

**Amended Petition for Writ of Mandamus Denied and Memorandum Opinion
filed August 22, 2023.**



In The

Fourteenth Court of Appeals

NO. 14-23-00561-CR

IN RE XAVIER POWELL, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
268th District Court
Fort Bend County, Texas
Trial Court Cause No. 08-DCR-048857**

MEMORANDUM OPINION

On August 8, 2023, relator Xavier Powell filed an amended petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221; *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Steve

Rogers, presiding judge of the 268th District Court of Fort Bend County, to rule on motions pending in the trial court.

BACKGROUND

On April 17, 2009, a jury convicted relator of murder and assessed his punishment at 50 years' incarceration. Relator appealed his conviction to this court. *See Powell v. State*, 14-09-00398, No. 2011 WL 1579734, at *1 (Tex. App.—Houston [14th Dist.] Apr. 21, 2011, pet. ref'd) (mem. op., not designated for publication). We affirmed the judgment of conviction. *Id.* at *3. The Texas Court of Criminal Appeal refused relator's petition for discretionary review.

On October 29, 2018, relator filed a pro se motion for post-conviction DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure. The State did not oppose relator's motion. On November 17, 2018, the trial court signed an agreed order for post-conviction DNA testing of State's Exhibit 26 (t-shirt) and State's Exhibit 27 (shell casings). Pursuant to article 64.03(a) and (2)(b-1), the trial court made the following findings:

1. The White t-shirt and casings were admitted in evidence as State's Exhibits 26 and 27, [and] have been maintained in the Fort Bend County District Clerk's Office since the trial. This evidence is available and is in a condition making DNA testing possible;
2. Having been maintained in the District Clerk's Office since the trial of this case, the chain of custody is sufficient to establish that the white t-shirt and casings have not been substituted, tampered with, replaced, or altered in any material respect;

3. There is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and

4. Identity was an issue in the case.

The trial court then ordered the DNA testing to be conducted by the Department of Public Safety, Houston Regional Crime Laboratory (the “DPS Crime Lab”). The trial court ordered that the testing be conducted pursuant to the following requirements under article 64.03(c)(1):¹

(1) The DNA testing shall be conducted in a timely and efficient manner under reasonable conditions designed to protect the integrity of the evidence and the testing process;

(2) The DNA testing shall employ a scientific method sufficiently reliable and relevant to be admissible under Rule 702, Texas Rules of Evidence; and

(3) On completion of the DNA testing, the results of the testing and all data related to the testing required for an evaluation of the test results shall be immediately filed with this Court and copies of the results and data shall be served on the convicted person and the Fort Bend County District Attorney’s Office, attention Appellate Division.

The trial court further ordered (1) the Fort Bend County District Attorney’s Office to obtain a buccal swab sample from relator (“District Attorney’s Office”); (2) the District Clerk’s Office to release State’s Exhibit 26 (a white t-shirt) and State’s Exhibit 27 (shell casings) to the District Attorney’s Office; (3) the District Attorney’s Office to transport the evidence together with relator’s sample and order to the Fort Bend County Sheriff’s Office, Criminal Investigations Division

¹ See Tex. Code Crim. Proc. art. 64.03(d).

(“Sheriff’s Office”); and (4) the Sheriff’s Office to transport the evidence, sample, and order to the DPS Crime Lab. The trial court also ordered the clerk of the court to provide a copy of the order to relator as soon as practicable.

On November 29, 2018, relator filed a pro se motion for the appointment of counsel to represent him in the Chapter 64 proceeding. That same day, the trial court granted relator’s motion and appointed attorney Patrick McCann to represent relator.

On December 21, 2018, the District Clerk’s Office released State’s Exhibit 26 (t-shirt) and State’s Exhibit 27 (shell casings) to a representative of the District Attorney’s Office for transfer to the DPS Crime Lab. On May 20, 2019, the DPS Crime Lab issued a report reflecting that no DNA profile could be obtained from any of the DNA extracts obtained from swabs of the nine shell casings submitted for forensic analysis; however, the report did not reflect any forensic analysis conducted on the t-shirt.

Although relator was represented by counsel, on March 8, 2020, relator filed a pro se notice of appeal.² Relator’s counsel advised the appellate court that relator’s request for DNA testing had been granted and that the contracted lab had received the items for testing and was preparing to go forward.” *Powell*, 2020 WL 5949986, at *1. Therefore, there was nothing for the court to review at that time because

² See *Powell v. State*, No. 11-20-00187-CR, 2020 WL 5949986, at *1 (Tex. App.—Eastland Oct. 8, 2020, no pet.) (mem. op., not designated for publication). The appeal was transferred from the First Court of Appeals to the Eleventh Court of Appeals pursuant to a docket equalization order issued by the Texas Supreme Court. *Id.* (citing Tex. Gov’t Code § 73.001).

relator's requests for DNA testing had been granted. *Id.* Relator's appeal was dismissed. *Id.*

On October 7, 2020, the DPS Crime Lab issued a supplemental report. The report showed that no DNA profile could be recovered from the tee-shirt. On May 16, 2023, relator, represented by counsel, filed an amended petition for writ of mandamus.

ANALYSIS

Relator claims that the trial court has not ruled on his pending motions, including his motion for the results of DNA testing, motion for discovery, and motion to rule on his pending motions.

To be entitled to mandamus relief in a criminal case, the relator must establish that (1) the relator has no adequate remedy at law, and (2) what he seeks to compel is a ministerial act, not involving a discretionary or judicial decision. *In re Meza*, S.W.3d 383, 388 (Tex. Crim. App. 2020) (orig. proceeding). A trial court has a ministerial duty to consider and rule on motions properly filed and pending before it, and mandamus may issue to compel the trial court to act. *In re Henry*, 525 S.W.3d 381, 382 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding). For relator to be entitled to mandamus relief, the record must show (1) the motion was filed and brought to the attention of the respondent-judge for a ruling, and (2) the respondent-judge has not ruled on the motion within a reasonable time after the motion was submitted to the court for a ruling or after the party requested a ruling. *In re Gomez*, 602 S.W.3d 71, 73 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding).

Relator has the burden to provide a sufficient record to establish that he is entitled to mandamus relief. *See Henry*, 525 S.W.3d at 382. Relator did not meet this burden. Relator has not included any copies the motion for the results of DNA testing, motion for discovery, or motion to rule on his pending motions in the appendix to his amended petition or mandamus record. Therefore, relator has not shown that (1) the complained of motions are pending in the trial court; (2) they were presented to the trial court; or (3) the trial court refused to rule on them.

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

PER CURIAM

Panel consists of Justices Wise, Zimmerer, and Wilson.
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