

TEXAS COURT OF CRIMINAL APPEALS

In re State of Texas ex rel. Brian Risinger v. Hal Ridley

In re Risinger · No. WR-84,212-01 · Decided November 18, 2015

OPINION

PER CURIAM.

WR-84,212-01 COURT OF CRIMINAL APPEALS AUSTIN, TEXAS November 18, 2015
Transmitted 11/18/2015 4:04:21 PM Accepted 11/18/2015 4:17:29 PM ABEL ACOSTA No. _____ CLERK IN THE Court of Criminal Appeals In re STATE OF TEXAS ex rel. BRIAN RISINGER, Relator, v. The Honorable HAL RIDLEY, 278th Judicial District Court of Madison County, Texas Respondent. MOTION FOR LEAVE TO FILE WRIT OF MANDAMUS AND PETITION FOR A WRIT OF MANDAMUS AND REQUEST TO FILE ON EMERGENCY BASIS Brian Risinger District Attorney For Madison County, TX Ellen Stewart-Klein Assistant Attorney General Special Prosecutor for Madison County Texas Bar No. 24018011 P.O.

Box 12548, Capitol Station Austin, Texas 78711 ATTORNEYS FOR THE RELATOR MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS: Relator, Brian Risinger, Criminal District Attorney of Madison County, through Ellen Stewart-Klein, Assistant Attorney General and Special Prosecutor to Madison County, moves for leave to file a writ of mandamus.

Relator seeks to compel Respondent, the Honorable Judge Hal Ridley of the 278th Judicial District Court of Madison County, Texas, to vacate the trial court order withdrawing the November 18, 2015 execution of Raphael Holiday and reinstate the execution date.

Because this petition addresses an execution scheduled for today, November 18, 2015, the State requests that it be reviewed on an emergency basis. STATEMENT OF THE CASE Holiday was charged and convicted of capital murder three times over for the burning deaths of three children, including his own daughter. Pursuant to the jury's answers to the special issues, the trial judge sentenced Holiday to death.

1 CR (10,423/7446) 9 (Tierra Shinea Lynch); 5 CR 642-45; 1 CR (10,425/7447) 2, 18-21 (Jasmine Rockell Dupaul); 1 CR (10,427/7448) 2, 18-21 (Justice Nicole Holiday). 2 Direct appeal to the Texas Court of Criminal Appeals is automatic and Holiday's three convictions and sentences were affirmed. Holiday v. State, AP-74,446; AP-74,447; AP-74,448, 2006 Tex. Crim.

App. Unpub. LEXIS 737 (Tex. Crim. App. Feb. 8, 2006). Holiday petitioned the Supreme Court for review but certiorari was denied. Holiday v. Texas, 549 U.S. 1033 (2006). While his direct

appeal was pending, Holiday filed three state habeas applications, one for each conviction. 1 SHCR 1.

The state court adopted the State's Proposed Findings of Fact. SHCR 21-62, 82-83. The Court of Criminal Appeals adopted the findings of the state habeas court and denied relief. SHCR at cover; Ex parte Holiday, Order No. WR- 73,623-01, -02, -03 (Tex. Crim App. May 5, 2010). Holiday's federal petition was filed on May 3, 2011. Holiday filed his amended petition on March, 2, 2012.

Pet., ECF No. 1; Amend. Pet. ECF No. 12. The district court denied Holiday relief and denied him a COA. Mem. Op. & Ord., ECF No. 23; F.J., ECF No. 24. The Fifth Circuit also refused to grant Holiday a COA and denied his motion for rehearing. *Holiday v. Stephens*, No. 13-70022 (5th Cir. Oct. 14, 2014), Or. (5th Cir. Dec. 29, 2014). Holiday 3 sought certiorari from the denial of a COA.

The Supreme Court denied the petition on June 29, 2015. On the day of his execution, Holiday filed a motion to withdraw or modify execution date. PETITION FOR WRIT OF MANDAMUS To be entitled to a writ of mandamus, it must be demonstrated that: (1) the relator has no other adequate remedy at law, and (2) he is clearly entitled to the relief sought. See, e.g., *State ex rel.*

Watkins v. Creuzot, 352 S.W.3d 493, 499 (Tex. Crim. App. 2011). A "clear right to relief sought" means that the act relator seeks to prohibit is "ministerial." *State ex rel. Sutton v. Bage*, 822 S.W.2d 55, 57 (Tex. Crim. App. 1992). An act is ministerial "'when the law clearly spells out the duty to be performed... with such certainty that nothing is left to the exercise of discretion or judgment.'" *State ex rel.*

Healey v. McMeans, 884 S.W.2d 772, 774 (Tex. Crim. App. 1994) (quoting *Texas Dep't of Corr. v. Dalehite*, 623 S.W.2d 420, 424 (Tex. Crim. App. 1981)). Relator seeks an order compelling the Respondent to vacate any order interfering with Holiday's execution date. 4 First, the 278th Judicial District Court set Holiday's execution date pursuant to this Court's mandate issued after the conclusion of her direct appeal.

See Tex. Code Crim. Proc. art. 43.141(a). This Court "is the court of last resort in this state in criminal matters. This being so, no other court of this state has authority to overrule or circumvent its decisions, or disobey its mandates." *State ex rel. Wilson v. Briggs*, 351 S.W.2d 892, 894 (Tex. Crim. App. 1961). Hence, the 278th Judicial District Court does not have authority to impede the carrying out of this Court's mandate by preventing Holiday's execution.

Second, a convicting court may modify or withdraw an order setting an execution date only in limited circumstances: (1) "if the court determines additional proceedings are necessary on... a subsequent or untimely application for writ of habeas corpus filed under Article 11.071," or (2) "if the court determines additional proceedings are necessary on... a motion for forensic testing of DNA evidence submitted under Chapter 64." Tex. Code Crim.

Proc. art. 43.141(d). The 278th Judicial District Court is purporting to halt Holiday's execution because "additional proceedings are necessary on a subsequent application for a writ of habeas corpus under Tex. Code Crim. Proc. Art 11.071." Holiday v. 5 Texas, Nos. 10,423; 10,425; & 10,427 (Ord. November 18, 2015). But, in this instance, the 278th Judicial District Court lacks authority to withdraw its order setting Holiday's execution date.

See State ex rel. Holmes v. Third Court of Appeals, 885 S.W.2d 389, 395–96 (Tex. Crim. App. 1994) (holding that the trial court was without jurisdiction to issue an injunction, "[n]otwithstanding that respondent held [it] was necessary to protect its jurisdiction over the appeal of Graham's civil case"), overruled on other grounds by Ex parte Elizondo, 947 S.W.2d 202 (Tex.

Crim. App. 1996). This Court has previously held that it was improper for a trial judge to withdraw an execution date in the absence an "active pleading." In re Roach, No. WR-41,168-08 (Tex. Crim. App. June 17, 2008) (per curiam).

The Court found that the trial judge was "without authority to act" because this Court had "dismissed the subsequent application and the judge had no power to consider the merits of any claims in those or possible future applications." Id. The statute contemplates that a subsequent writ or DNA motion has been filed and is pending and satisfies the abuse of the writ exceptions of art. 11.071 § 5.

Anything less is insufficient to authorize the trial court to modify or withdraw the date. 6 Thus, interpreting the statute to encompass the mere promise of a subsequent filing or expectation of future review would render the guidelines of art. 43.141 meaningless.

Finally, given the last-minute nature of these proceedings, there is no other adequate remedy available at law. The State has no right to appeal an order modifying or withdrawing an execution date. Tex. Code Crim. Proc. Art 44.01.

As Respondent lacks authority to withdraw the execution date, there is a clear right to relief. CONCLUSION Therefore, this Court should grant leave for the State to file an emergency petition for writ of mandamus. Further, the Court should issue a writ of mandamus directing Respondent to vacate its order withdrawing the November 18, 2015 execution of Raphael Deon Holiday, and to reinstate the execution date.

Respectfully submitted, BRIAN RISINGER District Attorney of Madison County, Texas 7 ___/s/
Ellen Stewart-Klein_____ *Counsel of Record *ELLEN STEWART-KLEIN Assistant Attorney
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Bar No. 24028011 P.O. Box 12548, Capitol Station Austin, Texas 78711 Tel: (512) 936-1400 Fax:
(512) 320-8132 ATTORNEYS FOR THE RELATOR 8 CERTIFICATE OF SERVICE I hereby
certify that on the 18th of November, 2015, this pleading was sent by electronic service to counsel

listed below: William F. Carter Judge Hal Ridley 108 E. William J. Bryan 278th Judicial District Bryan, Texas 77803 Madison County Wfcarter73@yahoo.com hridley@co.walker.tx.us Frank Blazek 1414 11th Street Huntsville, Texas 77340 frankblazek@smithermartin.com James W. Volberding 100 E. Ferguson St., Suite 500 Tyler, TX 75702 James@jamesvolberding.com Seth Kretzer 440 Louisiana Street, Suite 200 Houston, TX 77002 seth@kretzerfirm.com Gretchen Sims Sween 515 Congress Avenue, Suite 1900 Austin, TX 78701 gsween@beckredde.com ___/s/ Ellen Stewart-Klein_____ ELLEN STEWART-KLEIN Assistant Attorney General SPECIAL PROSECUTOR TO MADISON COUNTY 9