

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00427-CV

In re Tony Cervantes

ORIGINAL PROCEEDING FROM MILAM COUNTY

MEMORANDUM OPINION

Relator Tony Cervantes has filed a pro se petition for writ of mandamus asking this Court to compel the trial court to rule on his motion for DNA testing under Chapter 64 of the Code of Criminal Procedure and for the appointment of counsel to represent him in the proceeding. *See* Tex. Gov't Code Ann. § 22.221; Tex. Code Crim. Proc. arts. 64.01-05; *see also* Tex. R. App. P. 52.1. For the following reasons, we deny the petition.

To obtain mandamus relief for the trial court's refusal to rule on a motion, a relator must establish: (1) the motion was properly filed and has been pending for a reasonable time; (2) the relator requested a ruling on the motion; and (3) the trial court refused to rule. *In re Sarkissian*, 243 S.W.3d 860, 861 (Tex. App.—Waco 2008, orig. proceeding) (mem. op.); *In re Hearn*, 137 S.W.3d 681, 685 (Tex. App.—San Antonio 2004, orig. proceeding). A relator must show that the trial court received, was aware of, and was asked to rule on the motion. *In re Minton*, No. 03-12-00693-CV, 2013 WL 812074, at *1 (Tex. App.—Austin Feb. 27, 2013, orig. proceeding) (applying these principles to request that Court compel trial court to rule on request for counsel to assist with filing motion for DNA testing); *In re Blakeney*, 254 S.W.3d 659, 661 (Tex.

App.—Texarkana 2008, orig. proceeding); *In re Villarreal*, 96 S.W.3d 708, 710 (Tex. App.—Amarillo 2003, orig. proceeding); *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (per curiam).

It is relator’s burden to properly request and show entitlement to mandamus relief. *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992); *In re Davidson*, 153 S.W.3d 490, 491 (Tex. App.—Amarillo 2004, orig. proceeding); *see also Barnes*, 832 S.W.2d at 426 (“Even a pro se applicant for a writ of mandamus must show himself entitled to the extraordinary relief he seeks.”). In this regard, the relator must provide the reviewing court with a record sufficient to establish his right to mandamus relief. *See Walker*, 827 S.W.2d at 837; *In re Blakeney*, 254 S.W.3d at 661-62; *see also* Tex. R. App. P. 52.7(a)(1) (relator must file with petition “a certified or sworn copy of every document that is material to the relator’s claim for relief and that was filed in any underlying proceeding”), 52.7(a) (specifying required contents for record), 52.3(k) (specifying required contents for appendix).

Cervantes asserts in his petition that he filed his motion for DNA testing and request for the appointment of counsel in the 20th District Court of Milam County. Cervantes has attached unofficial copies of his “Request for DNA Testing” and “Request for Appointment of Counsel” with an indigency affidavit attached, both of which are dated March 17, 2017, as well as a copy of a letter requesting that the trial court file the documents. None of the documents that Cervantes has provided to this Court contain a file stamp from the trial court. Consequently, there is no way for us to determine whether the motion for DNA testing and appointment of counsel was properly filed, or if it was, the date on which it was received by the clerk’s office. *See In re Gallardo*,

269 S.W.3d 643, 645 (Tex. App.—San Antonio 2008, orig. proceeding) (concluding unofficial copy of document containing relator’s motion to stay did not establish motion was filed with trial court).

Furthermore, even if we assume that the motion was properly filed, Cervantes has not demonstrated that the motion has been brought to the trial court’s attention or that the court is aware of the application. *See In re Hearn*, 137 S.W.3d at 685 (simply filing matter with district clerk is not sufficient to impute knowledge of pending pleading to trial court). Although he attached a copy of a letter dated May 15, 2017, purporting to notify the trial court’s clerk that he had not received any response to his March 17, 2017 request, that letter does not contain a file stamp from the trial court (although it includes a request that a file-stamped copy be returned to him). Cervantes has not provided any other file-marked document that shows that he brought the motion to the attention of the trial court. *See In re Sarkissian*, 243 S.W.3d at 861 (mere filing of motion with trial-court clerk does not constitute request that trial court rule on motion). Moreover, Cervantes has failed to provide anything indicating that the trial court has refused to rule on the motion or has failed to rule within a reasonable time.

Absent a showing that the trial court is aware of the motion, has been asked to rule on the motion, and has refused to do so, Cervantes has not established entitlement to the extraordinary relief of a writ of mandamus. *See In re Lucio*, No. 03-12-00056, 2012 WL 593533, at *2 (Tex. App.—Austin Feb. 23, 2012, orig. proceeding) (mem. op.) (mandamus relief denied because relator failed to provide copy of motion, any correspondence to district court requesting ruling on motion, or anything indicating district court refused to rule on motion). Accordingly, we deny the petition for writ of mandamus. *See Tex. R. App. P. 52.8.*

Cindy Olson Bourland, Justice

Before Justices Puryear, Field, and Bourland

Filed: August 31, 2017