NO. 12-11-00101-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	§	
DANNY DALE WEISINGER, SR.,	§	*ORIGINAL PROCEEDING*
RELATOR	§	

MEMORANDUM OPINION

Relator was convicted of aggravated assault with a deadly weapon and sentenced to imprisonment for twenty years. He appealed pro se, and this court affirmed his conviction. *See Weisinger v. State*, No. 12-03-00274-CR, 2004 WL 3103643, at *8 (Tex. App.–Tyler Jan. 12, 2005, pet. ref'd) (mem. op., not designated for publication). Relator now seeks a writ of mandamus compelling the trial court to delete the deadly weapon finding in the judgment of conviction. As grounds, Relator alleges in his petition that the jury did not affirmatively find the use of a deadly weapon as required by *Polk v. State*, 693 S.W.2d 394 (Tex. Crim. App. 1985). Therefore, he maintains that the trial court had no authority to make the finding and therefore should be directed to delete it. We deny the petition.

To obtain mandamus relief in a criminal matter, the relator must establish that (1) the act sought to be compelled is ministerial, and (2) there is no adequate remedy at law. *Dickens v. Second Court of Appeals*, 727 S.W.2d 542, 548 (Tex. Crim. App. 1987). However, mandamus is not available where one fails to pursue the remedies provided by law. *In re Thomas*, 119 S.W.3d 378, 378 (Tex. App.–Tyler 2003, orig. proceeding). Here, Relator appealed his conviction, but did not challenge the deadly weapon finding. Moreover, Relator has failed to identify why this issue was not raised during his direct appeal or how it was not capable of being presented at that time. *See In re Luna*, No. 07-10-00079-CV, 2010 WL 1050236, at *2 (Tex. App.–Amarillo Mar. 23, 2010, orig. proceeding) (mem. op., not designated for publication).

Accordingly, Relator's petition for writ of mandamus is ***denied***. All pending motions are overruled as moot.

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JAMES T. WORTHEN
Chief Justice

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Opinion delivered May 18, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

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