



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-17-00237-CV**

IN RE M.B.

RELATOR

-----

ORIGINAL PROCEEDING  
TRIAL COURT NO. C2016374

-----

**MEMORANDUM OPINION<sup>1</sup>**

-----

In July 2017, pro se Relator M.B. filed a petition for writ of mandamus in this court, asking us to compel Respondent, the Honorable Ralph H. Walton Jr., to hold a hearing, to rule on Relator's petition for expunction, and to enter an order of expunction. The State agrees that Relator is entitled to a hearing and ruling. We conditionally grant relief in part.

---

<sup>1</sup>See Tex. R. App. P. 47.4, 52.8(d).

## I. Procedural and Factual Background

On January 9, 2017, Relator filed a petition for expunction in the 355th District Court, seeking the expunction of all records and files arising out of a misdemeanor case in Hood County for which he was acquitted several years ago. See Tex. R. Evid. 201 (allowing courts to judicially notice facts not subject to reasonable dispute); Tex. Code Crim. Proc. Ann. art. 55.02, § 2(a) (West Supp. 2016) (requiring the petition for expunction to be filed in a district court for the county in which the petitioner was arrested or the offense was alleged to have occurred). Within the petition, he also asked that his petition be set for hearing. Respondent has not yet set the petition for hearing or ruled on it.

Contemporaneously, Relator filed a separate “Motion for Bench Warrant or in the Alternative Motion for Hearing by Conference Call.” Respondent timely denied that motion. Relator attempted to appeal that denial in this court, but this court dismissed his appeal for want of jurisdiction because that order is an unappealable interlocutory order. *Ex parte M.B.*, No. 02-17-00070-CV, 2017 WL 2805871, at \*1 (Tex. App.—Fort Worth June 29, 2017, no pet.) (mem. op.). While that appeal was still pending, Relator filed a noncompliant petition for writ of mandamus in this court; his compliant petition seeking mandamus relief in this court was filed July 17, 2017.

## II. Discussion

In his petition for writ of mandamus, Relator contends that Respondent abused his discretion by

- failing to set the petition for expunction for hearing;
- failing to rule on the petition for expunction; and
- failing to order the expunction as requested.

**A. Standard of Review**

Mandamus relief is proper only to correct a clear abuse of discretion when there is no “adequate remedy at law, such as a normal appeal.” *In re H.E.B. Grocery Co., L.P.*, 492 S.W.3d 300, 304 (Tex. 2016) (orig. proceeding) (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding)).

**B. Respondent Has a Duty to Rule.**

Considering and determining a motion that is properly filed and before the trial court is a ministerial act. *Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding); see also *Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992) (orig. proceeding) (holding trial court abused its discretion by refusing to conduct a hearing and rule on a motion). The trial court’s duty to act on a pending motion is triggered when the movant has made the trial court aware of the motion and the court has had a reasonable time to rule. *In re Harris*, No. 02-17-00142-CV, 2017 WL 2375775, at \*1 (Tex. App.—Fort Worth June 1, 2017, orig. proceeding) (mem. op.); *In re Layton*, 257 S.W.3d 794, 795 (Tex. App.—Amarillo 2008, orig. proceeding). A trial court abuses its discretion when it refuses to rule on a properly filed, pending motion within a reasonable amount of time. *In re Shredder Co.*, 225 S.W.3d 676, 679 (Tex. App.—El Paso 2006, orig. proceeding); *In re Hearn*, 137 S.W.3d 681, 685 (Tex.

App.—San Antonio 2004, orig. proceeding); *Safety-Kleen Corp.* 945 S.W.2d at 269.

A relator has no adequate remedy at law from a refusal to rule. *Harris*, 2017 WL 2375775, at \*1; *In re Gerstner*, No. 02-15-00315-CV, 2015 WL 6444797, at \*1 (Tex. App.—Fort Worth Oct. 23, 2015, orig. proceeding) (mem. op.); *O'Donniley v. Golden*, 860 S.W.2d 267, 270 (Tex. App.—Tyler 1993, orig. proceeding).

Here, Relator filed his petition for expunction of files and records regarding the misdemeanor offense of which he was acquitted at the same time that he filed his motion to personally appear at the hearing on the petition or, alternatively, to appear by telephone. That motion refers to the petition for expunction. Respondent was therefore aware of the petition for expunction when he denied the motion in January 2017 but has failed to rule on the petition in the eight months that have elapsed since its filing. We therefore hold that Respondent abused his discretion by failing to rule on the petition for expunction. See *Shredder Co.*, 225 S.W.3d at 680.

Without a ruling on his petition for expunction, Relator is stuck. He needs a ruling, whether it is an order granting the expunction he seeks or an order denying the expunction that will in turn allow him to pursue a remedy by appeal. See Tex. Code Crim. Proc. Ann. art. 55.02, § 3(a) (West Supp. 2016). We therefore hold that Relator has no other adequate remedy at law.

Thus, Relator is entitled to mandamus relief on this issue.

**C. We May Not Tell Respondent How to Rule.**

While this court may compel a trial court to exercise its ministerial duty to rule, we may not instruct that court what its ruling should be. See, e.g., *In re Progressive Cty. Mutual Ins. Co.*, No. 05-15-00622-CV, 2015 WL 2345535, at \*1 (Tex. App.—Dallas May 15, 2015, orig. proceeding) (mem. op.); *In re Martinez Ramirez*, 994 S.W.2d 682, 684 (Tex. App.—San Antonio 1998, orig. proceeding); accord *Crofts v. Court of Civ. Appeals*, 362 S.W.2d 101, 105 (Tex. 1962) (orig. proceeding) (“While the Court of Civil Appeals may mandamus the district court to proceed to trial and judgment in habeas corpus proceedings, it may not tell the district court what judgment to enter.”).

We therefore deny mandamus relief as to Relator’s request that we compel Respondent to order the expunction of the records related to the misdemeanor of which Relator was acquitted.

**D. Relator Is Entitled to a Hearing, But Not Necessarily a Live Hearing.**

Article 55.02, section 2(c) requires a district court to set a hearing on a petition for expunction. Tex. Code Crim. Proc. Ann. art. 55.02, § 2(c) (West Supp. 2016). The State agrees that Relator is entitled to a hearing. Despite the language in the statute, however, Relator is not necessarily entitled to a formal, live hearing on his petition for expunction:

Texas courts have repeatedly held that a trial court may rule on an expunction petition without conducting a formal hearing and without considering live testimony if it has at its disposal all the information it needs to resolve the issues raised by the petition. Presumably, that

information might be available by what is in the pleadings, by summary judgment proof, or by judicially noticing court records.

*Ex parte V.A., Jr.*, No. 02-16-00370-CV, 2017 WL 1953340, at \*3 (Tex. App.—Fort Worth May 11, 2017, no pet.) (mem. op.) (citation and internal quotation marks omitted). Further, should Respondent deny Relator’s petition for expunction without a hearing, Relator may raise the issue of Respondent’s failure to hold a hearing in an appeal from the order denying the petition for expunction. See, e.g., *id.* (addressing issue on appeal). Relator therefore has an adequate remedy by appeal on this issue. See *H.E.B. Grocery Co., L.P.*, 492 S.W.3d at 304.

### III. Conclusion

Having determined that (1) Respondent abused his discretion by refusing to rule on Relator’s petition for expunction and (2) Relator has no adequate remedy at law, we conditionally grant the petition for writ of mandamus. Respondent is ordered to rule on Relator’s petition for expunction within thirty days. Because we are confident that Respondent will comply with this directive, the writ will issue only if he fails to do so. See, e.g., *Gerstner*, 2015 WL 6444797, at \*2. All other requested relief is denied.

PER CURIAM

PANEL: PITTMAN, MEIER, and KERR, JJ.

DELIVERED: September 8, 2017