NUMBER 13-17-00536-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE JACOB MUSICH

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Contreras and Hinojosa
Memorandum Opinion by Justice Contreras[1]

Jacob Musich, proceeding pro se, filed a petition for writ of mandamus seeking to compel the trial court to rule on and grant his motion for the appointment of counsel and forensic testing pursuant to article 64.01(c) of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 64.01(c) (West, Westlaw through 2017 1st C.S.). We deny the petition for writ of mandamus.[2]

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[1] *See* TEX. R. APP. P. 52.8(d) ("When denying relief, the court may hand down an opinion but is not required to do so."); TEX. R. APP. P. 47.4 (distinguishing opinions and memorandum opinions).

[2] Relator filed a "Motion for Leave to File Incorporated Original Application for Writ of Mandamus with Brief in Support." Relator's motion for leave is DISMISSED as moot. The Texas Rules of Appellate Procedure no longer require the relator to file a motion for leave to file an original proceeding. *See generally*

To be entitled to mandamus relief, the relator must show that: (1) he has no adequate remedy at law, and (2) 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). If the relator fails to meet both of these requirements, then the petition for writ of mandamus should be denied. *State ex rel. Young v. Sixth Jud. Dist. Ct. of App. at Texarkana*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding). It is the relator's burden to properly request and show entitlement to mandamus relief. *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (per curiam) ("Even a pro se applicant for a writ of mandamus must show himself entitled to the extraordinary relief he seeks."). In addition to other requirements, the relator must include a statement of facts supported by citations to "competent evidence included in the appendix or record," and must also provide "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the appendix or record." *See generally* TEX. R. APP. P. 52.3. In this regard, it is clear that the relator must furnish an appendix or record sufficient to support the claim for mandamus relief. *See id.* R. 52.3(k) (specifying the required contents for the appendix); R. 52.7(a) (specifying the required contents for the record).

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); *In re Hearn*, 137 S.W.3d 681, 685 (Tex. App.—San Antonio 2004, orig. proceeding). The

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TEX. R. APP. P. 52 & cmt; *see also In re Mason*, No. 05–16–01450–CV, 2017 WL 2464688, at *1 (Tex. App.–Dallas June 7, 2017, orig. proceeding) (mem. op.).

relator must show that the trial court received, was aware of, and was asked to rule on the motion. *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*, 832 S.W.2d at 426; *see also In re Cervantes*, No. 03-17-00427-CV, 2017 WL 3902966, at *1 (Tex. App.—Austin Aug. 31, 2017, orig. proceeding) (mem. op.) (applying these principles to a mandamus seeking to compel the trial court to rule on a motion under article 64 for the appointment of counsel and forensic testing).

Here, relator asserts in his petition that he filed his motion for the appointment of counsel and forensic testing on February 18, 2017 and has "diligently pursued" this matter by "writing several letters directly to the presiding judge [of the trial court] and the clerk as well to no avail." In support of his petition for writ of mandamus, relator has attached to the petition: (1) a copy of a letter dated February 18, 2017 requesting the district clerk to file his petition for post-conviction forensic DNA testing; (2) a copy of a letter dated February 18, 2017 providing the district attorney with a courtesy copy of the motion; (3) a copy of relator's "Motion for Post-Conviction Forensic DNA Testing and Appointment of Counsel with Brief in Support;" (4) transcript excerpts from the trial; (5) an affidavit of indigency; and (6) a receipt for certified mail sent on February 18, 2017 to "901 Leopard #206," but not the return of service showing delivery of the mail. None of the documents that relator has provided to this Court are file-stamped. Consequently, there is no way for us to ascertain 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 that an unofficial copy of a document containing relator's motion to stay did

not establish that the motion was filed with the trial court). Furthermore, even if we assume that relator's motion was properly filed, relator has not demonstrated that the motion has been brought to the trial court's attention or that the court is aware of the motion. *See In re Sarkissian*, 243 S.W.3d at 861 (concluding that the mere filing of motion with the trial court clerk does not constitute a request for the trial court to rule on the motion); *In re Hearn*, 137 S.W.3d at 685 (stating that filing a pleading with the district clerk is insufficient to impute knowledge of the pending pleading to the trial court). Moreover, relator has failed to provide anything indicating that the trial court has failed to rule on the motion within a reasonable time. *See In re Hearn*, 137 S.W.3d at 685. Finally, while we have jurisdiction to direct the trial court to exercise its discretion, we are not permitted to tell the trial court how to rule on the motion. *See, e.g., Barnes*, 832 S.W.2d at 426 ("The trial court's judicial discretion extends . . . to its decision how to rule after it considers a motion properly before it, and an appeals court may not issue a writ of mandamus to compel a trial court to rule a certain way on that motion.").

The Court, having examined and fully considered the petition for writ of mandamus and the applicable law, is of the opinion that relator has not established his right to the relief sought. Accordingly, we deny the petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(a).

DORI CONTRERAS
JUSTICE

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
12th day of October, 2017.