

Petition for Writ of Mandamus Denied and Memorandum Opinion filed May 3, 2016.



In The

Fourteenth Court of Appeals

NO. 14-16-00306-CR

IN RE MICHAEL WILLIAM GODFREY, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
230th District Court
Harris County, Texas
Trial Court Cause No. 912345**

MEMORANDUM OPINION

On April 13, 2016, relator Michael William Godfrey filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (West 2004); *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the

Honorable Brad Hart, presiding judge of the 230th District Court of Harris County, to grant his motion nunc pro tunc.

According to relator, he pleaded guilty, on September 30, 2002, to sexual assault of a child pursuant to a plea bargain, and was placed on deferred adjudication probation for ten years.¹ As a condition of probation, relator was required to wear an electronic ankle monitor and was confined to his house. The State moved to adjudicate relator's guilt for violations of the conditions of his probation. On December 2, 2005, the Honorable Susan Brown, presiding judge of the 185th District Court of Harris County, adjudicated relator's guilt and sentenced him to fifteen years' incarceration. Judge Brown stated that she was granting relator credit for all the time he had been in custody. Relator did not appeal the adjudication of his guilt.

Relator filed a pro se motion nunc pro tunc, in which he claimed that he had worn the electronic ankle monitor for 1158 days when Judge Brown sentenced him, but he was not given credit for time served for those 1158 days.² On November 5, 2015, the trial court denied relator's motion nunc pro tunc.

In a criminal case, mandamus relief is authorized only if the relator establishes that (1) under the facts and the law, the act sought to be compelled is purely ministerial; and (2) he has no other adequate legal remedy. *In re State ex*

¹ The factual background is taken from a petition relator previously filed in this court. See *In re Godfrey*, No. 14-14-00974-CR, 2014 WL 7204977 (Tex. App.—Houston [14th Dist.] Dec. 18, 2014, orig. proceeding) (mem. op., not designated for publication).

² Relators' motion nunc pro tunc was transferred to the 230th District Court after Judge Brown recused herself from hearing the motion.

rel. Weeks, 391 S.W.3d 117, 121–22 (Tex. Crim. App. 2013). An act is ministerial if the law dictates the duty to be performed with such certainty that nothing is left to the exercise of discretion. *State ex rel. Healy v. McMeans*, 884 S.W.2d 772, 774 (Tex. Crim. App. 1994). A court of appeals abuses its discretion in granting a mandamus when the act sought to be compelled is not ministerial. *State ex rel. Hill v. Court of Appeals for the Fifth Dist.*, 34 S.W.3d 924, 927 (Tex. Crim. App. 2001).

Defendants are entitled to credit for time toward their sentences for time spent in confinement from arrest to sentencing. *Ex parte Walker*, 150 S.W.3d 429, 431 (Tex. Crim. App. 2004). The trial court's failure to award all of the defendant's presentence jail time when the court pronounced sentence can be corrected by a judgment nunc pro tunc. *Ex parte Ybarra*, 149 S.W.3d 147, 148 (Tex. Crim. App. 2004). A defendant may seek mandamus challenging a trial court's denial of, or refusal to rule on, a motion for judgment nunc pro tunc. *Ex parte Florence*, 319 S.W.3d 695, 696 (Tex. Crim. App. 2010); *Ybarra*, 149 S.W.3d at 149.

On the other hand, when a defendant's community supervision is revoked, the trial court is not required to give a defendant credit for time spent in confinement as a condition of community supervision. Tex. Code Crim. Proc. Ann. art. 42.03 § 2(a)(1) (West Supp. 2015); *Ex parte Walker*, 150 S.W.3d at 431; *Applin v. State*, 341 S.W.3d 528, 533 (Tex. App.—Fort Worth 2011, no pet.). Whether to do so is within the trial court's discretion. *Applin*, 341 S.W.3d at 533.

Relator contends that he is entitled to credit for the time he was subject to electronic monitoring because it was a form of confinement. It is relator's burden to bring a record showing that he is entitled to relief. *See Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). Relator has not included in the mandamus record any document showing the terms of his community supervision, including that he was subject to electronic monitoring or for the number of days he alleges. Relator also has not provided a copy of the trial court's judgment adjudicating his guilt.

Moreover, relator included a page from the hearing where Judge Brown adjudicated his guilt, stating "Mr. Godfrey, I will give you credit for the time that you've been in custody so far." It was within Judge Brown's discretion to credit the time relator was purportedly subject to electronic monitoring. However, relator has not shown by that statement that Judge Brown specifically intended to give him credit for the time spent on electronic monitoring.

In denying relator's motion for judgment nunc pro tunc, the trial court had to make a specific determination regarding relator's entitlement or lack of entitlement to additional jail time credit. Relator has not demonstrated that there was mistake in the calculation of the time the trial court was required to credit as served. Therefore, no ministerial act was implicated. Thus, relator has not shown that the trial court had a ministerial duty to award him credit for time spent on electronic monitoring.

Relator has not shown that he is entitled mandamus relief. Accordingly, we deny relator's petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Busby, Donovan, and Wise.
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