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).

Analysis

In his petition for writ of mandamus, relator asks this court to compel the trial court to stay his trial and enforce the terms of the plea agreement. Relator alleges the trial court had a ministerial duty to enforce the terms of the plea bargain agreement. In support of his argument relator cites *Perkins v. Court of Appeals for Third Supreme Judicial Dist. of Tex.*, 738 S.W.2d 276 (Tex. Crim. App. 1987). In *Perkins*, the record reflected that the trial court accepted the defendant's plea of guilty and approved the plea bargain agreement. Thereafter, after receiving new information regarding the defendant's culpability as a party, the State withdrew its plea bargain offer and the trial court refused to accept the agreement he had previously approved. The Court of Criminal Appeals held that when the defendant enters into a plea bargain agreement with the prosecutor, and the trial court approves the agreement, and the agreement is not kept, the proper relief is either specific performance of the agreement, if it can be enforced, or withdrawal of the plea if it cannot. *See id.* at 283–84.

In this case, unlike *Perkins*, there is no evidence in the record that the trial court accepted the plea bargain.¹ In fact, there is contrary evidence reflecting that the State withdrew the plea bargain agreement prior to any request for the trial court's acceptance because relator did not comply with the terms of the agreement. Relator argues that the plea bargain agreement in cause number 1031225 was part of the plea agreement in the remaining cause numbers; therefore, he argues, by accepting the agreement in cause number 1031225, the trial court accepted the agreement in the remaining cause numbers.

¹ Relator also cites *Ortiz v. State*, 933 S.W.2d 102, 104 (Tex. Crim. App. 1996); *Wright v. State*, 158 S.W.3d 590, 593–94 (Tex. App.—San Antonio 2005, pet. ref'd); *Holland v. State*, 112 S.W.3d 251, 255 (Tex. App.—Austin 2003, no pet.); and *Zimm v. State*, 35 S.W.3d 283, 285 (Tex. App.—Corpus Christi 2000, pet. ref'd). Each of those cases is distinguishable on its facts in that in each case the trial court accepted the plea bargain; therefore, the defendant was entitled to specific performance of the agreement or to withdraw his plea.

The record reflects, however, that the trial court accepted relator's plea bargain in cause number 1031225 and signed a judgment in that case. At the very least, a fact issue was raised with regard to whether there was one plea bargain agreement or two. In denying relator's writ of habeas corpus, the trial court resolved that fact issue in favor of the State. On petition for writ of mandamus, we defer to the trial court's resolution of fact issues unless it is clear from the record that only one decision could have been reached. *See Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). In this case, relator has not established that only one decision could have been reached; therefore, he is not entitled to specific performance of the agreement.

Accordingly, we deny relator's petition for writ of mandamus and the request to stay his trial.

PER CURIAM

Panel consists of Justices Frost, Seymore, and Jamison.

Do Not Publish — Tex. R. App. P. 47.2(b).