In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-10-00090-CV

IN RE: DAVID W. NIENAS

Original Mandamus Proceeding

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Carter

MEMORANDUM OPINION

While incarcerated, David W. Nienas sued two Texas Department of Criminal Justice employees for "willful theft of [his] legal work." Nienas claims that he filed the following pleadings: "a motion for 'Attorney to Show Authority,'" "Rebuttal Response to Defendants[']s Motion to Quash Service," "'objection' to a decision made by the Honorable Judge . . . where she denied my request for the trial to be by jury," "Rebuttal Response to Defendants[']s Original Answer and Jury Demand," "Amended Rebuttal Response to Defendants[']s Original Answer and Jury Demand," "Amended Motion for Attorney to Show Authority," and a "Rebuttal Response to Defendants[']s Motion to Dismiss Pursuant to Chapter 14." He alleges that despite several letters to the trial court and "motion[s] for hearing," no hearings on his motions have been set. Nienas brings this pro se petition for writ of mandamus asking us to compel the trial judge "to have a hearing to address all motions."

Mandamus is an extraordinary remedy that issues only to correct a clear abuse of discretion or violation of a duty imposed by law when no other adequate remedy by law is available. *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding). Due to the nature of this remedy, it is Nienas' burden to properly request and show entitlement to mandamus relief. *See generally Johnson v. Fourth Dist. Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (orig. proceeding); *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding)

("Even a pro se applicant for a writ of mandamus must show himself entitled to the extraordinary relief he seeks.").

Consideration of a motion that is properly filed and before the court is a ministerial act. *State ex rel. Curry v. Gray*, 726 S.W.2d 125, 128 (Tex. Crim. App. 1987). However, Nienas must show that the trial court received, was aware of, and was asked to rule on the motion. *In re Grulkey*, No. 14-10-00450-CV, 2010 WL 2171408, at *1 (Tex. App.—Houston [14th Dist.] May 28, 2010, orig. proceeding) (mem. op.) (per curiam) (citing *In re Villarreal*, 96 S.W.3d 708, 710 (Tex. App.—Amarillo 2003, orig. proceeding)). All but two of Nienas' handwritten pleadings fail to contain a file-stamp mark indicating that they were filed. There are no envelopes or other indication in the record that the trial court actually received these pleadings.

Only two of the pleadings, a rebuttal response to defendants' motion to quash service and amended motion for attorney to show authority bear February 1, 2010 and March 8, 2010, file-stamp marks, respectively. However, "[f]iling something with the district clerk's office does not mean the trial court is aware of it; nor is the clerk's knowledge imputed to the trial court." *Id.* (citing *Villarreal*, 96 S.W.3d at 710 n.2); *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.").

In order to demonstrate the trial court's knowledge of all of the pleadings, Nienas attaches letters addressed to the district clerk and trial judge urging the court to rule. These letters also fail to contain any file mark, or other proof that they were sent. Because Nienas cannot meet his burden to demonstrate the trial court received, was aware of, and was asked to rule on his pleadings, we must deny his petition for writ of mandamus.

Jack Carter
Justice

Date Submitted: September 14, 2010
Date Decided: September 15, 2010