Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00641-CV

EX PARTE Rollie Bryan **KEITH**

Original Habeas Proceeding[1]

Opinion by: Luz Elena D. Chapa, Justice
Concurring Opinion by: Marialyn Barnard, Justice

Sitting: Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: November 22, 2017

HABEAS CORPUS RELIEF GRANTED

Rollie Bryan Keith was arrested and jailed pursuant to an Order for Issuance of Capias issued by Associate Judge Eric J. Rodriguez. Keith has filed a petition for a writ of habeas corpus, complaining the Order and capias were issued in violation of his right to due process of law.

BACKGROUND

The Office of the Attorney General filed a motion for enforcement of a child support order against Rollie Bryan Keith, seeking a judgment for arrearages and to hold Keith in contempt. Although Keith had not yet been served, on May 22, 2017, he filed an answer and an objection to the assignment of an associate judge. On June 20, Keith was served with a notice of hearing and

[1] This proceeding arises out of Cause No. 2014-CI-09063, styled *In the Interest of T.M.H., a Child*, pending in the 285th Judicial District Court, Bexar County, Texas, the Honorable Eric Rodriguez presiding.

an order to appear on June 26, 2017, in Room 411 of the Bexar County Courthouse. Room 411 is the location of the Bexar County Child Support Court, which is presided over by Associate Judge Eric Rodriguez. Keith moved for a continuance on the grounds that he received insufficient service and notice and that the matter could not be heard by the Associate Judge in Child Support Court. *See* TEX. FAM. CODE ANN. § 201.005 (West Supp. 2017) (providing that referring court shall hear trial on merits if timely objection to associate judge is filed); *id.* § 157.062(c) (requiring service of notice not later than tenth day before hearing). At the hearing on the motion for continuance held in Presiding Court, District Court Judge Renée Yanta signed an order continuing the June 26, 2017 hearing and ordering the matter be reset at a mutually agreeable date and time in Presiding Court.

Several days later, the Assistant Attorney General sent Keith's counsel an email, attaching a waiver of service and a draft reset order to be signed by Keith and his attorney. The draft reset order states the case is reset for August 30, 2017 at 8:31 a.m. in Room 411, the Child Support Court, and orders Keith to appear. However, the draft reset order had not been signed by a judge, and the Assistant Attorney General's email stated:

> I am aware that you have objected to the Associate Judge; this is a mechanism to get the reset in place, not to get you to agree to the Associate Judge. I figure we can get a hearing set in Presiding once the service has been accomplished.

Both Keith and his counsel signed the draft reset order resetting the hearing on the motion to enforce. Both noted that their signatures were made "subject to, and without waiving previous objection to associate judge." Counsel's sworn petition for a writ of habeas corpus states that he also spoke to the Assistant Attorney General on the telephone, who told counsel that the matter would not proceed on the date in the reset order because of Keith's objection to the associate judge and the previous order requiring a setting in Presiding Court.

The trial court's docket sheet suggests the Associate Judge signed a Reset Order on June 29, 2017, and the subsequent Order For Issuance of Capias recites that Keith was served with a

notice to appear on August 30, 2017, for a hearing in the case. However, Keith's counsel swears he has no evidence that a copy of the reset order and notice to appear, signed by the judge, was ever served. Neither the Attorney General nor Respondent controverted this assertion in their responses in this original proceeding.

Neither Keith nor his counsel appeared in Child Support court on August 30, 2017. On September 11, 2017, the Associate Judge signed an order recommending issuance of a capias based upon Keith's failure to appear after having been "duly served with notice to appear at the designated date, time and place for a hearing on a Motion for Enforcement." This order was signed and "Approved and Ordered" by the Presiding Judge on September 12, 2017. A capias issued and Keith was arrested on October 4, 2017. His attorney filed this original habeas proceeding with a request for emergency relief the same day. Keith was released after this court granted the emergency motion.

DISCUSSION

Relator is entitled to discharge in a habeas corpus proceeding if the order requiring his confinement is void, either because the court that issued the order lacked jurisdiction to enter it or because it deprived relator of his liberty without due process of law. *In re Aguilera*, 37 S.W.3d 43, 47, 53 (Tex. App.—El Paso 2000, orig. proceeding); *see Ex parte Davis*, 161 Tex. 561, 344 S.W.2d 153, 154-57 (1961) (orig. proceeding). Keith contends the Order for issuance of Capias was issued in violation of his right to due process because he did not receive notice that the motion for enforcement had been reset for hearing and because the Associate Judge was without authority to issue the order for Issuance of Capias.

Section 157.061 of the Family Code requires the court to set a hearing and to order respondent to personally appear to respond to a motion for enforcement. TEX. FAM. CODE ANN. § 157.061 (West 2014); *In re R.G.*, 362 S.W.3d 118, 123 (Tex. App.—San Antonio 2011, pet.

denied). The notice of court setting and order to appear must be served on the respondent. *See* TEX. FAM. CODE ANN. § 157.065 (West Supp. 2017), §§ 157.166, 157.114 (West 2014). If a person who has been personally served, appeared, or answered does not appear at the designated time, place, and date to respond to the motion, the court may order a capias to be issued. *Id.* § 157.115 (West 2014). However, a person is deprived of his liberty without due process of law if he is committed to jail for failing to appear at a hearing without having been given notice he was required to appear at that time and place. *Ex parte Peterson*, 444 S.W.2d 286, 288-89 (Tex. 1969) (orig. proceeding). When the original hearing date is cancelled, postponed or otherwise vacated, due process requires that the relator be given notice of any subsequent reset hearing. *Id.* at 289; *Ex parte Garza*, 593 S.W.2d 114, 116 (Tex. Civ. App.—Amarillo 1979, orig. proceeding).

The record before us is devoid of any evidence that an order signed by the court designating the time, date, and place for the reset hearing was served on Keith or his counsel. In his response to the petition, Respondent Associate Judge stated he disagrees with the assertion that Keith was not served with the reset order because "it may be justifiably presumed that both Relator and his counsel were aware of the order" since they both signed it. However, it is undisputed that the document Keith and his counsel signed had not been signed by a judge. "An order is defined as 'a mandate; precept; command or direction authoritatively given; rule or regulation' [or] '[d]irection of court or judge made or entered in writing, and not included in a judgment, which determines some point or directs some step in the proceedings.' *See* BLACK'S LAW DICTIONARY 1096 (6th ed. 1990)." *In re B.L.R.P.*, 269 S.W.3d 707, 710-11 (Tex. App.—Amarillo 2008, no pet.) (holding that service plan signed by father was not an order of the court because it had not been signed by the court or adopted by the trial court). The document Keith and his attorney signed was simply a draft or proposed order. The document was not a court order with a command or authoritative direction because it had not been signed by a court. Moreover, the Assistant Attorney

General represented to Keith's counsel, both by email and by telephone, that the hearing *would not* be set at the date, time, and place stated on the draft order, and would instead be reset in Presiding Court in accordance with Judge Yanta's previous order. Neither response asserts or provides evidence that Keith or his counsel were given notice that the court had reset the hearing and ordered Keith to appear on August 30 for a hearing in Child Support court. Nor is the recitation of service in the capias sufficient to establish compliance with due process. *See Ex parte Cardwell*, 416 S.W.2d 382, 384 (Tex. 1967) (orig. proceeding) ("It would be unconscionable for us to establish a precedent in contempt cases that a trial court could order the seizure and incarceration of a citizen with no notice and then deprive him of a right to relief in a habeas corpus proceeding by reciting in its judgment that the person had been 'duly served.'"); *see also Ex parte Garza*, 593 S.W.2d at 116.

In summary, we conclude from the record before us that Keith was not given notice that he was required by the court to appear on August 30, 2017, in Child Support court. The Order for Issuance of a Capias and the capias are void, and Keith's arrest pursuant to the capias was without due process of law.[2] We grant relief and order the relator discharged.

Luz Elena D. Chapa, Justice

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[2] Because of our resolution of Keith's contention that he was not given notice of the hearing, we do not address whether the Order for Issuance of the capias was void because of Keith's objection to trial by an associate judge.