

Conditionally GRANT in Part; and Opinion Filed May 30, 2017.



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

**No. 05-17-00507-CV
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IN RE WARREN KENNETH PAXTON, JR., Relator

**Original Proceeding from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 416-81913-2015, 416-82148-2015, and 416-82149-2015**

OPINION

Before Justices Bridges, Fillmore, and Schenck
Opinion by Justice Fillmore

Before the Court is relator's May 15, 2017 petition for writ of mandamus and petition for writ of prohibition. This original proceeding arises from an April 11, 2017 order granting the State's motion to transfer venue of the underlying cases from Collin to Harris County pursuant to article 31.02 of the Texas Code of Criminal Procedure. Relator complains that the respondent, the Honorable George Gallagher, continues to preside over the underlying cases without relator's consent and has interfered with the Collin County District Clerk's duty to transfer the original papers of the underlying cases to Harris County pursuant to article 31.05 of the code of criminal procedure.

Relator asks this Court to issue a writ of mandamus vacating all orders signed by respondent following the April 11, 2017 order transferring venue. Relator also asks this Court to issue a writ of prohibition against respondent prohibiting him from taking any further action in

the underlying cases. For the following reasons, we agree with relator that respondent's orders signed after the transfer order are void and conditionally grant the petition for writ of mandamus.

Background

Respondent was assigned to the 416th Judicial District Court of Collin County, Texas to preside over the criminal cases styled *The State of Texas v. Warren Kenneth Paxton, Jr.*, Cause Nos. 416-81913-2015, 416-82148-2015, and 416-82149-2015. Almost two years later, on April 11, 2017, respondent signed an order granting the State's motion to transfer venue to Harris County pursuant to article 31.02 of the code of criminal procedure.¹ The same day, relator filed a "Motion for Court's Compliance with Texas Code of Criminal Procedure Articles 31.05 and 31.09" in which relator advised respondent that relator did not consent under article 31.09 to respondent presiding over the cases in Harris County.² Relator's motion also requested that respondent order the Collin County District Clerk to send a certified copy of the case files to the Harris County District Clerk so that a new judge could be assigned.

The next day, April 12, 2017, relator supplemented his motion indicating that he did not seek entry of any order by respondent and only intended to notify respondent that relator expected statutory compliance with the code of criminal procedure. The same day, respondent entered a scheduling order and notified the parties via e-mail that he intended to conduct jury selection and trial beginning September 11, 2017 in Harris County. Five days later, respondent, via e-mail, invited the parties to meet with him that week in Houston to tour the courthouse and view the facilities in advance of trial. Two weeks later, relator sent a letter to the Collin County District Clerk requesting that she transmit the case files to Harris County as required by article

¹ Article 31.02 governs a State's motion to transfer venue in a criminal case. See TEX. CODE CRIM. PROC. ANN. art. 31.02 (West 2006).

² Article 31.05 sets out the clerk's duties on change of venue and article 31.09 addresses the circumstances under which a judge ordering a change in venue may continue to preside over the case and utilize services of the court reporter, the court coordinator, and the clerk of the court of original venue. See TEX. CODE CRIM. PROC. ANN. arts. 31.05 (West 2006), 31.09 (West Supp. 2016).

31.05 of the code of criminal procedure. The Clerk responded that she does not “plan to transmit the case papers to Harris County at this time” because it is her “understanding that [respondent] continues to preside over these cases under their current Collin County cause numbers and that he continues to use the services of the Collin County District Clerk’s office as the custodian of the records” in these cases. The district clerk also indicated that if she complied with relator’s request to send the case files to Harris County, she would be “perhaps running afoul of the directions, expressed and/or implicit, of the Presiding Judge regarding venue and my office’s ongoing role.”

Relief Requested

Relator now seeks relief from this Court. He contends respondent may not continue to preside over the cases in Harris County because a judge that orders a change in venue in a criminal case may continue to preside over the case after the transfer and continue to use the transferor court’s administrative resources only if the State, the defendant, and the defendant’s counsel consent. *See* TEX. CODE CRIM. PROC. art 31.09 (West Supp. 2016). According to relator, because he has not consented to respondent continuing to preside over the case, respondent no longer has authority to act and all actions taken after the April 11, 2017 transfer order are void as a matter of law. Relator asks this Court to grant a writ of mandamus vacating respondent’s April 12, 2017 scheduling order and all other orders issued by respondent after the April 11, 2017 transfer order. Relator further requests the Court to issue a writ of prohibition to prevent respondent from taking any further actions in the cases.

Analysis

This Court has jurisdiction to issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court. TEX. GOV’T CODE ANN. § 22.221(a) (West 2004). We also have jurisdiction to issue all writs of mandamus against a judge of a district court in our district.

TEX. GOV'T CODE ANN. § 22.221(b)(1). We have writ jurisdiction over district courts in Collin County but not Harris County. *See* TEX. GOV'T CODE ANN. § 22.201(f) (West Supp. 2016).

To establish a right to mandamus relief in a criminal case, the relator must show the trial court violated a ministerial duty and there is no adequate remedy at law. *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013) (orig. proceeding). The ministerial act requirement is satisfied if the relator can show a clear right to the relief sought. *Id.* “A clear right to relief is shown when the facts and circumstances dictate but one rational decision ‘under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles.’” *Id.* When a trial court acts beyond the scope of its lawful authority, a clear right to relief exists. *See, e.g., State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 506 (Tex. Crim. App. 2011) (orig. proceeding) (holding State entitled to mandamus relief because there was no basis under Texas law to conduct pretrial evidentiary hearing to determine adequacy of mitigation case in capital-murder proceeding); *see also State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 919 (Tex. Crim. App. 2011) (orig. proceeding) (holding State entitled to mandamus relief because there was no state law or procedure permitting pretrial hearing and ruling that would deprive relator of the opportunity to try its capital case and seek the death penalty). An issue of first impression can qualify for mandamus relief when the principle of law is clearly established. *Weeks*, 391 S.W.3d at 122.

When a court signs an order changing venue, jurisdiction immediately and automatically vests in the transferee court. *Williams v. State*, 145 Tex. Crim. 536, 540–41, 170 S.W.2d 482, 485–86 (1943) (“A change of venue not only absolutely divests the court from which the cause was removed of jurisdiction, but it also clothes the court to which removal is had with the same jurisdiction that reposed prior to the change in the court of original venue.”); *Webb v. State*, 133 Tex. Crim. 32, 36, 106 S.W.2d 683, 685 (1937) (“The order changing the venue in this case from

Sabine to Newton county conferred jurisdiction upon the district court of the latter county. The court's order changed the venue; the certified copy thereof was merely evidence of the change of venue."); *see also In re Gibbs*, No. 06-15-00002-CV, 2015 WL 400468, at *2 (Tex. App.—Texarkana Jan. 30, 2015, orig. proceeding) (mem. op.) (“The failure to transfer the physical file from Fannin County to Tarrant County affects neither the finality of the transfer order nor the transferring court’s plenary jurisdiction.”).

Here, respondent signed the order transferring the case to Harris County on April 11, 2017. As a result of that order, jurisdiction over the cases vested in the Harris County district courts, and the Collin County district court was divested of jurisdiction over the cases. The failure of the Collin County District Clerk to transfer the case files from Collin County to Harris County did not affect that jurisdictional change. *See, e.g., Gibbs*, 2015 WL 400468 at *2. The Harris County district courts have jurisdiction over all further proceedings in these cases as a matter of law.

This conclusion does not end our inquiry, however, because respondent has taken actions after transferring venue that may be void. The issuance of a void order is an abuse of discretion. *In re Gibbs*, 2015 WL 400468, at *1 (citing *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (per curiam) (orig. proceeding) and *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (per curiam) (orig. proceeding)). “Mandamus is proper if a trial court issues an order beyond its jurisdiction.” *In re Sw. Bell Tel. Co.*, 35 S.W.3d at 605. Although appellate courts do not have jurisdiction to address the merits of appeals from void orders or judgments, they do have jurisdiction “to determine that the order or judgment underlying the appeal is void and make appropriate orders based on that determination.” *Freedom Commc’ns., Inc. v. Coronado*, 372 S.W.3d 621, 623–24 (Tex. 2012); *Bossley v. Dallas Cty. Mental Health & Mental Retardation*, No. 05-99-00081-CV, 1999 WL 993901, at *3 (Tex. App.—Dallas Nov. 2, 1999, no pet.) (mem.

op., not designated for publication) (“When a party appeals from a void order and the appellate court lacks jurisdiction to consider the appeal, the proper procedure is for the appellate court to declare the order to be void and dismiss the appeal for lack of jurisdiction.”). Similarly, when, as here, a party seeks mandamus relief from a trial court’s void orders, an appellate court may conditionally grant the writ and direct the trial court to set aside the void orders and take other steps necessary to cure any problems caused by the void orders. *See In re Gibbs*, 2015 WL 400468, at *3 (conditionally granting writ and directing trial court to set aside void order and to transfer the physical file in the case to the transferee court).

A judgment is void when it is apparent from the record that “the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court.” *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding) (per curiam).

Relator argues that any actions taken by respondent after respondent signed the transfer order are void because the Harris County district courts have jurisdiction over the cases and, absent relator’s consent, respondent may not preside over the cases in Harris County. We have already determined that the signing of the transfer order vested jurisdiction in the Harris County district courts and divested the Collin County district court of jurisdiction over the cases. Relying on article 31.09 of the Texas Code of Criminal Procedure, relator maintains that the transfer also deprives respondent of any authority to act in the cases. Article 31.09 provides as follows:

(a) If a change of venue in a criminal case is ordered under this chapter, the judge ordering the change of venue may, with the written consent of the prosecuting attorney, the defense attorney, and the defendant, maintain the original case number on its own docket, preside over the case, and use the services of the court reporter, the court coordinator, and the clerk of the court of original venue. The court shall use the courtroom facilities and any other services or facilities of the district or county to which venue is changed. A jury, if required, must consist of residents of the district or county to which venue is changed.

TEX. CRIM. PROC. CODE Ann. art. 31.09(a).

Jurisdiction over the cases vested immediately in the Harris County district courts when respondent signed the transfer order. The Texas Constitution does not allow the 416th Judicial District Court to sit outside of the Collin County seat, McKinney, absent express statutory authority. TEX. CONST. art. V, § 7. The only authority by which this may occur is article 31.09, which requires consent of the parties. Thus, absent effective application of article 31.09, respondent may not continue to preside over the cases or utilize the services of the court reporter, court coordinator, or clerk of the court of original venue. Relator has unequivocally stated that he did not consent to respondent continuing to preside over the cases or otherwise acting in accordance with article 31.09, and no written consent appears in our record. Accordingly, under the plain language of the statute, respondent is without authority to continue to preside over the cases and is also without authority to issue orders or directives maintaining the case files in Collin County. Consequently, all orders issued by respondent after he signed the April 11, 2017 transfer order are void.

In reaching this conclusion, we necessarily reject the State's suggestion that applying the plain language of article 31.09 to this case will lead to an absurd result. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (explaining courts should not apply statutory language literally where plain language would lead to absurd consequences Legislature could not possibly have intended, thus respecting lawmaking powers of the legislative branch). The State does not articulate why following the plain language of article 31.09 in this case would lead to an absurd result, nor can we envision why it would. Moreover, prior to the 1995 enactment of article 31.09, no statute allowed a presiding judge to maintain a case on his docket and continue to use his court's administrative resources, after the case had been transferred to another venue. *See Fain v. State*, 986 S.W.2d 666, 675–76, n.13 (Tex. App—Austin 1998, pet. ref'd). Article 31.09

provides a limited exception to the long-standing rule that a judge does not follow the transferred case. The judge may continue to preside over the case only with the agreement of the parties.

We likewise reject the State’s argument that article 31.09 does not apply to respondent because he was appointed to preside over these cases by the regional administrative judge under section 74.056(b) of the government code. The State failed to provide authority for this proposition and we have found none.³ To be sure, respondent was appointed to “the 416th [Judicial] District Court of Collin County” to preside over these cases. But the Legislature has made no distinction in article 31.09 between elected and appointed judges, and we will not create one by judicial fiat. *See Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (the objective in statutory construction is to give effect to the Legislature’s intent by looking first to the statute’s literal text, reading words and phrases in context and construing them according to the rules of grammar and usage, and presuming “that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible”) (internal citations omitted); *see also Merritt v. State*, 252 S.W.3d 757, 760 (Tex. App.—Texarkana 2008, no pet.) (“We will assume that the Legislature used precisely the words that it intended to use and apply them as written.”).

The State’s arguments that applying article 31.09 to an appointed judge somehow thwarts the objective of section 74.056(b) of the government code and results in a violation of the separation of powers clause⁴ are equally unavailing. Section 74.056(b) generally allows the presiding judge of one administrative region to ask the presiding judge of another administrative

³ We note that in a somewhat analogous situation, the Corpus Christi Court of Appeals has held that the appointment of a judge to hear a case following recusal does not shield the case from a subsequent transfer order of the local administrative judge:

[T]he Presiding Judge’s appointment of a new judge to hear the case following recusal does not in itself create a proprietary right to have that particular judge and court decide the case for its duration. We hold that, as with the initial assignment of the lawsuit to a judge and court, any subsequent appointment is subject to the lawful transfer orders of the local Administrative Judge.

In re PG & E Reata Energy, L.P., 4 S.W.3d 897, 901 (Tex. App.—Corpus Christi 1999, orig. proceeding).

⁴ TEX. CONST. art. II, § 1

region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request. TEX. GOV'T CODE ANN. § 74.056(b) (West 2013). The State does not explain how the general language in section 74.056(b) permitting appointment of judges between administrative regions somehow supplants the specific language in article 31.09(a) requiring the parties' consent for a judge to continue to preside over a case he has transferred to a different venue. Similarly, the State's complaint that application of article 31.09 to an appointed judge violates the separation of powers clause and "affords the Legislature the authority to provide [relator] with the unchecked authority to remove [respondent] from presiding" and "encroaches on [the regional administrative judge's] exclusive authority . . . to appoint [respondent] to Relator's cases . . . and her sole authority to remove him" is also misplaced. Respondent was assigned to a particular court to preside over particular cases pending in that court. By seeking a change in venue, the State invoked Chapter 31 of the code of criminal procedure and the various requirements of that chapter of the Code. By transferring the case on the State's motion, respondent, not relator, triggered the requirements of articles 31.05 and 31.09 and divested the 416th Judicial District Court of Collin County, Texas of jurisdiction over the cases. Following the signing of the transfer order, the only action respondent could take was to vacate the transfer order during the period of the court's plenary power. Because he did not do so, respondent's authority to act expired when the venue order became final. Consequently, respondent's appointment also terminated at that time.

A trial court entering a void order has a ministerial duty to vacate the order. *State ex rel. Thomas v. Banner*, 724 S.W.2d 81, 85 (Tex. Crim. App. 1987) (orig. proceeding) ("Absent proper jurisdiction, it was the trial court's ministerial duty to vacate the orders."). Mandamus is the proper relief to set aside an improper order. *Id.* Because we conclude that the trial court lacked authority to issue orders or directives after signing the transfer order, all orders and

directives issued after he signed the April 11, 2017 transfer order are void and should be vacated. See *In re Melton*, 478 S.W.3d 153, 157 (Tex. App.—Texarkana 2015, no pet.) (conditionally granting writ and directing trial court to vacate void nunc pro tunc judgments); *In re Gibbs*, 2015 WL 400468, at *3 (conditionally granting writ, directing the court to set aside void order, and directing the court to transfer the physical file in this case to the transferee court).

Accordingly, we conditionally grant the petition for writ of mandamus and lift our May 16, 2017 stay order. We direct respondent to vacate the April 12, 2017 scheduling order, vacate any other orders issued by respondent after the April 11, 2017 transfer order, withdraw any directives made, explicit or implied, that preclude the Collin County District Clerk from performing her mandatory duty to transfer the case files to the Harris County district courts under article 31.05 of the Texas Code of Criminal Procedure, and direct the Collin County District Clerk to transfer the case files to the transferee district court in Harris County. The writ of mandamus will issue only if respondent fails to act in accordance with this opinion.

We do not have jurisdiction to issue the requested writ of prohibition because there is no appeal pending and a writ of prohibition is not necessary to protect our jurisdiction. See *Bayoud v. N. Cent. Inv. Corp. Through Bayoud*, 751 S.W.2d 525, 529 (Tex. App.—Dallas 1988, writ denied) (“A court of appeals does not have jurisdiction, absent a pending appeal, to issue a writ of prohibition requiring that a trial court refrain from performing a future act.”); see also *In re Yates*, 193 S.W.3d 151, 152 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (courts of appeals have jurisdiction to issue writs other than writs of mandamus only if the writ is “necessary to

enforce the jurisdiction of the court.”) (citing TEX. GOV’T CODE ANN. § 22.221(a) (Vernon 2004)). Accordingly, we dismiss the petition for writ of prohibition for want of jurisdiction.

/Robert M. Fillmore/

ROBERT M. FILLMORE
JUSTICE

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