

Cause No. 8701

STATE OF TEXAS	§	IN THE 21ST DISTRICT COURT
	§	
v.	§	OF
	§	
RODNEY REED	§	BASTROP COUNTY, TEXAS

**RESPONSE IN OPPOSITION TO
MOTION TO DECLARE EXECUTION ORDER VOID**

On July 23, 2019, this Court set Rodney Reed’s execution for November 20, 2019. Execution Order, *State v. Reed*, No. 8701 (21st Dist. Ct., Bastrop County, Tex. July 23, 2019). Reed now asks the Court to declare his execution date void because he claims it was improperly set by a visiting judge. Mot. Declare Execution Date Void 1–6. The State opposes.

At the outset, it should be noted what Reed’s motion is—an attempt to forum shop after disappointment in another judge’s rulings. Reed has done this before. He asked that the prior elected judge of this court recuse under an offensive sins-of-the-father theory. When self-recusal occurred, Judge Shaver was appointed to this case. Now Reed is tired of this judge and wants another. Only the administrative presiding judge may alter this assignment, and no court but the Court of Criminal Appeals (CCA) may disrupt Reed’s execution setting.

On May 28, 2014, the Honorable Olen Underwood, presiding judge of the Second Administrative Region, appointed Judge Shaver “to the 21st Judicial District Court of Bastrop County, Texas.” Ex. 1, at 1. The assignment was “for the primary purpose of hearing cases and disposing of any accumulated business requested by the court” and “shall continue as may be necessary for the assigned Judge to dispose of

any accumulated business and to complete trial of any case or cases begun during this assignment, and to pass on motions for new trial and all other matters growing out of accumulated business or cases heard before the Judge herein assigned, *or until terminated by the Presiding Judge.*” *Id.* (emphasis added).

The letter accompanying the assignment order, addressed to Judge Shaver, states that the assignment was for him “to hear Cause No. 8701; State of Texas vs. Rodney Reed and to dispose of any other business requested by the court.” Ex. 1, at 2. The notice of assignment sent to the parties stated that Judge Shaver “has been assigned to Cause No. 8701; State of Texas vs. Rodney Reed; 21st Judicial District Court of Bastrop County, Texas.” *Id.* at 3.

The presiding judge of an administrative region may assign a qualified judge of that region “to try cases and dispose of accumulated business.” Tex. Gov’t Code § 74.056(a); *see Hughes v. State*, 897 S.W.2d 285, 305–06 (Tex. Crim. App. 1994) (discussing assignment of judges pursuant to the precursor of the present statute). The terms of the assignment control the scope of the assigned judge’s authority. *See Ex parte Eastland*, 811 S.W.2d 571, 572 (Tex. 1991) (orig. proceeding); *In re Amos*, 397 S.W.3d 309, 314 (Tex. App.—Dallas 2013, orig. proceeding) (“The terms of the assignment order control the extent of the visiting judge’s authority and when it terminates.”).

This is not a difficult question of law. Judge Shaver was assigned to Reed’s underlying cause number, the case providing the conviction for which all other postconviction actions have emanated (e.g., execution settings, habeas applications,

postconviction DNA testing motions, etc.). By the terms of the assignment, it does not end “until terminated by the Presiding Judge.” Ex. 1, at 1. And Reed has not provided—and the State is unaware of—any order by Judge Underwood terminating Judge Shaver’s assignment in this case. From the plain language of the assignment, Judge Shaver is the proper presiding judge in this case.

But there is more—this exact language, from this exact presiding judge, and in a postconviction posture, has been considered by the CCA in determining scope of assignment, albeit incidentally in the context of a motion to recuse setting. In *Ex parte Thuesen*, following a voluntary recusal by an elected district judge in a habeas case, Judge Underwood sent an order and cover letter to a senior judge assigning him to hear a particular cause number, beginning on a date certain and continuing as long “as may be necessary for the assigned Judge to dispose of any accumulated business and to complete trial of any case of cases begun during this assignment . . . or until terminated by the Presiding Judge.” *Ex parte Theusen*, 546 S.W.3d 145, 148 (Tex. Crim. App. 2017) (alteration in original). After this assignment was made, the applicant filed a motion to reassign the elected judge to the case claiming that the conflict had dissipated. *Id.* The elected judge agreed, eventually signing an order “reinstating” himself to the case. *Id.* at 149. He then presided over a five-day evidentiary hearing and recommended granting relief. *Id.* at 149–50.

When forwarded the record, the CCA filed and set the case asking the parties to brief the elected judge’s authority to act after his voluntary recusal and assignment of the case to another judge. *Id.* at 150. In deciding that the elected judge did not have

authority to act, the Court held that the assigned senior judge “had judicial authority over the case at th[e] time” of the “reinstatement,” *id.* at 153, and that, “[b]ecause Judge Underwood had not signed or executed an order terminating [the senior judge’s] assignment, [the senior judge] retained judicial authority over the . . . case,” *id.* at 156. As such, the elected judge’s rulings and findings were “disregard[ed]” and the case remanded for the senior judge “to complete his assignment[.]” *Id.* at 157.

With identical language, there must be an identical result—Judge Shaver, absent a “signed or executed . . . order terminating [his] assignment, . . . retain[s] judicial authority over the [Reed’s] case.” *Id.* at 156; *compare id.* at 148, *with* Ex. 1, at 1. Thus, Judge Shaver is the proper presiding judge, and no judge but Judge Underwood may change that. As Reed admits, assignments may be for a “period of time or *for a particular case.*” Mot. Declare Execution Date Void 3 (emphasis added) (quoting *In re Republic Parking Sys. of Tex., Inc.*, 60 S.W.3d 877, 879 (Tex. App.—Houston [14th Dist.] 2001, orig. proceeding)). Judge Shaver has been assigned to a particular case—Reed’s—and thus, as Reed admits, he may preside “as long as that case remains pending.” *Id.*

Moreover, when the State moved for the setting of Reed’s current execution date, and Reed tried to prevent it by filing a motion under the Texas Citizens Participation Act, the State sought a writ of prohibition from the CCA. *In re State ex rel. Goertz*, No. WR-90,124, 2019 WL 3776027, at *1 (Tex. Crim. App. Aug. 9, 2019). Not only did the CCA request a response from Judge Shaver as the respondent in that proceeding, Ex. 2, at 3 (“Therefore, the Honorable Doug Shaver, Judge of the

21st Judicial District Court sitting by assignment, has ten days . . . to file any response.”), the concurring judges specifically noted that Judge Shaver, after setting Reed’s execution, “appears to have complied with the opinions of this Court and has not taken any actions outside the convicting court’s jurisdiction or otherwise violated a ministerial duty,” *In re State ex rel. Goertz*, 2019 WL 3776027, at *2 (Keasler, J., concurring). The continuing validity of Judge Shaver’s appointment could not be any clearer.

Reed’s argument on this point is also curious. He claims that Judge Shaver was assigned only to the postconviction DNA testing and habeas proceedings, but not the execution resetting proceeding (as if that is a separate “proceeding”). But there is no limiting language in the assignment—that Judge Shaver was relegated to a particular type of proceeding. Indeed, Reed has implicitly accepted that Judge Shaver’s assignment is broad, covering, for example, the evidentiary hearing in his eighth state habeas proceeding. Before that hearing, Reed asked Judge Underwood to assign a different judge to preside, Ex. 3, at 1–4, but Judge Underwood denied the request, Ex. 4, at 1. From this, two conclusions arise—Reed believed that Judge Shaver’s assignment included such proceeding, and Judge Underwood believed that Judge Shaver was still assigned to Reed’s case. Both of these beliefs occurred despite the fact that the assignment said nothing about habeas (nor did it say anything about any particular type of proceeding), but it did say something about Reed’s underlying cause number, from which all other proceedings in the district court arise, and that

was apparently good enough for Reed at that time. Thus, his turnabout now is, at the very least, odd.

And, in any event, Reed has forfeited the right to complain about Judge Shaver's assignment to his case or the scope of his authority. As to the former, Reed had to object before Judge Shaver heard any matter in this case because "[o]nce an assigned judge has heard any matter in a case, the parties have waived the right to object to that judge under section 74.053 of the Government Code." *In re Canales*, 52 S.W.3d 698, 704 (Tex. 2001) (orig. proceeding). And Judge Shaver has heard many matters in this case—he entered the first execution setting for Reed, he ruled on Reed's postconviction DNA motion, and he proposed findings in Reed's eighth state habeas proceeding, all matters that have been before this Court in various vehicles (stay, appeal, and habeas). As to the latter, Reed "never complained to Judge [Shaver] that his assignment had expired. Therefore, [Reed] forfeited his right to challenge the authority of Judge [Shaver] to preside in this cause." *Wilson v. State*, 977 S.W.2d 379, 381 (Tex. Crim. App. 1998). Hence, even if Reed's scope-of-assignment argument had merit—and it does not—he has forfeited his right to complain about the matter because he did not raise it when opposing the setting of an execution date. Either way, Reed's complaint is procedurally defaulted for failing to timely object, in addition to being without merit.

In addition to Judge Shaver being the correct presiding judge in this matter, "no other court of this state has authority to overrule or circumvent [the CCA's] decisions, or disobey its mandate[]." *State ex rel. Wilson v. Briggs*, 351 S.W.2d 892,

894 (Tex. Crim. App. 1961). Reed, in seeking that one district court judge void another's execution order, is trying to prevent execution of Reed's sentence. Thus, he is attempting to interfere with the mandate of the CCA after it affirmed Reed's sentence. No court may do so but the CCA. *See State ex. rel. Holmes v. Honorable Court of Appeals for Third Dist.*, 885 S.W.2d 389, 412 (Tex. Crim. App. 1994) ("Any order by another state court which purports to stay a scheduled execution circumvents our decision and disobeys our mandate."), *overruled in other part by Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 2002). As such, Reed's motion must be denied.

CONCLUSION

Judge Shaver is the proper presiding judge in this matter. No other judge has authority to act. As such, the State requests that Judge Shaver deny Reed's motion to declare the execution order void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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