In re Brent Smith, No. WR-93,354-02 (Tex. Crim. App.-Dec. 7, 2022)

Attorneys. Kristin Etter (writ), Jerome Wesevich (writ), Keith Hampton (writ), Billy Pavord (writ)

Issue & Answer. Does a district court have statewide jurisdiction to hear a habeas writ before the filing of an indictment? **No.**

Facts. Governor Abbott declared a second disaster of illegal border crossings through his Operation Lone Star ("OLS"). The result has been lawlessness along the US-Texas Border, a place now seemingly devoid of Constitutional protections for people who enter the United States. This case involves Kinney County and its county attorney Brent Smith who spearheads Texas's scheme to punish Hispanics with illegal and perpetual confinement. This is accomplished by courts and prosecutors systematically denying arrestees access to the justice system. Because Kinney County courts have effectively suspended the writ of habeas corpus, the above-named attorneys and others (including Angelica Cogilano) have taken their clients' writs to be heard in Travis County. This is a writ of prohibition aimed at stopping them.

The briefing by Kristin Etter, et al. sets forth the real disaster at the border:

OLS features three central directives: (1) it authorizes "use of all available resources of state government . . . to assist and protect Texans from criminal activity and property damage;" (2) it "direct[s] DPS to use available resources [to prevent] criminal activity along the border, including criminal trespassing, smuggling, and human trafficking;" and (3) it commits state resources to support pretrial detention of persons arrested under OLS.

OLS's concentration of law enforcement and military resources along the border has produced roughly four thousand arrests for misdemeanor trespass since June 2021, and few other charges. Of the 3,245 persons who have been booked through the OLS processing centers in Del Rio and Hebbronville, 2,722 (84%) were charged in Kinney County. The trespass arrests have overwhelmed the Kinney County Court, which adjudicated zero misdemeanor cases in the 30 months prior to OLS's inception. To date there has not been a single trial of an OLS trespass case. Instead, an ad hoc system has emerged to dispense justice. It operates as follows: (1) arresting officers take OLS detainees to a tent in Val Verde County where they appear before a specially designated OLS magistrate via video link for Article 15.17 proceedings; (2) the magistrates set bond for persons charged with misdemeanor trespass and no criminal history at generally between $1,000 and $10,000; (3) the pretrial detainees, who are almost always indigent, have no means of posting bond, and are transferred more than 100 miles away from the county of arrest to await trial in state prison facilities, the first time this has been done in Texas history; (4) the Texas Supreme Court issued an order under which counsel are appointed to represent OLS detainees, yet significant delays in appointment of counsel routinely occur, and appointment after arrest ranges between 2 and 139 days; (5) usually between 30 and 90 days after arrest, the Kinney County Attorney files an information alleging Class B misdemeanor trespass with an enhancement if convicted to Class A penalty due to the disaster Proclamation, providing a maximum possible sentence of one year in jail; (6) generally between 90 and 120 days after arrest, judges set the cases for

arraignment, where each OLS detainee is offered a sentence of "time served" in exchange for a guilty plea; and (7) counsel for detainees must advise their clients that the only way to contest the trespass charge is to remain in jail.

Almost no detainees elect to wait in jail to contest the charges, even when they are demonstrably innocent. Clients uniformly decline to assert substantial defenses that they have to the trespass charge, including not being on private property at all and lack of notice that entry was forbidden. All OLS criminal trespass convictions to date were attained by guilty plea.

As this Court recently recognized, Article 17.151 is an important tool to protect pretrial detainees: "Article 17.151 is mandatory; if the State is not ready for trial within [15] days of the beginning of the defendant's detention, the defendant accused of a [class B misdemeanor] must be released on personal bond or by reducing the required bail amount." Ex parte Lanclos, 624 S.W.3d 923, 927 (Tex. Crim. App. 2021).

Counsel for OLS detainees have attempted to enforce Article 17.151 with limited success. See, e.g., Ex. Parte Eric Uriel Sifuentes, et al., No. 04-21-00579-CR, 2022 WL 202720, at *1 (Tex. App.-San Antonio Jan. 24, 2022). As Sifuentes recognizes, even though 153 OLS detainees were jailed between 114 and 153 days in violation of Article 17.151, all but four had pleaded no contest to leave jail prior to issuance of the appellate mandate directing their immediate release. Id. at *1-2. Practical delays in enforcing Article 17.151, even under the expedited procedures allowed in TEX. R. APP. P. 31, limit its efficacy. For example, the 153 Sifuentes petitioners applied for habeas relief due to violation of Article 17.151 on November 5, 2021, but the clerk did not accept the filing until December 5, 2021, and a hearing was not granted until December 13, 2021, and the appealable order denying habeas relief was not made of record on the court's docket until after December 22, 2021.

Efficacy of Article 17.151 has been further undermined by the deliberate efforts of Relator Smith and judges serving Kinney County. They sought and obtained the removal of three judges who indicated that they were prepared to hear habeas petitions based on violation of Article 17.151.

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One of the writs involves an individual who was arrested on what appears to be a Class C misdemeanor criminal trespass complaint on October 14, 2021, who has now been in custody on a $1,500 bond for 147 days since his arrest with no formal charges ever having been filed against him. In that case, despite having requested appointed counsel on October 14, 2021, undersigned counsel was not appointed until March 3, 2022. On that same date, undersigned counsel filed an Article 17.151 writ and is currently awaiting the acceptance of that filing by the Kinney County District Clerk. Counsel is attempting to have that case heard prior to April 22, 2022, given the blatant and inexcusable disregard for Article 17.151 and the excessive and illegal detention.

Analysis. A writ of prohibition requires a showing that (1) there is no adequate remedy at law, and (2) the party requesting prohibition has a clear right to relief. Here the Kinney County Attorney satisfies the first prong because he has no adequate remedy at law-the

Travis County District Court prohibited him from representing the State when hearing the underlying writ of habeas corpus. Conceivably, the Kinney County attorney could vindicate his rights on direct appeal, but [ironically] denying him access to the courts for such a lengthy period of time is not an adequate remedy. The crux of this case thus focuses on the second prong: whether the Kinney County Attorney has a clear right to relief.

Since the late 1800s Texas "one of the cardinal principles of our system of government was to localize the administration of law." In 1885 the State Supreme Court found that its original habeas jurisdiction over matters not first brought before a district court was limited to cases in which the applicant has shown a valid reason why it had circumvented the local judge. To not limit the exercise of this authority to extraordinary circumstances would lead to the absurdity of courts in far-flung places requiring parties and witnesses to incur the expense of travel.

If the Court of Criminal Appeals must abstain from exercising its habeas jurisdiction absent extraordinary circumstances, it only makes sense that only in extraordinary circumstances should a non-local court invoke habeas jurisdiction over matters arising in another county. Examples of extraordinary circumstances include: "long-term unavailability or serious backlog of courts in the county of the charges" or "a truly catastrophic event." The circumstances of this case do not rise to the level.

The citation to Texas Code of Criminal Procedure Article 11.06 as support for state-wide habeas jurisdiction is also unpersuasive. Article 11.06 provides that "Before indictment found, the writ may be returnable to any county in the State." Clearly this provision deals with felony offenses-a misdemeanor case (such as those involved here) cannot be considered "before indictment" if the State intends to file by information and no indictment is expected.

Comment. [sigh . . .]

The courts are the only check on Greg Abbott's power. And we all live in the Kingdom of Abbott unless our courts say we don't. Here they didn't. The Court of Criminal Appeals grounds its opinion in Texas's history of localized rule of law: "one of the cardinal principles of our system of government was to localize the administration of law." The irony is tragic. This aspect of our State's legal tradition derives from our roots as a slave state and post-civil-war legal traditions seeking to perpetuate some semblance of control over the Black population.

Texas's political structure was expressly designed to limit government's ability to impose social change, and to prevent the nonwhite population from threatening the traditional power of Whites (R.B. Campbell, 2003; Keyssar, 2000; Perkinson, 2010). An extremely decentralized system of government endured through reforms in the early 1970s, and Texas entered its period of intense modernization with a state legislature that met just once every two years, allocated limited powers to the governor, and established a state structure that deferred power to local government and away from centralized decision making (R.B. Campbell, 2003). Taxes were low and state institutions meager. For prison policy, this meant the emergence and perpetuation of plantation-style prisons that

endured into the early 1980s, with prisoners, mostly Black and Hispanic, toiling fields in rural Texas under guard by poorly paid rural Whites (Perkinson, 2010).

MC Campbell Theoretical Criminology, 2012.

Was the court's discussion of the wisdom of those who made the rules in 1885 a useful argument on a superficial level? Yes. It is regrettably aloof to the fact that many will view this citation as an approving memorialization of the shameful aspects of our history. Brown people are being imprisoned at our border and they cannot meaningfully avail themselves to our courts. That-any way you *choose* to interpret the law-is an absolute wrong the redress for which high courts must exist.