



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-50,961-10

EX PARTE RODNEY REED, Applicant

**ON APPLICATION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS
AND MOTION TO STAY THE EXECUTION
IN CAUSE NO. 8701 IN THE 21ST DISTRICT COURT
BASTROP COUNTY**

**YEARY, J., filed a concurring and dissenting opinion in which WALKER and
SLAUGHTER, JJ., joined.**

CONCURRING AND DISSENTING OPINION

I agree with the Court's decision to grant Applicant's motion to stay the execution and remand the cause to the convicting court for further development of his first, second, and fourth claims. When this Court finds that the requisites of Article 11.071, Section 5, have been satisfied, authorizing an applicant to proceed with a subsequent post-conviction application for writ of habeas corpus in a capital case, the writ "shall issue by operation of law" and "the convicting court" may proceed to adjudicate it. TEX. CODE CRIM. PROC. art. 11.071, §§ 5 & 6(b). That is all the Court's order need authorize today. The Court has appropriately dismissed the State's application for writ of prohibition opposing Judge

Campbell's participation in the earlier, now-moot proceedings in the case,¹ and it has no occasion to make such a finding in the context of Applicant's subsequent application for writ of habeas corpus and motion for stay of execution.

Which judge should be the one to preside over "the convicting court" for purposes of adjudicating Applicant's subsequent writ application is not an issue presently pending in any pleading before the Court, and we should not pass on it at this juncture. I therefore oppose the Court's "finding" that Judge Shaver "continues to sit by assignment as the judge" of the convicting court "for Applicant's case." Court's Order at 4.

The Court's order also does not explain how it comes to the conclusion that Judge Shaver "continues" to preside over Applicant's case, and that assertion seems to me to be at least somewhat in question. The State, as Relator in the earlier, now-moot application for writ of prohibition, attached an order to its application that appears to be a general assignment of Judge Shaver to the 21st Judicial District Court, on May 28, 2014. The only designation of the purpose for the assignment appearing in the order itself is the following phrase: "for the primary purpose of hearing cases and disposing of business requested by the court." Nothing in the order expressly designates Judge Shaver as the permanent judge of the 21st Judicial

¹ Applicant filed a motion in the convicting court requesting that his execution date be rescheduled pursuant to Article 43.141 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 43.141. He filed a separate motion arguing that the order setting the execution date was void because it was signed by a visiting judge, Doug Shaver, whose authority to preside over the case, Applicant claimed, had lapsed. The State filed an application for writ of prohibition in this Court to prohibit the currently elected judge of the convicting court, Judge Carson Campbell, from holding a hearing and ruling on Applicant's motions. The Court's order today staying Applicant's execution renders Applicant's motions—and hence, the State's prohibition application—moot.

District Court, and perhaps more importantly, nothing in the order even expressly designates Judge Shaver “to sit” on Applicant’s case. Instead, the only document transmitted to this Court by the State having any tendency to suggest that Judge Shaver might ever have been assigned specifically to Applicant’s case is an enclosure letter appearing to accompany the assignment order and transmitting it to Judge Shaver. That enclosure letter is signed not by the Regional Presiding Judge but by his administrative assistant.

I recognize that an administrative assistant may be presumed to work closely with the judge that she serves, and perhaps may even be presumed to know what the judge she works for is thinking about a particular matter, but her enclosure letter is not an assignment order. Perhaps there is a different order that we have yet to see. Perhaps a statute makes clear that the particular type of assignment order signed by the Regional Presiding Judge in this case empowers an assigned judge to override the authority of the elected judge when that judge returns to his bench. None of those things have been demonstrated at this point to my satisfaction. That this Court would now presume that Judge Shaver “continues to sit by assignment as the judge of the 21st Judicial District Court of Bastrop County for Applicant’s case” seems to me—at best—premature.² While I certainly remain open to persuasion on the question by facts or law that would lead clearly to that conclusion, I would wait for a proper

² Judge Campbell set a hearing to consider Applicant’s motions to withdraw the execution date, notwithstanding that Judge Shaver had presided over Applicant’s case up to that point, and this was what prompted the State’s now-moot application for writ of prohibition. Should Judge Campbell similarly decide to preside over Applicant’s subsequent writ application following this Court’s remand today, it is likely the issue will present itself again, and the issue would then be ripe for this Court’s disposition.

pleading even to address the issue. The Court cannot reasonably invoke “judicial economy” to justify addressing issues that are neither raised by the pleadings presently before us nor even fairly necessary to resolution of the issues that *are* raised by the pleadings, namely, whether Applicant should be allowed to proceed on the claims made in his subsequent writ application under Article 11.071, §5.

There remain unanswered questions with respect to which judge ought to preside over “the convicting court” in this case moving forward. But that issue is not properly before us at this time, and I would not presuppose an answer to any of them in our present order.

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