NO. 12-18-00127-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	§	
JEREMIE D. WHEELER,	§	***ORIGINAL PROCEEDING***
RELATOR	§	

MEMORANDUM OPINION

Jeremie D. Wheeler, Relator, filed this original proceeding in which he complains of Respondent's failure to rule on his motion for DNA testing.[1] We deny the writ.

BACKGROUND

According to Relator's petition, he was convicted of aggravated assault and the State alleged that his DNA was found on the complainant's pocket. He argues that DNA testing will "undoubtedly show that the Relator is not a contributor to the biological material collected in this alleged crime."

PREREQUISITES TO MANDAMUS

To obtain mandamus relief in a criminal case, the relator must show that he does not have an adequate remedy at law and the act he seeks to compel is ministerial (not involving a discretionary or judicial decision). ***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 prong of this test, mandamus relief should be denied. ***Id***.

[1] Respondent is the Honorable Jack Skeen, Jr., judge of the 241st District Court of Smith County, Texas.

<u>**AVAILABILITY OF MANDAMUS**</u>

Relator contends that, as of the time he filed his petition with this Court, his motion had been on file with Respondent for over forty-five days without a ruling. To obtain a writ of mandamus compelling a trial court to consider and rule on a motion, the relator must show that the trial court (1) had a legal duty to perform a nondiscretionary act, (2) was asked to perform the act, and (3) failed or refused to do so. ***In re Molina***, 94 S.W.3d 885, 886 (Tex. App.–San Antonio 2003, orig. proceeding). Generally, a trial court has a nondiscretionary duty to consider and rule on a motion within a reasonable time. ***In re Thomas***, No. 12–05–00261–CV, 2005 WL 2155244, at *1 (Tex. App.–Tyler Sept. 7, 2005, orig. proceeding) (mem. op.). However, a trial court cannot be expected to consider a motion not called to its attention. *See* ***In re Chavez***, 62 S.W.3d 225, 228 (Tex. App.–Amarillo 2001, orig. proceeding). It is incumbent upon the relator to establish that the motion has been called to the trial court's attention. *See* ***id***.

In this case, Relator contends that he filed a motion for DNA testing. However, the mere statement that a document was filed is insufficient to reasonably infer that the trial court had notice of the filed document and of the need to act on it. ***Id***. The record does not indicate that, in this case, the trial court was afforded or had notice of Relator's motion. *See* ***id***. Accordingly, Relator has not shown that he called his motion for DNA testing to Respondent's attention.

Even assuming Respondent received notice of Relator's motion, he still has a reasonable time in which to rule once the matter is called to his attention. *See* ***In re Thomas***, 2005 WL 2155244, at *1. Whether the trial court has had a reasonable time within which to rule depends on the circumstances of each case, and "no bright-line demarcates the boundaries of a reasonable time period." ***Chavez***, 62 S.W.3d at 228. "Its scope is dependent upon a myriad of criteria, not the least of which is the trial court's actual knowledge of the motion, its overt refusal to act on same, the state of the court's docket, and the existence of other judicial and administrative matters which must be addressed first." ***Id***. at 228–29. In this case, Relator presents no evidence of the number of other cases, motions, or issues pending on Respondent's docket, those which have pended on its docket longer than the present case, those pending on its docket that lawfully may be entitled to preferential settings, or Respondent's schedule. *See* ***id***. at 229. Therefore, assuming that Relator's motion was brought to Respondent's attention, we cannot say that a reasonable time for ruling has passed. *See* ***id***. at 228–29. Under these circumstances, Relator has

not established that mandamus relief is available for Respondent's failure to rule on his motion for DNA testing.

<u>DISPOSITION</u>

Because Relator has not shown that he is entitled to mandamus relief, we ***deny*** Relator's petition for writ of mandamus.

<u>GREG NEELEY</u>
Justice

Opinion delivered May 31, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 31, 2018

NO. 12-18-00127-CR

JEREMIE D. WHEELER,
Relator
V.

HON. JACK SKEEN, JR.,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by Jeremie D. Wheeler; who is the relator in Cause No. 241-1655-14, pending on the docket of the 241st Judicial District Court of Smith County, Texas. Said petition for writ of mandamus having been filed herein on May 18, 2018, and the same having been duly considered, because it is the opinion of this Court that the writ 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**.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.