

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00538-CV

In re the State of Texas, ex rel. Henry Garza

ORIGINAL PROCEEDING FROM BELL COUNTY

DISSENTING OPINION

For the reasons that follow, I respectfully dissent from the Court’s opinion and would conditionally grant mandamus relief in this case.

In general, “‘mandamus will issue only to correct a clear abuse of discretion or the violation of a duty imposed by law’ when the petitioning party lacks an adequate remedy by appeal.” *In re Turner*, 500 S.W.3d 641, 642 (Tex. App.—Austin 2016, orig. proceeding) (quoting *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 207 (Tex. 2009) (orig. proceeding)); see Tex. R. App. P. 52.1-11 (setting out requirements for filing petition for writ of mandamus); see also *In re State ex rel Parsons*, No. 10-17-00216-CV, 2019 WL 156798, at *1 (Tex. App.—Waco Jan. 9, 2019, orig. proceeding) (mem. op.) (explaining that nondisclosure proceedings are civil in nature and “applying civil rules” when determining whether mandamus relief was warranted). “A trial court has no discretion to misapply the law.” *In re Turner*, 500 S.W.3d at 642.

The petition for writ of mandamus in this case pertains to the trial court’s order of nondisclosure regarding Y.W.C.’s criminal history. In 2007, Y.W.C. was charged with

aggravated assault with a deadly weapon and was ultimately placed on deferred-adjudication community supervision after pleading guilty. Once Y.W.C. was discharged from community supervision, she asked the trial court to issue an order of nondisclosure, and the State objected to her request. After convening a hearing and considering the parties' arguments, the trial court concluded that the statutory requirements were met and issued the requested nondisclosure order.

The nondisclosure statute in effect at the time of the 2007 offense provided, in relevant part, as follows:

(d) Notwithstanding any other provision of this subchapter, if a person is placed on deferred adjudication community supervision under Section 5, Article 42.12, Code of Criminal Procedure, subsequently receives a discharge and dismissal under Section 5(c), Article 42.12, and satisfies the requirements of Subsection (e), the person may petition the court that placed the defendant on deferred adjudication for an order of nondisclosure under this subsection.

...

(e) A person is not entitled to petition the court under Subsection (d) if the person has been previously convicted or placed on deferred adjudication for:

...

(4) *any other offense involving family violence*, as defined by Section 71.004, Family Code.

Act of May 31, 2003, 78th Leg., R.S., ch. 1236, § 4, sec. 411.081, 2003 Tex. Gen. Laws 3499, 3500 ("former Tex. Gov't Code § 411.081") (emphasis added) (amended 2007, 2013, 2015, 2017) (current version at Tex. Gov't Code § 411.074). Regarding the term "family violence," the referenced provision of the Family Code defines that term, in part, as meaning "an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault,

or sexual assault, but does not include defensive measures to protect oneself.” Tex. Family Code § 71.004(1).

The record before this Court establishes that the victim of the 2007 assault was Y.W.C.’s then husband and that she injured him by using a knife during the assault. Accordingly, the offense involves “family violence” as defined by the Family Code and, therefore, falls within the prohibition on nondisclosure found in former subsection 411.081(e)(4) of the Government Code. *See* Former Tex. Gov’t Code § 411.081(e)(4). Accordingly, I believe that the trial court abused its discretion by granting Y.W.C.’s request for nondisclosure. *See In re State ex rel Parsons*, 2019 WL 156798, at *3 (granting State’s petition for writ of mandamus and ordering trial court to vacate order granting petition for non-disclosure because individual seeking nondisclosure “was placed on deferred adjudication community supervision for an offense that involved family violence” and therefore was “not eligible for an order of non-disclosure”); *see also In re Foremost Cty. Mut. Ins. Co.*, 172 S.W.3d 128, 135 (Tex. App.—Beaumont 2005, orig. proceeding) (explaining that trial courts do not have discretion “to make an erroneous legal conclusion even in an unsettled area of law”).

Furthermore, based on the record of the trial court’s hearing on the request for nondisclosure, I am not persuaded that the State has an adequate remedy by appeal. *See State v. L.P.*, 525 S.W.3d 418, 420 (Tex. App.—Fort Worth 2017, no pet.) (dismissing State’s appeal of order granting petition for nondisclosure of records); *see also Huth v. State*, 241 S.W.3d 206, 208 (Tex. App.—Amarillo 2007, no pet.) (dismissing for want of jurisdiction appeal seeking review of trial court orders on petitions for nondisclosure); *Rado v. State*, No. 05-06-00200-CV, 2007 WL 1829648, at *1 (Tex. App.—Dallas June 27, 2007, no pet.) (mem. op.) (same); *Bergin*

v. *State*, No. 06-06-00089-CV, 2006 WL 2456302, at *1-2 (Tex. App.—Texarkana Aug. 25, 2006, no pet.) (mem. op.) (same).

For these reasons, I cannot join the Court’s opinion denying mandamus relief in this case.

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, and Kelly

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