

NO. 12-12-00028-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:

§

TERRY LOUIS PAIGE,

§

ORIGINAL PROCEEDING

RELATOR

§

MEMORANDUM OPINION

In this original mandamus proceeding, Relator Terry Louis Paige requests an order directing the trial court to sign a second judgment nunc pro tunc granting him additional jail time credit. We deny the petition.

BACKGROUND

On June 7, 2010, Relator filed his first motion for judgment nunc pro tunc requesting presentence jail time credit. The trial court signed a judgment nunc pro tunc on January 4, 2011, that granted Relator's specific requests. Relator alleges that he filed a second motion for judgment nunc pro tunc to correct the first judgment nunc pro tunc. Specifically, Relator alleges that the trial court's first judgment nunc pro tunc contained an error that erroneously granted jail time credit from May 31, 2000, to May 31, 2000. Relator contends that the dates should be corrected to reflect that he was incarcerated from May 31, 2000, to November 6, 2000. Relator includes a facsimile from a jail official in the Houston County Sheriff's Office acknowledging that Relator was incarcerated from May 31, 2000, to November 6, 2000, and that the jail's prior calculation of May 31, 2000, to May 31, 2000, was incorrect.

Relator alleges that the trial court has abused its discretion by not signing a second order for judgment nunc pro tunc.

PREREQUISITES TO MANDAMUS

To obtain mandamus relief for a trial court's failure to rule on a motion, a relator must establish that (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). The mere filing of a motion with a trial court does not equate to a request that the trial court rule on the motion. *Id.* A relator must show that the trial court received, was aware of, and was asked to rule on the motion. *In re Riffe*, No. 03-12-00355-CV, 2012 WL 2160561, at *1 (Tex. App.—Austin June 12, 2012, orig. proceeding) (mem. op., not designated for publication).

A party seeking mandamus relief must generally bring forward all that is necessary to establish the claim for relief. *In re Pena*, 104 S.W.3d 719, 719 (Tex. App.—Tyler 2003, orig. proceeding). Therefore, it is Relator's burden to provide this court with a sufficient record to establish his right to mandamus relief. *See id.*

AVAILABILITY OF MANDAMUS

The trial court is required to grant a defendant presentence jail time credit when the sentence is pronounced. TEX. CRIM. PROC. ANN. art. 42.03, § 2(a) (West 2011). Presentence time credit claims typically must be raised by a motion for judgment nunc pro tunc filed with the clerk of the convicting trial court. *Ex parte Florence*, 319 S.W.3d 695, 696 (Tex. Crim. App. 2010). If a defendant has been denied presentence jail time credit, the preferred practice is for the trial court to enter a nunc pro tunc order authorizing credit for the appropriate time. *See Ex parte Forooghi*, 185 S.W.3d 498, 499 (Tex. Crim. App. 2006) (Johnson, J., concurring); *Ex parte Ybarra*, 149 S.W.3d 147, 148-49 (Tex. Crim. App. 2004). If the trial court denies the motion for judgment nunc pro tunc or fails to respond, relief may be sought by filing a petition for writ of mandamus in the appropriate court of appeals. *See Florence*, 319 S.W.3d at 696; *Ybarra*, 149 S.W.3d at 149.

Here, Relator alleges the trial court received a copy of his motion for a second nunc pro tunc judgment on December 5, 2011. But there is no file mark on the copy of the motion that is included in the record, and there is no other indication in the record before us that the motion was filed with the clerk of the convicting court. *See* TEX. R. APP. P. 52.7(a)(1) (requiring certified or sworn copy of every document material to relator's claim for relief and filed in any

underlying proceeding). Consequently, we cannot determine whether the motion was properly filed. Even if we assume that the motion was properly filed, the record does not show that Relator requested the trial court to rule on the motion, and that, after a reasonable amount of time, the trial court failed to rule on the motion. *See, e.g., In re Riffe*, 2012 WL 2160561, at *1; *In re Newsome*, No. 14-11-00692-CR, 2011 WL 3793323, at *1 (Tex. App.—Houston [14th Dist.] Aug. 25, 2011, orig. proceeding) (mem. op., not designated for publication); *Sarkissian*, 243 S.W.3d at 861.

Accordingly, Relator’s petition for writ of mandamus is *denied*.

BRIAN HOYLE
Justice

Opinion delivered July 31, 2012.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)



COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

JULY 31, 2012

NO. 12-12-00028-CR

TERRY LOUIS PAIGE,
Relator
v.
HON. MARK A. CALHOON,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by **TERRY LOUIS PAIGE**, who is the relator in Cause No. 00-CR-093, pending on the docket of the 349th Judicial District Court of Houston County, Texas. Said petition for writ of mandamus having been filed herein on January 17, 2012, and the same having been duly considered, because it is the opinion of this Court that the 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., Griffith, J., and Hoyle, J.