

CONCUR; and Opinion Filed June 1, 2016.



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00004-CR

No. 05-16-00005-CR

No. 05-16-00006-CR

EX PARTE WARREN KENNETH PAXTON JR.

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

CONCURRING OPINION

Before the Court sitting En Banc¹
Opinion by Justice Fillmore

I join the Court’s opinion and judgment, but write separately to address an issue related to appellant’s third application for writ of habeas corpus that was not addressed by the Court.

In order for a complaint regarding the manner in which a grand jury was constituted to be cognizable through pretrial writ of habeas corpus, the organization of the grand jury “must have been void as distinguished from voidable.” *Ex parte Becker*, 422 S.W.2d 442, 443 (Tex. Crim. App. 1970). As discussed in the Court’s opinion, the organization of a grand jury can be void when there has been an arbitrary disregard by the trial court of the statutes governing the selection and organization of the grand jury, vitiating and rendering the grand jury without authority. *Id.* at 444. The Court concludes, and I agree, that the actions by the trial court in impaneling the grand jury in this case did not constitute such an arbitrary disregard of the statutes

¹ Justices Myers, Evans, Lewis, and Whitehill not participating.

applicable to the selection of the grand jury² as to render appellant’s complaint cognizable through a pretrial writ of habeas corpus.

However, after determining the trial court’s failure to comply with the statutory requirements governing the selection of the grand jury constituted an “irregularity,” rather than an arbitrary disregard of the statute, the *Becker* court concluded the irregularity was “not of sufficient gravity to warrant holding the Grand Jury illegally constituted rendering void ipso facto every indictment returned by such Grand Jury, particularly without any showing of harm or prejudice.” *Id.* at 445. In our opinion in this case, we do not address whether appellant’s third application for writ of habeas corpus was cognizable on this basis.

The trial court’s actions in impaneling the grand jury in this case were a departure from the applicable statutory requirements, similar to the “irregularity” in *Becker*. However, the record reflects no showing of particularized harm to appellant from the trial court’s actions. Appellant complains of statutory, not constitutional, error and is required to show any error by the trial court affected his substantial rights. *See* TEX. R. APP. P. 44.2(b); *Becker*, 459 S.W.2d at 445. On the record before us, appellant has failed to establish his third application for writ of habeas corpus is cognizable at this stage of the proceeding on the basis he was harmed by an “irregularity” in the proceedings that resulted in impaneling of the grand jury.

Joined by Schenck, J.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

Publish
TEX. R. APP. P. 47

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² At the time the grand jury was impaneled, the relevant statutes were Act of May 5, 2001, 77th Leg., R.S., ch. 344, § 1, 2001 Tex. Gen. Laws 630, 630 (amended 2015) (current version at TEX. CODE CRIM. PROC. ANN. art. 19.01 (West Supp. 2015)); Act of May 25, 2005, 79th Leg., R.S., ch. 801, § 2, 2005 Tex. Gen. Laws 2763, 2763 (amended 2015) (current version at TEX. CODE CRIM. PROC. ANN. art. 19.08 (West Supp. 2015)); TEX. CODE CRIM. PROC. ANN. arts. 19.21–22, 19.24–25 (West 2015); and Act of May 13, 1969, 61st Leg., R.S., ch. 412, § 6, 1969 Tex. Gen. Laws 1364, 1366 (amended 2015) (current version at TEX. CODE CRIM. PROC. ANN. art. 19.23 (West Supp. 2015)).