



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-81,584-01

EX PARTE JOHN THUESEN, Applicant

**ON REVIEW OF APPLICATION FOR A WRIT OF HABEAS CORPUS
FROM CAUSE NO. 09-02136-CRF-272 IN THE 272nd DISTRICT COURT
BRAZOS COUNTY**

Per curiam. ALCALA, J., filed a dissenting opinion in which WALKER, J., joined.

O P I N I O N

This is an application for a writ of habeas corpus filed pursuant to Texas Code of Criminal Procedure article 11.071.¹ In an opinion issued on February 8, 2017, we considered the preliminary issue of the judicial authority of the judge who presided over the habeas proceedings in this case. *Ex parte Thuesen*, ___ S.W.3d ___, No. WR-81,584-01, 2017 Tex. Crim. App. LEXIS 185 (Tex. Crim. App. Feb. 8, 2017). The judge at issue signed an order

¹ All references to articles refer to the Texas Code of Criminal Procedure unless otherwise stated.

voluntarily recusing himself from presiding over applicant's habeas proceedings. He then sought and obtained the appointment of a replacement judge, but subsequently signed an order purporting to restore his own judicial authority to preside over the case.² For reasons stated in the opinion, we held that the judge did not have authority to take any further action after signing the voluntary recusal order. We therefore restored the matter to its position immediately following the replacement judge's assignment to the case and remanded it to the trial court for further proceedings.

Applicant subsequently filed a motion to rehear that decision and a motion to stay the proceedings in the lower court pending the rehearing. On May 3, 2017, we stayed the

² The dissent claims that the recused judge's lack of authority in this case was simply a result of "missing administrative paperwork." This claim mischaracterizes the posture of this case. The presiding judge of the administrative judicial district never issued an order restoring the recused judge to the case. The recused judge claimed that the presiding judge had said he was "back on this case." *See Thuesen*, 2017 Tex. Crim. App. LEXIS 185, *7. But the presiding judge specifically stated that "no such order ever existed." *Id.* at *11.

The dissent also claims that the State "invited error" with respect to the recused judge resuming control over this case. But the recused judge made it clear that he was resuming control over the case while the State's objection to doing so was still pending, and the recused judge told the State that it would have "to seek an involuntary recusal." *Id.* at *7-8. It was only after these statements by the recused judge *and the representation that the presiding judge had authorized the reinstatement* that the State said it was abandoning its objection to the recused judge resuming control over the case. Further, the State's reason for abandoning its objection was that the Office of Capital Writs had made assurances that alleviated its concerns over a potential conflict of interest in the recused judge presiding over the case. *See id.* at *8. Those concerns might mean that the State would not oppose an order of reinstatement, but that does not mean that the recused judge can act in the absence of an order of reinstatement. *See id.* at *16-22. And we are not an appellate court confronted with completed trial proceedings in the which parties knowingly allowed a recused judge to act. We are the court of return in an Article 11.071 habeas proceeding and the habeas judge does no more than make recommendations to us. *See id.* at *27; TEX. CODE CRIM. PROC. art. 11.071, § 4(a). Because the relevant proceedings are not even complete, it is within our province to recognize that the judge purporting to act as factfinder in these proceedings lacks the authority to do so.

proceedings below and granted rehearing. *Ex parte Thuesen*, No. WR-81,584-01 (Tex. Crim. App. May 3, 2017)(not designated for publication).

Having considered applicant's motion, we now conclude that the motion was improvidently granted. We deny applicant's motion for rehearing and lift the stay of the lower court proceedings. No further motions for rehearing will be entertained.

Delivered: March 7, 2018

Publish