

DISMISSED and Opinion Filed June 16, 2020



**In the
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-01565-CR

EX PARTE KEVIN RAY TAYLOR

**On Appeal from the 291st Judicial District Court
Dallas County, Texas
Trial Court Cause No. W08-30431-U (F08-30431-U)**

MEMORANDUM OPINION

Before Justices Bridges, Molberg, and Carlyle
Opinion by Justice Carlyle

In this appeal, Kevin Ray Taylor contends the trial court has failed to act on, and presumptively denied, his application for writ of habeas corpus filed pursuant to article 11.072 of the code of criminal procedure. Appellant has also filed a motion to abate the appeal because he needs to obtain a complete copy of the record, wants counsel appointed to represent him, and desires to file a motion for new trial. We dismiss the appeal for want of jurisdiction.

According to this court's records, appellant entered a guilty plea to aggravated robbery in exchange for deferred adjudication and placement on community supervision. Subsequently, appellant entered a plea of true to allegations that he

violated the terms of community supervision. The trial court adjudicated him guilty of aggravated robbery and assessed punishment at twenty-five years' imprisonment. We affirmed appellant's conviction. *See Taylor v. State*, No. 05-16-00708-CR, 2017 WL 1046771, at *1 (Tex. App.—Dallas Mar. 20, 2017, no pet.) (mem. op., not designated for publication).

On January 25, 2019, appellant filed a pro se application for writ of habeas corpus on the standard pre-printed form required to file an article 11.07 writ application. *See* TEX. R. APP. P. 73.1. To indicate he was filing under article 11.072, appellant hand-wrote a "2" at the end of "11.07" on the pre-printed form. The State filed a response contending appellant had failed to meet the requirements for an 11.07 writ application because he did not include any grounds for relief on his form. In a reply, appellant insisted he had filed his writ application under article 11.072.

On March 4, 2019, pursuant to the requirements of article 11.07, the trial court entered an order finding no controverted, previously unresolved factual issues requiring a hearing and forwarded the case to the court of criminal appeals. *See* TEX. CODE CRIM. PROC. art. 11.07, § 3(c). Appellant filed a letter with the court of criminal appeals arguing transmission of the trial court's findings to the court of criminal appeals was a mistake because he had filed an 11.072 writ. In one of two notices of appeal, appellant contends the court of criminal appeals returned the case to the trial court to review under article 11.072; however, the record before us does

not reflect any further action after the trial court entered its order forwarding the case to the court of criminal appeals.

On June 7, 2019, appellant filed a handwritten document styled “Applicant’s 3rd Writ of Habeas Corpus under Chapter § 11.072 of the Code of Crim. Proc. (The first two having been filed but not adjudicated).” There is no indication in the record that the trial court has taken any action on this document.

On October 1, 2019, appellant filed a notice of appeal with the trial court clerk seeking to appeal the denial of his application for writ of habeas corpus filed “on the 4 day of Jan 2019.”¹ In a marginal notation, appellant stated that he was attaching the “certified mail card” showing when the district clerk received his habeas application. The card is dated June 7, 2019, the date appellant filed his “3rd Writ” application. As alternative relief, appellant asks that his notice of appeal be treated as a petition for writ of mandamus. The October 1, 2019 notice of appeal was not forwarded to this court, but is included in the clerk’s record.

On December 19, 2019, appellant filed a notice of appeal with the Clerk of the Court, contending the State incorrectly responded to his 11.072 writ as if it was an 11.07 writ. The notice of appeal says the trial court sent his 11.072 writ to the court of criminal appeals which returned the writ to the trial court for decision.

¹ Though not included in the clerk’s record for this appeal, the trial court’s online docket shows appellant filed a handwritten application for writ of habeas corpus under article 11.072 on January 4, 2019 labeled as “Defendant Correspondence” on the trial court’s docket sheet.

Appellant contends his habeas application has been sitting in the trial court without action, and presumes the trial court has denied his writ application. Appellant attaches to the notice of appeal copies of the State's response to his January 25, 2019 writ application and the trial court's order finding no controverted facts.

As a preliminary matter, appellant has filed several purported article 11.072 habeas writ applications and his notices of appeal do not distinguish which is the subject of this appeal. Although he attached the certified mail receipt from his third writ application and states he wants to appeal the January 4, 2019 writ application, all of the other descriptions and commentary in his notices of appeal point to the denial of the January 29, 2019 writ application as the basis for his appeal. This court cannot review the trial court's determination on the January 29, 2019 writ application or the trial court's alleged failure to address appellant's other applications for two reasons.

First, appellant is not eligible for relief under article 11.072 because the trial court revoked community supervision, found him guilty, and sentenced him, meaning he is serving time for a felony conviction. *See* TEX. CODE CRIM. PROC. art. 11.07, §§1, 3; *Board of Pardons and Paroles ex rel. Keene v. The Eighth Court of Appeals*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (en banc, orig. proceeding). Article 11.072 provides the exclusive avenue for habeas relief for an individual who is either serving a term of community supervision or who has completed a term of

community supervision. *See* TEX. CODE CRIM. PROC. art. 11.072, § 1; *Ex parte Villanueva*, 252 S.W.3d 391, 397 (Tex. Crim. App. 2008).

The trial court and the State correctly treated appellant's January 29, 2019 writ application as an 11.07 writ application, because article 11.07 governs applications for relief when a person is serving a sentence. *See* TEX. CODE CRIM. PROC. art. 11.07, § 1; *Ex parte Rios*, No. 05-19-00051-CR, 2019 WL 2296234, at *2 (Tex. App.—Dallas May 30, 2019, no pet.) (trial court permissibly treated writ application mistakenly filed under article 11.07 as article 11.072 application); *see also Ex parte Glass*, 203 S.W.3d 856, 857 (Tex. Crim. App. 2006) (Johnson, J., concurring in dismissal of habeas corpus) (court of criminal appeals bound by decision to treat applicant's 11.072 writ application as an 11.07 application even though applicant was not eligible for 11.07 relief); *Ex parte Holland*, No. 05-17-01422-CR, 2018 WL 3949545, at *3–4 (Tex. App.—Dallas Aug. 17, 2018, pet. ref'd) (mem. op., not designated for publication) (appellate court accepted characterization by trial court and State of writ application as filed under 11.072 even though it was filed on 11.07 writ application form).

This court has jurisdiction to review writ applications filed under article 11.072, but not writ applications filed under article 11.07. *See* TEX. CODE CRIM. PROC. arts. 11.07, § 5, 11.072, § 8. The trial court characterized appellant's writ application as an article 11.07 writ, made the findings required on an article 11.07 writ application, and forwarded the case to the court of criminal appeals. Therefore,

we have no jurisdiction to consider appellant's appeal from the trial court's order. *See* TEX. CODE CRIM. PROC. arts. 11.07, § 5, 11.072, § 8; *Keene*, 910 S.W.2d at 483; *see also Ex parte Wicker*, No. 02-18-00318-CR, 2018 WL 4140642, at *1 (Tex. App.—Fort Worth Aug. 30, 2018, no pet.) (mem. op., not designated for publication) (dismissing for want of jurisdiction appeal of trial court's order recommending denial of article 11.07 writ application); *Ex parte Salazar*, No. 12-10-00443-CR, 2011 WL 6043028, at*2-3 (Tex. App.—Tyler Nov. 30, 2011, pet. ref'd) (mem. op., not designated for publication) (dismissing appeal where trial court treated inmate's writ application filed under article 11.072 as being filed under article 11.07).

Second, even if this court construed one or more of appellant's writ applications as filed under article 11.072, the court may only hear appeals arising from final judgments and interlocutory orders expressly permitted by statute. *See State v. Sellers*, 790 S.W.2d 316, 321 n. 4 (Tex. Crim. App. 1990); *Apolinar v. State*, 820 S.W.2d 792, 794 (Tex. Crim. App. 1991); *Wright v. State*, 969 S.W.2d 588, 589 (Tex. App.—Dallas 1998, no pet). The trial court's order making findings of fact and transmitting appellant's writ application to the court of criminal appeals for decision is neither a final judgment nor an appealable order assigned to this court. *See Wright*, 969 S.W.2d at 589; *see also Ex parte Prescott*, 02-20-00066-CR, 2020 WL 1949013, at *1 (Tex. App.—Fort Worth Apr. 23, 2020, no pet. h.) (mem. op., not designated for publication) (dismissing attempted appeal from trial court's order

adopting findings of fact and conclusions of law in connection with 11.07 writ application). The record does not show any appealable order or judgment.

Likewise, without an appealable order, there is no basis for the court to assume jurisdiction over appellant's other habeas applications. *See Henderson v. State*, 153 S.W.3d 735, 735–36 (Tex. App.—Dallas 2005, no pet.). Even if a final order was filed, this court would be unable to grant appellant relief because, as noted, appellant is not eligible for relief under article 11.072.

In appellant's October 1, 2019 notice of appeal, he requested that if we determined that there was no final order, we treat his notice of appeal as a petition for mandamus to compel the trial court to enter one. We decline to do so for three reasons.

First, petitions for writ of mandamus have technical requirements that appellant's notice of appeal does not meet. *See* TEX. R. APP. P. 52.1, 52.3, 52.7. This court's precedents require strict adherence to the pleading rules governing petitions for writs of mandamus. *See In re Butler*, 270 S.W.3d 757, 758–59 (Tex. App.—Dallas 2008, orig. proceeding). We would dismiss the writ on this basis alone.

Second, to obtain a writ of mandamus, appellant must show he has no adequate remedy at law and that what he seeks to compel is a ministerial act. *In re State ex rel Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013). In this case, having determined appellant's case should proceed as an 11.07 writ, the trial court's ministerial duty was to determine whether there were controverted, previously

unresolved factual issues requiring a hearing and, if not, to make such a finding and forward the case to the court of criminal appeals. *See* TEX. CODE CRIM. PROC. art. 11.07, § 3(c). On the record before us, because the trial court has entered an order, it has performed that duty, and the writ of mandamus is moot. *See In re Bonilla*, 424 S.W.3d 528, 534 (Tex. Crim. App. 2014).

Finally, we note that even if we granted mandamus relief and compelled the trial court to issue a final ruling on some of appellant's other article 11.072 writ applications, because appellant is serving a prison term, he is only entitled to request relief under article 11.07, and thus compelling the trial court to issue an 11.072 order would be a fruitless action.²

We deny appellant's motion to abate and dismiss the appeal for want of jurisdiction.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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² Appellant's efforts may be better expended seeking relief by filing an application for writ of habeas corpus with the trial court clerk under article 11.07. *See* TEX. CODE CRIM. PROC. art. 11.07, § 3.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

EX PARTE KEVIN RAY TAYLOR

No. 05-19-01565-CR

On Appeal from the 291st Judicial
District Court, Dallas County, Texas
Trial Court Cause No. W08-30431-U
(F08-30431-U).

Opinion delivered by Justice Carlyle.
Justices Bridges and Molberg
participating.

Based on the Court's opinion of this date, the appeal is **DISMISSED**.

Judgment entered this 16th day of June, 2020.