In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00025-CR

IN RE SHAWN SHAFFER BAXTER, RELATOR

ORIGINAL PROCEEDING

January 22, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Relator Shawn Shaffer Baxter is a prison inmate appearing *pro se*. In this original proceeding, he seeks a writ of mandamus compelling respondent, the Honorable Steven R. Emmert, judge of the 31st District Court of Roberts County, to rule on a pending motion. We will deny the petition.

In 2010 a jury found relator guilty of aggravated sexual assault of a child and assessed punishment at life imprisonment. Sentence was imposed accordingly. In the present proceeding, relator expresses his intention to pursue habeas corpus relief in the Court of Criminal Appeals.

On June 8, 2015, relator mailed a motion to the district clerk requesting appointment of counsel for the intended habeas proceeding. In letters to the district clerk dated September 19 and November 21, 2015, relator specifically requested the court's ruling on his motion. Yet, according to relator, Judge Emmert has made no ruling.

On our own initiative, we turn first to the question of our jurisdiction. "It is well established that only the Court of Criminal Appeals possesses the authority to grant relief in a post-conviction habeas corpus proceeding where there is a final felony conviction." *Padieu v. Court of Appeals of Tex., Fifth Dist.,* 392 S.W.3d 115, 117 (Tex. Crim. App. 2013) (orig. proceeding) (per curiam) (quoting *Ex parte Alexander,* 685 S.W.2d 57, 60 (Tex. Crim. App. 1985); TEX. CODE CRIM. PROC. ANN. art. 11.07 § 5).

But this rule does not mean a court of appeals lacks original jurisdiction in every mandamus proceeding relating to a possible writ of habeas corpus under article 11.07 of the Code of Criminal Procedure. In *Padieu* the court explained, "we perceive no reason why our exclusive Article 11.07 jurisdiction divests an appellate court of jurisdiction to decide the merits of a mandamus petition alleging that a district judge is not ruling on a motion when the relator has no Article 11.07 application pending." 392 S.W.3d at 117-18.

Here relator states he seeks appointment of counsel to investigate the claimed ineffective assistance of his trial counsel. According to relator's motion, as of June 8, 2015, he had not filed an application for writ of habeas corpus under article 11.07. Relator does not indicate in his petition that he has since filed such an application, and

on our inquiry the trial court clerk has advised that relator has not filed an application for article 11.07 habeas relief. We therefore find relator's present mandamus petition falls within our subject matter jurisdiction.

To obtain relief by mandamus a relator must show he has no adequate remedy at law and the action he seeks to compel is ministerial, rather than one involving judicial discretion. *Bowen v. Carnes,* 343 S.W.3d 805, 810 (Tex. Crim. App. 2011) (orig. proceeding).

When a relator complains the trial court failed or refused to hear and rule on a pending motion, his burden includes that of demonstrating the trial court had a legal duty to perform; performance was demanded; and the trial court refused to act. *Stoner v. Massey,* 586 S.W.2d 843, 846 (Tex. 1979) (orig. proceeding). A trial court abuses its discretion when it fails to rule within a reasonable time on properly-presented pretrial motions. *Safety-Kleen Corp. v. Garcia,* 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding).

No requirement exists that a court consider a motion not called to its attention. *Metzger v. Sebek,* 892 S.W.2d 20, 49 (Tex. App.—Houston [1st Dist.] 1994, writ denied). That a motion was filed with the district clerk does not show it was brought to the trial court's attention because the clerk's knowledge of the motion is not imputed to the court. *In re Chavez,* 62 S.W.3d 225, 228 (Tex. App.—Amarillo 2001, orig. proceeding); *see also In re Blakeney,* 254 S.W.3d 659, 662 (Tex. App.—Texarkana 2008, orig. proceeding) ("Showing that a motion was filed with the court clerk does not constitute proof that the motion was brought to the trial court's attention or presented to

the trial court with a request for a ruling"). Therefore, "[relator] must prove that the trial court received notice of the pleading . . . . Merely alleging that something was filed with or mailed to the district clerk does not satisfy that requirement." *In re Metoyer,* No. 07-07-0506-CR, 2008 Tex. App. LEXIS 243, at *4 n.2, (Tex. App.—Amarillo January 14, 2008, orig. proceeding) (not designated for publication) (citations omitted). The logic of this standard needs no substantial explanation. "[A] court cannot be faulted for doing nothing when it is or was unaware of the need to act." *Id.*

In the present matter, relator's petition fails for want of proof that his motion was brought to the attention of Judge Emmert.[1] *See In re Posey,* No. 07-03-0518-CV, 2004 Tex. App. LEXIS 695, at *2-3 (Tex. App.—Amarillo January 22, 2004, orig. proceeding) (mem. op.). Accordingly, relator's petition is denied.

Per Curiam

Do not publish.

[1] We note also relator's petition does not contain the certification required by appellate rule 52.3(j). TEX. R. APP. P. 52.3(j).