

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00423-CV

In re Herman Lee Kindred

ORIGINAL PROCEEDING FROM BELL COUNTY

MEMORANDUM OPINION

Relator Herman Lee Kindred, an inmate proceeding pro se, has filed a petition for writ of mandamus. In it, Kindred asks us to direct the County Court at Law No. 2 of Bell County to forward to this Court an application for writ of habeas corpus that Kindred claims to have filed in the court below. Kindred included with his petition what purports to be a verbatim handwritten copy of the original application. In that document, Kindred challenges the legality of his 1984 and 1988 convictions for the misdemeanor offense of theft, which, along with other prior convictions, have been used to enhance the sentences that Kindred has received for committing subsequent theft offenses.¹

In his mandamus petition, Kindred asserts that the trial court is required to forward to this Court the application that he claims to have filed below, so that we may “further review” it, in the same manner that the Court of Criminal Appeals reviews habeas applications challenging the

¹ See, e.g., *Kindred v. State*, No. 13-13-00526-CR, 2015 Tex. App. LEXIS 1072, at *1 (Tex. App.—Corpus Christi Feb. 5, 2015, no pet.) (mem. op., not designated for publication); *Kindred v. State*, No. 10-10-00380-CR, 2011 Tex. App. LEXIS 7672, at *1, *14-16 (Tex. App.—Waco Sept. 21, 2011, no pet.) (mem. op., not designated for publication).

legality of final felony convictions pursuant to article 11.07 of the Code of Criminal Procedure.² However, the procedures in article 11.07 do not apply to habeas applications challenging the legality of misdemeanor convictions.³ Accordingly, Kindred is not entitled to mandamus relief on the ground that the trial court failed to follow those procedures here.⁴ To the extent that Kindred might also be challenging the failure of the trial court to rule on his habeas application, which he claims to have filed in February and May 2016,⁵ Kindred has failed to provide this Court with a record demonstrating that his application was properly filed with the trial court, that the trial court was made aware of the application and was asked to rule on it, and that the trial court either refused to rule or failed to rule on the application within a reasonable time.⁶ Therefore, Kindred is also not entitled to mandamus relief on that ground.⁷

² See Tex. Code Crim. Proc. art. 11.07, §§ 3, 5.

³ See *id.*, § 1; *Ex parte Jordan*, 659 S.W.2d 827, 828 (Tex. Crim. App. 1983); *Ex parte Phelper*, 433 S.W.2d 897, 897 (Tex. Crim. App. 1968); see also *Tarvin v. State*, No. 01-08-00449-CR, 2011 Tex. App. LEXIS 6868, *8-9 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet.) (mem. op., not designated for publication).

⁴ See *State ex rel. Hill v. Court of Appeals for the Fifth Dist.*, 34 S.W.3d 924, 927-28 (Tex. Crim. App. 2001); *State ex rel. Healey v. McMeans*, 884 S.W.2d 772, 774 (Tex. Crim. App. 1994).

⁵ According to Kindred, his application was filed in February and what he terms a “supplemental writ of habeas corpus” was filed in May.

⁶ See *In re Blakeney*, 254 S.W.3d 659, 662 (Tex. App.—Texarkana 2008, orig. proceeding); *In re Keeter*, 134 S.W.3d 250, 252 (Tex. App.—Waco 2003, orig. proceeding); *In re Villarreal*, 96 S.W.3d 708, 710 (Tex. App.—Amarillo 2003, orig. proceeding); *Ex parte Bates*, 65 S.W.3d 133, 135-36 (Tex. App.—Amarillo 2001, orig. proceeding); *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).

⁷ See, e.g., *Blakeney*, 254 S.W.3d at 662-63 (delay of between five to seven months not unreasonable based on circumstances of that case); *Villarreal*, 96 S.W.3d at 711 (concluding that

The petition for writ of mandamus is denied.⁸

Bob Pemberton, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Filed: July 7, 2016

five-month delay is not per se unreasonable); *Bates*, 65 S.W.3d at 136 (six-month delay from date of filing of motions and seven-week delay from date of bringing motions to court's attention not considered unreasonable).

⁸ See Tex. R. App. P. 52.8(a).