NO. 12-11-00377-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	***§***	
HENRY JOE PETTIGREW,	***§***	***ORIGINAL PROCEEDING***
RELATOR	***§***	

MEMORANDUM OPINION

Relator Henry Joe Pettigrew seeks mandamus relief alleging that the trial court has failed to rule on his motion for a court of inquiry filed on September 22, 2011. We deny the petition.

RELATOR'S MOTION

Relator was convicted of murder in 1990 and sentenced to imprisonment for ninety-nine years. He is presently incarcerated. Relator filed a motion for a court of inquiry in which he alleges that the reporter's record filed in the appeal of his 1990 conviction did not include the testimony of two witnesses who testified at a pretrial hearing. He contends further that the pretrial hearing transcript has been altered, and that the testimony of these two witnesses has been deleted and destroyed. As authority for his request, Relator cites the statutory provisions relating to a court of inquiry. He points out, however, that an appellant is entitled to a new trial under the circumstances set out in Texas Rule of Appellate Procedure 34.6(f).[1] According to Relator's motion, those circumstances exist here, and he has requested a court of inquiry "so the Court can make findings of facts concerning the missing portions of the testimony in the pre-trial transcripts and lost or destroyed reporter's notes." Alternatively, he requests that the record be supplemented with the

[1] As it relates to this case, Rule 34.6(f) provides that an appellant is entitled to a new trial if (1) the appellant has timely requested a reporter's record; (2) if, through no fault of the appellant, a significant portion of the court reporter's notes and records has been lost or destroyed; (3) the lost or destroyed portion is necessary to the appeal's resolution; and (4) the lost or destroyed portion cannot be replaced by agreement of the parties.

affidavits attached to the motion. Those affidavits pertain to the testimony that Relator alleges is missing.

AVAILABILITY OF MANDAMUS

To obtain mandamus relief in a criminal case, a relator must demonstrate that he does not have an adequate remedy at law to redress an alleged harm and that the act he seeks to compel is ministerial, that is not involving a discretionary or judicial decision. *See* ***State ex rel. Young v. Sixth Judicial Dist. Court of Appeals***, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding). If the relator fails to satisfy either aspect of this two part test, mandamus relief should be denied. ***Id***.

When a motion is properly filed and pending before a trial court, the act of considering and resolving it is ministerial. ***In re Chavez***, 62 S.W.3d 225, 228 (Tex. App.–Amarillo 2001, orig. proceeding).

ANALYSIS

When a district judge, acting in her capacity as magistrate, has probable cause to believe an offense has been committed against the laws of this state, she may request that the presiding judge of the administrative judicial district appoint a district judge to commence a court of inquiry. TEX. CODE CRIM. PROC. ANN. art. 52.01(a) (West 2006). A court of inquiry is a criminal proceeding authorized by and conducted according to Chapter 52 of the Texas Code of Criminal Procedure. *See* ***id***. arts. 52.01-.09 (West 2006). It is not unusual for a private citizen to request a district judge to convene a court of inquiry. *See generally, e.g.*, ***In re Butler***, No. 12-10-00225-CR, 2011 WL 193477 (Tex. App.–Tyler Jan. 19, 2011, orig. proceeding); ***In re Thompson***, 330 S.W.3d 411 (Tex. App.–Austin 2010, orig. proceeding); ***In re Request for Court of Inquiry***, No. 06-10-00191-CR, 2010 WL 4111306 (Tex. App.–Texarkana Oct. 19, 2010, orig. proceeding).

Relator has furnished this court a copy of the motion he filed in the trial court. Although the motion is entitled "Court of Inquiry," the complaint he alleges pertains only to the loss or destruction of a portion of the reporter's record of his murder trial. The hearing he requests is for the purpose of obtaining findings of fact and conclusions of law to establish that the circumstances set out in Rule 34.6(f) exist here, which would entitle him to a new trial. Consequently, we construe the motion as a request for findings of fact and conclusions of law pursuant to Rule 34.6(f), instead of a request for a court of inquiry as authorized by the code of criminal procedure. *See*

Hadnot v. State, No. 07-10-00296-CR, 2010 WL 5128785, at *1 (Tex. App.–Amarillo Dec. 16, 2010, order) (per curiam) (not designated for publication) (abating and remanding for hearing and entry of findings of fact and conclusions of law pertaining to the circumstances set out in Rule 34.6(f)); ***Pierre v. State***, 2 S.W.3d 439, 444 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd) (ordering new trial based upon findings of fact entered pursuant to Rule 34.6(f) after abatement). "[I]t is the substance of the motion that governs, not the title." ***Ex parte Caldwell***, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000).

We have previously addressed the trial court's jurisdiction to rule on other motions Relator has filed pertaining to the portions of the reporter's record that he alleges are missing. *See generally* ***In re Pettigrew***, 301 S.W.3d 920 (Tex. App.–Tyler 2009, orig. proceeding). In that opinion, we explained that once a conviction has been affirmed on appeal and the mandate has issued, the trial court's jurisdiction is limited. *See* ***id***. at 922. Specifically, the trial court then has special or limited jurisdiction to ensure that a higher court's mandate is carried out and to perform other functions specified by statute, such as finding facts in a habeas corpus setting or determining entitlement to DNA testing. ***Id***. No such action is involved here. Therefore, the trial court is without jurisdiction to rule on Relator's motion. Because the trial court has no jurisdiction to rule on the motion, we cannot categorize the motion as "properly filed." Moreover, since the trial court has no jurisdiction to rule, it logically follows that it does not have a ministerial duty to do so. Therefore, Relator cannot establish that the trial court violated a ministerial duty by failing to rule on his motion. *See* ***Young***, 236 S.W.3d at 210.

DISPOSITION

Relator has not shown that the trial court violated a ministerial duty by failing to rule on his motion. Therefore, he cannot show that he is entitled to mandamus relief. Accordingly, we ***deny*** Relator's petition for writ of mandamus

BRIAN HOYLE
Justice

Opinion delivered March 14, 2012.
Panel consisted of Worthen, C.J. and Hoyle, J.,
Griffith, J., not participating.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 14, 2012

NO. 12-11-00377-CR

HENRY JOE PETTIGREW,
Relator
v.
HON. CHRISTI J. KENNEDY,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by HENRY JOE PETTIGREW, who is the relator in Cause No. 4-89-230, pending on the docket of the 114th Judicial District Court of Smith County, Texas. Said petition for writ of mandamus having been filed herein on November 28, 2011, and the same having been duly considered, because it is the opinion of this Court that this writ of mandamus should not issue, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, hereby **DENIED**.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J. and Hoyle, J.,
Griffith, J., not participating.