In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00405-CV

IN RE ANTWAIN JAMAR TUTSON, RELATOR

Original Proceeding
Arising From Proceedings Before the 108th District Court
Potter County, Texas
Trial Court No. 66,888-E; Honorable Douglas R. Woodburn, Presiding

November 7, 2017

MEMORANDUM OPINION

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

By this original proceeding, Relator, Antwain Jamar Tutson, seeks to compel the Honorable Douglas R. Woodburn, Judge of the 108th District Court of Potter County, to rule on his post-conviction motions requesting the entry of a second judgment *nunc pro tunc.*[1] For the reasons expressed herein, we dismiss Relator's petition.

[1] This is Relator's second request for mandamus relief. His first attempt was dismissed without prejudice for failing to comply with the requirements of chapter 14 of the Texas Civil Practice and Remedies Code. *See In re Tutson*, No. 07-17-00305-CV, 2017 Tex. App. LEXIS 8396, at *3 (Tex. App.—Amarillo Aug. 31, 2017, orig. proceeding).

BACKGROUND

According to the limited documents before this court, pursuant to a plea bargain, Relator was convicted of possession of a controlled substance on June 12, 2013. He was sentenced to thirteen years confinement and assessed a $1,000 fine. The summary portion of the original judgment reflects "N/A" under Findings on Deadly Weapon. Almost two years later, on March 11, 2015, for reasons not known to this court, the trial court signed and filed a judgment *nunc pro tunc* changing the Findings on Deadly Weapon to reflect "YES, A FIREARM."

Relator was notified that the deadly-weapon finding would require him to serve one-half of his sentence before becoming eligible for parole.[2] In response, he filed a *Motion for Judgment Nunc Pro Tunc to Dismiss Deadly Weapon Finding* asking the trial court to delete the deadly-weapon finding. After no action was taken on his motion, on May 4, 2017, he filed a *Motion to Compel the Trial Court to Answer Defendant's Motion for Judgment Nunc Pro Tunc to Dismiss Deadly Weapon Finding*. To date, the trial court has not ruled on the pending motions prompting Relator to seek mandamus relief.

MANDAMUS STANDARD OF REVIEW

Mandamus relief is extraordinary. *In re Braswell*, 310 S.W.3d 165, 166 (Tex. App.—Amarillo 2010, orig. proceeding) (citing *In re Southwestern Bell Telephone Co.*, *L.P.*, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding)). "Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there

[2] *See* TEX. GOV'T CODE ANN. § 508.145(d)(1)(B), (2) (West Supp. 2017) (calculating parole eligibility to be one-half of the sentence or thirty calendar years, whichever is less, for an offense for which the judgment contains an affirmative finding under article 42.12, section 3g(a)(2) of the Code of Criminal Procedure, which is a finding on use of a deadly weapon. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(2) (West Supp. 2017).

is no other adequate remedy by law." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding)). To show entitlement to mandamus relief in a criminal case, a relator must show two things: (1) that he has no adequate remedy at law and (2) that what he seeks to compel is a ministerial act. *In re Bonilla*, 424 S.W.3d 528, 533 (Tex. Crim. App. 2014).

ANALYSIS

By the motions pending in the trial court and by the petition for writ of mandamus pending in this court, Relator challenges the propriety of adding the deadly-weapon finding to his judgment of conviction twenty-one months after entry of the original judgment. Relator also challenges the sufficiency of the evidence supporting that finding, and as such, his challenge is a collateral attack on the new judgment *nunc pro tunc.* Under Texas law, a felony conviction is not subject to a collateral attack by means of a writ of mandamus. *See In re Patton*, No. 06-06-00116-CV, 2006 Tex. App. LEXIS 10555, at *6 (Tex. App.—Texarkana Dec. 12, 2006, orig. proceeding) (mem. op.) (holding that a writ of habeas corpus is "the exclusive post-conviction judicial remedy available when the conviction is final and the applicant is confined by virtue of his or her felony conviction"). *See also In re Isaac*, No. 05-17-00536-CV, 2017 Tex. App. LEXIS 4998, at *1 (Tex. App.—Dallas May 31, 2017, orig. proceeding) (mem. op.) (citing TEX. CODE CRIM. PROC. ANN. art. 11.07) (providing that jurisdiction for a post-conviction application for a writ of habeas corpus vests with the Texas Court of Criminal Appeals), and *In re McAfee*, 53 S.W.3d 715, 717 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding) (noting that article 11.07 contains no role for courts of appeal)).

This court does not have jurisdiction to entertain a collateral attack on a felony judgment. We note, however, if Relator was never given the opportunity to contest the felony judgment *nunc pro tunc*, he may be entitled to an out-of-time direct appeal or other relief by filing a post-conviction writ of habeas corpus returnable to the Texas Court of Criminal Appeals. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2015).

Relator's petition for writ of mandamus is dismissed for want of jurisdiction.

Patrick A. Pirtle
Justice

Campbell, J., concurring.