

**NO. 12-12-00108-CV**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

*IN RE:*

§

*CLYDE L. DAVIS,*

§

*ORIGINAL PROCEEDING*

*RELATOR*

§

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***MEMORANDUM OPINION***

Relator Clyde L. Davis filed this original proceeding in an attempt to recover cash seized from him during a traffic stop. He requests an order directing the trial court to hold a hearing on his “Motion to Release Seized Property” and to grant the requested relief. We deny the petition.

**BACKGROUND**

Relator filed a motion in the trial court requesting the return of \$6,800.00 in cash that was seized from him during a traffic stop. According to Davis, he was charged with money laundering following seizure of the funds, and the State, acting through the Shelby County District Attorney, filed a “Notice of Seizure and Intended Forfeiture” against him. Davis alleges that the notice was mailed to the wrong address and therefore he was never properly served. Nevertheless, the State was awarded the seized currency by a default judgment signed on July 3, 2008.

On January 11, 2011, the money laundering charge was dismissed on the State’s motion in which it alleged that Davis had been convicted in another case. Several months later, Davis filed his “Motion to Release Seized Property.” In response, the Shelby County District Attorney informed Davis that the seized property had been forfeited to the State by the July 3, 2008 default judgment and his criminal case had been dismissed. He then filed a “Motion for Discovery and/or Production of Public Records” pertaining to his arrest. The motion included a

proposed order, which was returned to Davis unsigned. Davis then filed this original proceeding requesting a writ of mandamus directing the trial court to hold a hearing on his “Motion to Release Seized Property” and grant the relief requested. We construe his argument as a complaint that the trial court failed to rule on the motion.

#### PREREQUISITES TO MANDAMUS

A writ of mandamus will issue to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *Walker*, 827 S.W.2d at 839-40. The relator has the burden to establish the prerequisites to mandamus. *Canadian Helicopters Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1994) (orig. proceeding). This burden is a heavy one. *Id.*

#### AVAILABILITY OF MANDAMUS

A defendant who seeks to set aside a default judgment on the basis of defective service must do so by motion for new trial, or if the trial court’s plenary power has expired, by bill of review. *McEwen v. Harrison*, 345 S.W.2d 706, 710 (Tex. 1961). Here, Davis filed a motion for release of the seized property and requested a hearing on the motion. After reviewing this motion, we construe it as a motion for new trial. A trial court has no duty to rule on a motion for new trial. *See* TEX. R. CIV. P. 329b(c) (motion for new trial not determined by written order signed within seventy-five days after judgment signed to be considered overruled by operation of law).

Moreover, the motion for new trial was filed more than three years after the default judgment was signed. Therefore, the motion was untimely. *See* TEX. R. CIV. P. 329b(a) (providing that a motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed). The trial court’s plenary power expires thirty days after the judgment is signed if no motion extending the court’s plenary power is filed. TEX. R. CIV. P. 329b(d), (e), (g). Because Davis’s motion for new trial was untimely, it did not extend the trial court’s plenary power. *See* TEX. R. CIV. P. 329b(e) (plenary power extended if motion

for new trial is timely filed). Consequently, the trial court’s plenary power expired well before Davis filed his motion. Therefore, the trial court had no power to rule on the motion and did not abuse its discretion by failing to do so. *See In re Dickason*, 987 S.W.2d 570, 570 (Tex. 1998) (orig. proceeding) (per curiam) (order void where trial court granted motion for new trial after expiration of plenary power).

### **CONCLUSION**

Because Davis has not shown that the trial court abused its discretion by failing to rule on his “Motion to Release Seized Property,” he has failed to satisfy one of the prerequisites for mandamus. Therefore, he has not established that he is entitled to the relief he seeks. Accordingly, Davis’s petition for writ of mandamus is *denied*.

**JAMES T. WORTHEN**  
Chief Justice

Opinion delivered May 31, 2012.  
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(PUBLISH)



**COURT OF APPEALS**  
**TWELFTH COURT OF APPEALS DISTRICT OF TEXAS**  
**JUDGMENT**

**MAY 31, 2012**

**NO. 12-12-00108-CV**

**CLYDE L. DAVIS,**  
Relator  
v.  
**HON. GUY W. GRIFFIN,**  
Respondent

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**ORIGINAL PROCEEDING**

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ON THIS DAY came to be heard the petition for writ of mandamus filed by **CLYDE L. DAVIS**, who is the relator in Cause No. 08-CV-29991, pending on the docket of the 123rd Judicial District Court of Shelby County, Texas. Said petition for writ of mandamus having been filed herein on March 22, 2012, and the same having been duly considered, because it is the opinion of this Court that 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**.

James T. Worthen, Chief Justice.  
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*