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⚖ Vol. 29, No. 8 - March 8, 2021

Case Name: [State ex rel Ogg](#)

- **NATURE OF CASE:** Mandamus Proceedings
 - **COUNTY:** Harris
 - **CCA. CASE No.** WR-91-936-01
 - **DISPOSITION:** Relief Granted
 - **OPINION:** [Presiding Judge Sharon Keller](#)
 - **TRIAL COURT:** CCrCL 16; Hon. Darrell Jordan
 - **LAWYERS:** [Carmen Roe](#) (Defense / Real Party in Interest); [John David Crump](#) (State / Relator); [Seth Hopkins](#) (Judge Jordan)
- DATE OF OPINION:** March 3, 2021
VOTE: 8-1-0

⚖ **208 Trial Courts / Authority to Act:** Jacob Straughan, the real party in interest and the defendant in the underlying cases, sought to waive his right to a jury trial and have a bench trial. By statute, the State has the authority to refuse to consent to such a waiver, and the State refused to consent. The trial court, however, concluded that it had the power, under the Texas Supreme Court's Emergency Order in response to COVID-19, to suspend that statutory provision and conduct a bench trial despite the State's refusal to consent. The State first sought mandamus relief from the 14th Court of Appeals, but that court declined to grant relief. [In re State ex rel. Ogg](#), 610 S.W.3d 607 (Tex.App. - Houston [14th] 2020)(see ⚖, [Vol. 28, No. 43](#); 11/02/2020). The State now seeks mandamus relief against the Court of Appeals.

Holding: We have issued mandamus relief in the past when a trial court has indicated that it intends to conduct a bench trial despite the State's lack of consent to a defendant's waiver of a jury. *** The question we confront is whether the Emergency Order changes that. Under the Government Code, the Texas Supreme Court, "*notwithstanding any other statute . . . may modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor.*" An order modifying or suspending procedures under this statute is effective for no more than 90 days unless renewed by the Chief Justice of that court. We take notice that the country is in the middle of a pandemic due to the virus known as COVID-19 and that this pandemic has caused the Governor to declare a disaster. *** Although a judge's authority is different from the jurisdiction of the court, a judge's lack of authority to

preside over a proceeding can, depending on the reason for that lack of authority, invalidate the proceeding itself. The ability to modify or suspend “procedures” cannot by itself be a magic wand that allows a judge to preside over a proceeding over which he is otherwise barred from presiding. For example, this phrase in the Emergency Order would not suddenly give a recused judge the power to decide on his own to reassume general authority over a case. *** If the Supreme Court’s Emergency Order were really intended to permit trial courts to enlarge their own jurisdiction and to permit trial judges to enlarge the types of proceedings over which they have authority, we would expect a provision to explicitly say so. It is true that part 3 proper says “subject only to constitutional provisions,” but that is still not an explicit statement that courts and judges have the ability enlarge their jurisdiction and authority over proceedings. *** Turning to the present case, we conclude that the consent requirement is not merely procedural, but implicates the trial court’s authority to preside over a particular type of proceeding. We have indicated that a judgment obtained from a bench trial conducted without the State’s consent in violation of 1.13 is a nullity for double-jeopardy purposes. The judge simply does not have the authority to conduct a bench trial when the State has not consented. He cannot use the Emergency Order’s authorization to modify or suspend procedures to confer that authority upon himself. If he could, then he could do the same thing to a criminal defendant regarding his statutory right to a jury assessment of punishment (after being convicted by a jury at the guilt stage of trial). *** It is clear and indisputable that the Emergency Order did not confer upon the trial court the authority to conduct a bench trial without the State’s consent.

Concurring / Dissenting Opinions: Judge David Newell concurred without note

([David A. Schulman](#)) When the Court of Appeals’ decision was delivered, John and I both recognized its importance. Given this unanimous decision, it’s clear that the CCA also saw that. It probably recognized some of the problems we envisioned. So, problem solved.