



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-17-00161-CR

EX PARTE ARTEMIO GOMEZ

On Appeal from the 106th District Court
Lynn County, Texas
Trial Court No. 16-04-07292, Honorable Carter T. Schildknecht, Presiding

June 13, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant Artemio Gomez attempts to appeal an order from the district court denying his application for writ of habeas corpus. We dismiss the appeal for want of jurisdiction.

Appellant filed a pretrial application for writ of habeas corpus in the district court concerning pending misdemeanor charges. On May 10, 2016, the district court dismissed the application for want of jurisdiction based on the State's argument that jurisdiction over writs of habeas corpus in misdemeanor cases vests in the county courts under Texas Code of Criminal Procedure article 11.09. However, on appeal, this court held that article 11.05 of the Texas Code of Criminal Procedure entitled a district

court to hear writs of habeas corpus on misdemeanors and remanded the case for consideration of the merits of the application. *Ex parte Gomez*, No. 07-16-00196-CR, 2016 Tex. App. LEXIS 11461, at *3-4 (Tex. App.—Amarillo Oct. 20, 2016, no pet.) (mem. op., not designated for publication).

On May 8, 2017, appellant filed “Appellant’s Motion to Re-Open” in this court. He attached an order issued by the district court on October 31, 2016, denying his application for writ of habeas corpus because he was “not in custody, confined, or restrained of his liberty.” In “Appellant’s Motion to Re-Open,” he claims the district court denied the application in error and asks this court to “consider the original appeal” and dismiss his criminal charges. Accordingly, we construed his motion as a notice of appeal.

Appellant was required to file a notice of appeal no later than thirty days after the trial court entered the order on October 31, 2016, or by November 30, 2016. See TEX. R. APP. P. 26.2(a). However, he did not file “Appellant’s Motion to Re-Open” until May 8, 2017. A timely notice of appeal is required to invoke our appellate jurisdiction. *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996). If the notice is untimely, we can take no action other than to dismiss for lack of jurisdiction. *Id.* at 523.

Questioning whether we had jurisdiction over the appeal, we directed appellant to address the matter. In response, he contended that he seeks a writ of mandamus to direct the district court to consider the merits of his application. However, he has not complied with the pleading requirements for a petition for writ of mandamus. See TEX. R. APP. P. 52. Furthermore, mandamus is intended to be an extraordinary remedy, only available where there is not an adequate appellate remedy. See *Walker v. Packer*, 827

S.W.2d 833, 840 (Tex. 1992). Here, direct appeal of the order denying his application for writ of habeas corpus presented an adequate remedy. See *Ex parte Schmidt*, 109 S.W.3d 480, 481-82 (Tex. Crim. App. 2003) (stating that one can appeal from an order denying an application for a writ of habeas corpus).

Additionally, the October 2016 order denying his application for a writ of habeas corpus provided him the relief he purportedly seeks from us via his alleged mandamus. Again, he asks that we direct the trial court to consider the merits of his application. By denying the application because appellant was not in custody, confined, or restrained, the trial court effectively considered the merits of his application and denied it due to the failure to prove an element required by statute. That element pertains to restraint and the necessity for same. See TEX. CODE CRIM. PROC. ANN. art. 11.01 (West 2015) (stating that a “writ of habeas corpus is the remedy to be used when any person is restrained in his liberty”). So, the trial court did what he wants us to tell it to do; it considered the application on the merits. The accuracy of its decision is not before us, though, given appellant’s failure to timely appeal it.

Appellant also asserted that the deadline for filing his notice of appeal should have been tolled but cited no authority supporting the argument. We found no such authority mandating same given the circumstances before us.

Accordingly, appellant has not demonstrated grounds or cited any authority illustrating that we have jurisdiction over this appeal. Thus, we dismiss the appeal for want of jurisdiction.

Per Curiam

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