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

No. 06-17-00106-CR

IN RE BRIAN KEITH MELTON

Original Mandamus Proceeding

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

M E M O R A N D U M O P I N I O N

This is Brian Keith Melton's fourth petition for a writ of mandamus arising from judgments of conviction issued in 2001. We deny Melton's petition for a writ of mandamus.

Pursuant to two plea agreements, Melton pled guilty on July 5, 2001, to two charges of burglary of a habitation in two separate cause numbers.[1] Under the terms of the plea agreement, Melton agreed to a twenty-year sentence on each charge, the sentences were to run concurrently, and he was to receive 258 days' time credit. This Court previously issued an opinion stating that the "problem with that [plea] agreement was that such [time] credit exceeded the maximum amount of credit legally available in Melton's situation," because the trial court could not "give credit for noncustody time." *In re Melton*, No. 06-10-00212-CR, 2010 WL 4922917, at *1 (Tex. App.—Texarkana Dec. 2, 2010, orig. proceeding) (mem. op., not designated for publication).

In January 2003, the trial court entered nunc pro tunc judgments in each case assessing nineteen years and 200 days' confinement, along with 258 days' time credit. On August 7, 2015, Melton sought mandamus relief asking this Court to compel the trial court to vacate its January 2003 nunc pro tunc judgments of conviction. *See In re Melton*, 478 S.W.3d 153, 154 (Tex. App.—Texarkana 2015, orig. proceeding). We conditionally granted Melton's petition for writ of mandamus and directed the trial court to vacate the nunc pro tunc judgments of conviction entered on January 8, 2003. *Id.* at 157. On December 1, 2015, the trial court entered an order vacating the prior nunc pro tunc judgments.

[1]Melton was convicted in trial court cause numbers 20,570 and 20,572.

On July 8, 2016, Melton filed a petition for a writ of mandamus asking this Court to vacate the original judgments of July 5, 2001. We denied Melton's petition, finding he failed to show that he sought relief from the trial court prior to filing his petition for writ of mandamus. Then, after Melton had filed motions to vacate the 2001 judgments with the trial court, he again filed a petition for writ of mandamus asking this Court to order the trial court to vacate the July 5, 2001, judgments. By opinion dated February 7, 2017, we denied Melton's petition after explaining that Melton had not provided us with a record demonstrating that "he asked the trial court for a hearing or ruling on his motions and that the trial court refused to consider them." *In re Melton*, No. 06-16-00215-CR, 2017 WL 524990, at *1 (Tex. App.—Texarkana Feb. 7, 2017, orig. proceeding) (mem. op., not designated for publication).

In this petition for a writ of mandamus, Melton again asks us to direct the trial court to rule on his motions to vacate the 2001 judgments. This time, he has attached his requests for a hearing or ruling on those motions. The record establishes that Melton filed his requests for a hearing or ruling on April 27, 2017.

To be entitled to mandamus relief, a relator must show (1) that he has no adequate remedy at law and (2) that what he seeks to compel is a ministerial act. *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013) (orig. proceeding). The ministerial-act prerequisite is satisfied if the relator can show a clear right to the relief sought. *State ex rel. Young v. Sixth Judicial Court of Appeals at Texarkana*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding). When a relator fails to meet both of these requirements, then the petition for writ of mandamus should be denied. *Id.*

A "trial court is required to consider and rule on a properly filed motion within a reasonable period of time once a ruling has been requested." *In re Greenwell*, 160 S.W.3d 286, 288 (Tex. App.—Texarkana 2005, orig. proceeding). Thus, consideration of a request or motion that has been properly filed and brought before the court is a ministerial act. *State ex rel. Curry v. Gray*, 726 S.W.2d 125, 128 (Tex. Crim. App. 1987) (orig. proceeding). To obtain mandamus relief for the trial court's refusal to rule on a motion, a relator must establish that "(1) the motion was properly filed and had been pending for a reasonable time; (2) he requested a ruling on the motion; and (3) the trial court has either refused to rule or failed to rule within a reasonable time." *In re Brown*, No. 06-17-00049-CR, 2017 WL 1404372, at *2 (Tex. App.—Texarkana Apr. 18, 2017, orig. proceeding) (mem. op., not designated for publication). "However, if a reasonable time has not yet passed, the trial court's failure to rule may not be a clear abuse of discretion." *Id.* (citing *Greenwell*, 160 S.W.3d at 288).

"There is no bright-line rule establishing what constitutes a reasonable time period." *In re Smith*, No. 06-15-00223-CR, 2016 WL 157627, at *2 (Tex. App.—Texarkana Jan. 14, 2016, orig. proceeding) (mem. op., not designated for publication) (citing *Ex parte Bates*, 65 S.W.3d 133, 135 (Tex. App.—Amarillo 2001, orig. proceeding)). Since Melton filed his requests for a hearing or ruling on April 27, 2017, we conclude that Melton has not shown that a reasonable time has passed. *See In re Nash*, No. 06-11-00197-CR, 2011 WL 4452405, at *1 (Tex. App.—Texarkana Sept. 27, 2011, orig. proceeding) (mem. op., not designated for publication) ("Four weeks' elapsed time is not unreasonable."); *Greenwell*, 160 S.W.3d at 288 (citing *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459, 460–61 (Tex. App.—Corpus Christi 1999, orig. proceeding) ("mandamus not

available when only thirty days had passed")); *Bates*, 65 S.W.3d at 136 ("[W]e cannot hold as a matter of law that the passage of seven weeks constitutes a *per se* unreasonable time period.").

We deny Melton's petition for writ of mandamus.

Josh R. Morriss, III
Chief Justice

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