In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00294-CR

WAYNE ANTHONY WILLIAMS, APPELLANT

V.

STATE OF TEXAS, APPELLEE

On Appeal from the County Court of
Swisher County, Texas
Trial Court No. 16,986; Honorable Wayne Nance, Presiding

October 13, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant was charged with criminal mischief in an amount of more than $500 but less than $1,500 in damages, a class A misdemeanor.[1] He entered a plea of *nolo contendere*, and punishment was assessed pursuant to a plea bargain. The case was

[1] TEX. PENAL CODE ANN. § 28.03(b)(3) (West Supp. 2016). After Appellant was charged in April 2015, the Legislature amended section 28.03(b)(3) to increase the amount of pecuniary loss for a Class A misdemeanor to $750 or more but less than $1,500 effective September 1, 2015. *See* Act of May 31, 2015, 84th Leg., R.S., ch. 1251, § 5, 2015 Tex. Gen. Laws 4209, 4211. The amended provisions do not apply to the facts of this case.

heard by the Honorable Wayne Nance, sitting as a visiting judge. Appellant was found guilty as charged and sentenced to two days confinement in county jail (credit for time served) and assessed a $1,000 fine. Appellant's *Motion for New Trial* was denied by operation of law. Appellant filed a timely notice of appeal.

By a single issue, Appellant contends "the visiting trial judge sitting in this case was not properly qualified pursuant to statute and court order, and therefore the judgment of guilt entered by that judge is void." Specifically, Appellant complains that (1) "the record does not contain a certified copy of the order of assignment," and (2) there is nothing in the record to indicate the reason for the duly-elected judge's absence, rendering the appointed judge unqualified to preside over the case. Both complaints are rejected and the judgment of the trial court is affirmed.

BACKGROUND

Appellant was tried for the offense of criminal mischief and sentenced pursuant to a plea bargain in Swisher County Court on April 20, 2015.[2] Presiding over the plea was the Honorable Wayne Nance, the duly-elected County Judge of Briscoe County. Judge Nance was sitting as a visiting judge for the duly-elected County Judge of Swisher County, the Honorable Harold Keeter. Judge Nance was appointed by a standing order "to fill any vacancy on the bench of Swisher County, which may occur during the calendar year beginning April 17, 2015 and ending December 31, 2015 for any reason allowed by the Texas Government Code." The standing order also provided that "[a] copy of this order shall be maintained by the Clerk of the Court and [be]

[2] Notwithstanding the plea bargain, Appellant sought and obtained permission to appeal pursuant to Rule 25.2(a)(2) of the Texas Rules of Appellate Procedure.

available as a matter of public record" as well as the "Clerk is ordered to place in the file of any matter heard by [Judge Nance] a copy of this order certified to be a true and correct copy." The original was maintained by the clerk of the court; however, the copy contained in the clerk's file in this case was not certified. Additionally, there is nothing in the record to indicate why Judge Keeter was unable to preside or that he was "absent from the county or absent because of physical incapacity."[3]

CERTIFICATION

The appointment of a visiting judge to act for and in the absence of a constitutional county judge is governed by section 26.023 of the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 26.023 (West 2004). That section states as follows:

> (a) The county judge may appoint a retired judge or a constitutional county judge from another county as a visiting judge when the county judge is absent from the county or absent because of physical incapacity.
>
> (b) The visiting judge shall sit in all matters that are docketed on any of the county court's dockets and has the powers of the county judge in relation to the matter involved.
>
> (c) Without the consent of the commissioners' court, visiting judges appointed under this section may not sit for more than 15 working days during a calendar year.
>
> (d) The order appointing the visiting judge shall be noted in the docket of the court.

ANALYSIS

Appellant contends that, as applied to the facts of this case, the standing order is void because the copy of that order included in the court's file was not certified to be true and correct, as required by the standing order. Appellant reasons that because the

[3] TEXAS GOV'T CODE ANN. § 26.023 (West 2004).

order contained in the court's file was not certified, Judge Nance was not qualified. Appellant is mistaken.

When a judge is not qualified to preside over a case, orders entered by that putative judge are void. *Davis v. Crist Industries, Inc.*, 98 S.W.3d 338 (Tex. App.—Fort Worth 2003, pet. denied). In *Davis*, the Fort Worth Court of Appeals stated as follows:

> If a judge is disqualified by constitution or statute, it is not that the judge had no jurisdiction, but that the judge had no authority to act. If a putative judge does not have the prescribed qualifications to act or if a judge is disqualified because of relationship to the case or a party, then that judge has no authority, and her actions are a nullity. If, however, the complaint is that the judge acted in a case without statutory or procedural authority, the alleged error is not void, but voidable, and must therefore be raised by objection or complaint to be preserved for appellate review.

Id. at 342. A judge is disqualified from presiding over a case when he has a relationship to the case or one of the parties, or when he has not taken the oath of office. *Davis v. State*, 956 S.W.2d 555, 559 (Tex. Crim. App. 1997). Furthermore, a judge is not qualified to preside over certain cases when he does not have the statutory or constitutional authority to preside over that type of case. In *Johnson v. State*, the Court of Criminal Appeals found that a constitutional county judge who lacked criminal jurisdiction in his own county did not have the authority to preside over a criminal case while appointed as visiting judge in another county. *See Johnson v. State*, 869 S.W.2d 347, 349-50 (Tex. Crim. App. 1994). *See also* TEX. GOV'T CODE ANN. § 74.121(a) (West 2013) ("A judge may not sit or act in a case unless it is within the jurisdiction of his court.").

In *Lackey v. State*, 322 S.W.3d 863, 864 (Tex. App.—Texarkana 2010), *aff'd*, 364 S.W.3d 837 (Tex. Crim. App. 2012), the constitutional county judge appointed a local, practicing attorney to preside over her bench in her absence. The appointed attorney, who was neither a retired judge nor a constitutional county judge from another county, was not qualified to be appointed as a visiting judge under section 26.023. *Id.* at 869. The attorney, therefore, had no authority to act and his actions in that capacity were void. *Id.* Such errors, involving "the authority of the judge to act as such cannot be waived—just as the subject-matter jurisdiction of a court cannot be waived." *Id.*

However, when the judge is otherwise qualified and the error is merely procedural, the order is only voidable and can be waived. *Wilson v. State*, 977 S.W.2d 379, 380 (Tex. Crim. App. 1998). Where procedural irregularities exist, an appellant may not complain for the first time on appeal that a statutory procedure was not followed in the assignment of a visiting judge who is otherwise qualified. *Thull v. State*, 963 S.W.2d 879, 881 (Tex. App.—Texarkana 1998, no pet.). In such cases, the appellant must have objected at the trial court level in order for the error to be preserved upon appeal. *Id.*

A timely objection allows such errors to be corrected without wasting the time and resources of the court by requiring a case to be reheard. *Wilson*, 977 S.W.2d at 380–81. In *Wilson*, the Court held that the order of appointment for an otherwise qualified visiting judge that had expired two days before the beginning of trial was merely a procedural error. *Id.* at 381. Similarly, in *Davis v. State*, 956 S.W.2d at 559-60, the Court found that the district court's untimely referral order was procedural, rather than jurisdictional, in nature. The referral order was not signed until *after* the otherwise

qualified magistrate had taken the plea, which the appellant contended meant that the magistrate did not have jurisdiction. *Id*. at 556-57. The court, however, found that because the magistrate was qualified to hold that position, the ability of the district court to refer the case to the magistrate and the district court's jurisdiction were never in question. *Id*. at 560. The court reasoned that the error only concerned the *process* of the transfer, which constituted a procedural error. *Id.*

In the case at hand, Appellant contends the uncertified order renders the visiting judge statutorily disqualified. The State correctly notes that certification is not required by the statute. Section 26.023(d) requires only that "the order appointing the visiting judge be noted in the docket of the court." Here, the standing order maintained by the clerk was the original document, which is not required to be certified. The trial court's file contained an actual copy of the standing order, which is not required by law. The purpose of including such a copy is to give the parties notice of the original appointment, which had already been filed with and maintained by the trial court clerk. Appellant is not complaining that the copy contained in the trial court's file is misleading or incorrect. He merely complains that the copy was not certified as being a true and correct copy of the original order.

Section 26.023 requires that the appointed judge be either a retired judge or a constitutional county judge of another county. Judge Nance is the constitutional county judge of Briscoe County, and as such, he is qualified to be appointed. Appellant does not contend that Judge Nance is statutorily or constitutionally disqualified from holding this position nor does he argue that Judge Nance is otherwise not qualified to hear

criminal cases. While the details of the standing appointment order were not fully complied with, the statutory requirements for the appointment were met.

Furthermore, even if the enabling statute or the standing order of appointment required certification, because Judge Nance was otherwise qualified to preside over the case, the lack of certification would only constitute a procedural error, similar to the expired order of appointment in *Wilson* and the untimely referral in *Davis*. Because procedural errors cannot be brought for the first time on appeal and Appellant did not object at trial, error, if any, was waived. *Wilson*, 977 S.W.2d at 380.

RECORD FAILS TO INDICATE REASON FOR APPOINTMENT

The standing referral order contained in the record states that Judge Nance will be appointed when the bench is vacant due to "illness, absence or other reason, not inconsistent with the law," pursuant to chapter 26 of the Government Code. Appellant contends that Judge Nance was not qualified to preside over his case because the record does not indicate the reason for the duly-elected judge's absence.

"[I]t has long been a 'cardinal rule' of appellate procedure in Texas that we 'must indulge every presumption in favor of the regularity of the proceedings and documents' in the trial court." *Murphy v. State*, 95 S.W.3d 317, 320 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). In *Murphy,* the court held that an appellant who complains that a visiting judge is not qualified for failure to take the constitutionally required oath "must make a prima facie showing that the trial judge did not take the required oaths before we will consider the issue on the merits." *Id.* Additionally, the court stated that a "lack of

filing of any required oath is not proof, in itself, of the failure of the judge to take the constitutionally required oaths." *Id.* at n.3.

Holding Appellant's contention in this case to the same standard, without a prima facie showing that the duly-elected judge's absence was inconsistent with this requirement, it is presumed that the appointment was lawful. Similarly, failure to note in the record the reason for the duly-elected judge's absence is not proof, in itself, that the reason for the absence did not fall within the purview of section 26.023(a) of the Government Code. Appellant's issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

Do not publish.