The Supreme Court of Texas

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September 4, 2019

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issue

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matter.

Procedures to Compel a Ruling. In the attached letter, Chief Justice Gray points out that litigants, particularly self-represented inmates, are often unable to get trial courts to timely rule on pending motions and proposes rule changes to address the issue. The Committee should consider Chief Justice Gray's proposals and other potential solutions.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachment

TENTH COURT OF APPEALS

McLennan County Courthouse
501 Washington Avenue, Rm. 415
Waco, Texas 76701-1373
Phone: (254) 757-5200 Fax: (254) 757-2822

July 15, 2019

Honorable Jeffrey S. Boyd
Supreme Court
P.O. Box 12248
Austin, TX 78711-2248

Dear Justice Boyd:

We recently had a conversation about issues this Court spends an inordinate amount of time on that could potentially be remedied if the issue was addressed in an opinion or rule. I promised to provide specific examples. I enclose my first example.

The following is a frequently recurring problem. A motion is filed in the trial court. The motion sits for weeks, months, sometimes years, without being ruled upon. The party, frequently pro se, or an inmate, or both, tries to get a ruling but is unable to do so and is also unable to determine why. So, the person then files a mandamus with a court of appeals.

In addition to procedural problems due to the failure to comply with the rules, there is virtually no way an inmate is going to have the "necessary evidence" to show the court of appeals that either the motion or request for ruling has been brought to the attention of the trial court. The mandamus will be denied summarily or sometimes with a curt explanation of an insufficient record.

As I note in the enclosed concurring opinion in *In re Rangel*, what is an inmate going to do? I also enclose a letter I received from an inmate that discusses my comments in *Rangel*.

We spend a lot of time on this type proceeding all because the trial court does not timely rule. I am convinced the trial court does not rule because the trial court is simply unaware of the motion. We sometimes request a response to the petition for writ of mandamus in hopes that the district attorney or maybe a court coordinator or assistant attorney general will bring the pending motion to the attention of the trial court. If this happens, the trial court frequently then denies the motion and the mandamus is dismissed as moot. This process will allow the person to move on with their case, sometimes to an immediate appeal of the trial court's denial. But we spend a lot of time and effort to get there just because initially there is no ruling by the trial court.

Can this time-consuming problem be fixed?

One option would be a universal request for a ruling form. If such a form is used, it could start a clock when filed. If the pending motion that is the subject of the request for a ruling is not ruled on in some defined period of time, say 60 days, the motion to which it relates would be denied by operation of law. There would have to be some carve-outs from such a rule.

As an alternative "fix," maybe it is easier to require that the trial court clerk present a report of all such ruling requests to the judge at least once monthly. This would create a presumption the trial court had been informed of the motion and request for a ruling and either failed or refused to rule. Such a presumption or the reports would then provide the evidentiary support for a mandamus to compel a ruling, particularly if the rule also set a presumptive time in which a ruling was to be made.

Obviously, there may be a number of other ways to remedy the problem and I will be happy to discuss these or any other proposals with you.

Sincerely,

Tom

Thomas W. Gray
Chief Justice

Enclosure

Jeff
Before I could get this out the door to you we have had at least one more!
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IN THE
TENTH COURT OF APPEALS

No. 10-19-00014-CR

IN RE JERRY RANGEL

Original Proceeding

OPINION

In this original proceeding,[1] Relator Jerry Rangel seeks mandamus relief in the form of compelling the Respondent trial judge to rule on Rangel's motion for post-conviction DNA testing under Code of Criminal Procedure Chapter 64.[2] We requested a

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[1] Rangel's petition for writ of mandamus has several procedural deficiencies. It does not include the certification required by Rule of Appellate Procedure 52.3(j). *See* TEX. R. APP. P. 52.3(j). The appendix, which apparently serves as Rangel's record, is not certified or sworn to, as required by Rules 52.3(k) and 52.7(a)(1). *See id.* 52.3(k), 52.7(a)(1). The petition also lacks proof of service on the Respondent trial judge. *See id.* 9.5, 52.2. Because of our disposition and to expedite it, we will implement Rule 2 and suspend these rules. *Id.* 2.

[2] We affirmed Rangel's aggravated sexual assault conviction in 2009. *Rangel v. State*, No. 10-07-00247-CR, 2009 WL 540780 (Tex. App.—Waco Mar. 4, 2009, pet. ref'd) (mem. op., not designated for publication).

response to Relator's petition, which the State has now filed. Having reviewed Relator's petition and the State's response, we deny Realtor's petition.

"A court with mandamus authority 'will grant mandamus relief if relator can demonstrate that the act sought to be compelled is purely 'ministerial' and that relator has no other adequate legal remedy.'" *In re Piper*, 105 S.W.3d 107, 109 (Tex. App.—Waco 2003, orig. proceeding) (quoting *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 197–99 (Tex. Crim. App. 2003) (orig. proceeding)). Consideration of a motion properly filed and before the court is ministerial. *State ex rel. Hill v. Ct. of Apps. for the 5th Dist.*, 34 S.W.3d 924, 927 (Tex. Crim. App. 2001) (orig. proceeding). A trial judge has a reasonable time to perform the ministerial duty of considering and ruling on a motion properly filed and before the judge. *In re Chavez*, 62 S.W.3d 225, 228 (Tex. App.—Amarillo 2001, orig. proceeding). But that duty generally does not arise until the movant has brought the motion to the trial judge's attention, and mandamus will not lie unless the movant makes such a showing and the trial judge then fails or refuses to rule within a reasonable time. *See id.*

Rangel bears the burden of providing this Court with a sufficient record to establish his right to mandamus relief. *See In re Mullins*, 10–09–00143–CV, 2009 WL 2959716, at *1, n. 1 (Tex. App.—Waco Sept. 16, 2009, orig. proceeding) (mem. op.); *In re Blakeney*, 254 S.W.3d 659, 661 (Tex. App.—Texarkana 2008, orig. proceeding). There is no record showing that Rangel has brought his petition to the attention of the trial judge and that the trial judge has then failed or refused to rule within a reasonable time. In its

response to Rangel's petition, the State provides exhibits that reflect that the petition was forwarded to the Court of Criminal Appeals the date it was received. Accordingly, we deny the petition for writ of mandamus.

REX D. DAVIS
Justice

Before Chief Justice Gray,*
Justice Davis, and
Justice Neill
*(Chief Justice Gray concurring)
Petition denied
Publish
Opinion delivered and filed March 13, 2019
[OT06]

IN THE
TENTH COURT OF APPEALS

No. 10-19-00014-CR

IN RE JERRY RANGEL

Original Proceeding

CONCURRING OPINION

Over a year ago, the defendant filed a motion for post-conviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. It has not been ruled upon. It appears that even after this Court requested a response to the petition for writ of mandamus, it nevertheless still has not been ruled upon. So now we must address the merits of a petition for writ of mandamus.

The State goes to great efforts in its response to show that the motion was forwarded to the Court of Criminal Appeals. Why? The Court notes that the motion was promptly forwarded to the Court of Criminal Appeals. Why? Both are good questions not addressed by the Court. It was forwarded to the Court of Criminal Appeals apparently because Rangel put the letter "A" after the cause number on the Chapter 64

DNA testing motion (he contends in his response that the Clerk did it). The cause number plus the letter "A" is apparently the number assigned to his post-conviction application for an 11.07 writ. We have been repeatedly told that we should determine what a document is by the content, not the title, of the document. Here, both the content and the title confirm that the document is a Chapter 64 post-conviction motion for DNA testing.

It is unfortunate that the number applied to the motion matched the docket number for the post-conviction 11.07 application. If nothing had happened to cause this oversight to come to the attention of the clerk and the State, and if the response to the petition had been more in the nature of: "We see what happened. We'll get right on that Chapter 64 DNA motion so that you do not have to spend your time addressing the petition for a writ of mandamus," I would be okay with what we do here, now, in this proceeding. But, after more than 30 days had passed after the motion was filed, Rangel moved for findings and conclusions on his DNA motion; doing what he could to bring attention to the motion he had previously filed. It seems that no one did anything in response to this motion. No, "Ooops, we forwarded that motion to the Court of Criminal Appeals as part of the 11.07 writ, which it clearly was not intended to be part of." Nothing was done. So finally, Rangel files a petition for a writ of mandamus. Maybe his better course of action was to write the clerk, and the court coordinator, and the trial court judge asking about the status and possibly requesting a hearing on his motion. But a "hearing" or even a request for a hearing would have been premature. It is important to notice that the statute requires the trial court and the State to take action, prior to any

hearing, upon receipt of the motion. TEX. CODE CRIM. PROC. ANN. art 64.02 (West 2018).[1]

The State, as the real party in interest in this proceeding, and the Court, fault Rangel for not bringing forth any evidence that his motion for post-conviction DNA testing was actually brought to the attention of the trial court. Technically that is correct. But then ask yourself; how exactly is an inmate supposed to do that? It is not like he can take a copy to the trial court's office, courtroom, or home to "serve" the trial court with a copy of the motion. And no matter how many letters the inmate writes, in all likelihood those letters are going straight to a file in the clerk's office. Although those letters may possibly get as far as the court coordinator, they do not necessarily make it to the trial court, even if addressed for delivery only to the trial court judge. But even then, how is the inmate supposed to get any evidence that the trial court was actually made aware of the motion? This Court requested a response from the parties. The trial court is a party, the respondent. We could infer from that procedure the trial court is now aware of the motion. Maybe Rangel can now use this proceeding and that inference to compel a ruling if one is not timely received after this Court's opinion and judgment issue.

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[1]Article 64.02(a) provides:

> (a) On receipt of the motion, the convicting court shall:
>
> (1) provide the attorney representing the state with a copy of the motion; and
>
> (2) require the attorney representing the state to take one of the following actions in response to the motion not later than the 60th day after the date the motion is served on the attorney representing the state:
>
> (A) deliver the evidence to the court, along with a description of the condition of the evidence; or
>
> (B) explain in writing to the court why the state cannot deliver the evidence to the court.

Since we will have ruled on the mandamus, and as part of that we will send a copy of the opinion and judgment to the trial court, will that be "evidence" that the trial court has "received" the motion? Not really. It is only evidence that he might be aware of it.

At some point, the sworn allegation that the movant has filed the motion and requested a ruling should be enough. I am disappointed that there is no procedure in the statute or the rules, or even within the county's (district clerk's) filing system, to cause the filing of motions pursuant to Chapter 64 to trigger the action by the trial court and the State that the statute requires. *Id.* 64.02(a). But the trial court's requirement to start the process by providing a copy to the "attorney representing the state" and the requirement for that attorney to take one of several alternative actions, begins only when "the convicting court" is in "receipt" of the motion. *Id.* So we are back to where we started. How can the inmate prove when the convicting trial court received the motion?

It would avoid the waste of a lot of resources if the trial court would simply take the required action on the motion. Now that it is over a year after the motion was filed, and the State and, we must infer, the trial court are aware of the filing of the motion, it is not unreasonable to expect action as required by the statute forthwith, including, if appropriate, the appointment of counsel. A ruling, any ruling, would avoid the interminable delay and unnecessary consumption of judicial resources caused by the pursuit of a mandamus. And a mandamus seems to be an extraordinarily inefficient way to create the evidence necessary for a successive mandamus in which the inmate can show that the trial court has been made aware of the Chapter 64 motion that has been filed.

While I think the better course of action would be to conditionally issue the writ to compel the trial court's compliance with the statute regarding the procedure for post-conviction DNA testing pursuant to Texas Code of Criminal Procedure Chapter 64, I concur in the Court's judgment but not its opinion.

TOM GRAY
Chief Justice

Concurring opinion delivered and filed March 13, 2019

06-09-19

Chief Judge Tom Gray
McClennan County Courthouse
501 Washington Ave
Waco Tx. 76701

RE: PERSONAL LETTER

Dear Judge Gray

Recently, I read your opinion in the case of "In re Jerry Rangel" where you decried a problem I have been faced with for years. The problem of how to get the attention of the Judge of a court. I have tried "restricted access" sending pleadings directly to a Judge certified paying the extra fee for restricted access. This "in theory" would limit the U.S. post office's delivery to only that person to which the mail is addressed. I have tried, having the court called asking the Judge to return the call to the person making the call. I have tried writing to the Administrative Judges or even filing pleadings in the Admin. Courts. I have asked people to e-mail the Judges or even text them if they could. NONE, I repeat none of these things worked.

Why? I think the answer is simple. The fact is that inmates have filed so much bogus crap over the years those who really have tried to file serious well thought out pleadings are given short shift.

Moreso, there are times this has a serious impact on the lives of the correctional officers in the system. How,? well as the Supreme Court of the U.S. explained courts are the alternative to violence. One individual kept stealing property from this specific inmate who lived on the dorms and had lived in prison many years. The inmate eventually filed a tort claim against the officer. This was in the 259th Judicial District Court, Judge Hagler. The action languished without resolution, so the inmate "took matters to hand" so to speak and caused the officer to be injuried. Not seriously, but... It seems to me it is time the state system swung the other way a bit and started to pay at least minimal attention to inmate litigation.

Sinc.

Jm DeMoss

James De Moss
#894554
French M. Robertson
12071 F.M. 3522
Abilene Tx. 79601

P.S. I wonder if you will get this?

TENTH COURT OF APPEALS

McLennan County Courthouse
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July 1, 2019

James De Moss
French M. Robertson Unit, #894554
12071 FM 3522
Abilene, TX 79601

Re: 10-19-00014-CR; *In re Jerry Rangel*

Dear Mr. De Moss:

This is in response to your June 9, 2019 letter, a copy of which is enclosed for reference purposes. Thank you for taking the time to write. Your letter confirms the challenges of an inmate trying diligently to work within the system to get a hearing on a filed motion. It is my hope that a rule or statute change will help; but until then, please continue to be patient and respectful and we will try to be respectful and quick.

Sincerely,

Thomas W. Gray

Thomas W. Gray
Chief Justice

Enclosure

cc: Jerry Rangel
Jarvis J. Parsons

yes, I did receive your letter.
Tom