

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DISTRICT COURT WASHINGTON CO. OK
JILL L. SPITZER, COURT CLERK

NOV - 8 2013

BY V. Goodlett DEPUTY

FILED

Stephens Media, LLC, dba Bartlesville Examiner-
Enterprise,
Plaintiff/Appellee,

vs

City of Bartlesville, Bartlesville Police Department,
and District Attorney's Office for the 11th Judicial
District, Oklahoma,
Defendants/Appellants.

)
) Supreme Court Case Number: 110568
)
) Lower Court Case Number: CV-2012-8
)
) Lower Court: Washington County District Court
)

MANDATE

On the 4th day of November , 2013 , the Honorable Chief Justice Tom Colbert of the Oklahoma Supreme Court ordered the Clerk of the Supreme Court to issue mandate, pursuant to the rules of the Oklahoma Supreme Court, in the above-styled appeal from the Washington County District Court.

On appeal, the following judgment was entered on October 2nd, 2013:

DISMISSED

Costs of \$0.00 are taxed and allowed pursuant to Section 978 of Title 12 of the Oklahoma Statutes and the rules of the Oklahoma Supreme Court.

Therefore, the Washington County District Court is directed to enter of record the above judgment and to issue process or take further action as required by the order or opinion issued in this appeal.

MICHAEL S. RICHIE
Clerk of the Appellate Courts

By Deborah Keys, Deputy

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

OCT - 2 2013

MICHAEL S. RICHIE
CLERK

STEPHENS MEDIA, LLC, dba
BARTLESVILLE EXAMINER-
ENTERPRISE,

Plaintiff/Appellee,

vs.

Case No. 110,568

CITY OF BARTLESVILLE,
BARTLESVILLE POLICE
DEPARTMENT, and DISTRICT
ATTORNEY'S OFFICE FOR THE
11TH JUDICIAL DISTRICT,

Defendants/Appellants.

APPEAL FROM THE DISTRICT COURT OF
WASHINGTON COUNTY, OKLAHOMA

HONORABLE CURTIS L. DELAPP, TRIAL JUDGE

TRIAL COURT ORDER AFFIRMED; APPEAL DISMISSED

James M Elias
BREWER, WORTEN, ROBINETT
Bartlesville, Oklahoma

For Plaintiff/Appellee

Kevin D. Buchanan
DISTRICT ATTORNEY
Bartlesville, Oklahoma

For Defendant/Appellant
District Attorney's Office
for the 11th Judicial District

OPINION BY P. THOMAS THORNBURGH, PRESIDING JUDGE:

The District Attorney's Office for the 11th Judicial District appeals the district court's entry and refusal to stay enforcement of a writ of mandamus commanding a co-defendant, the Bartlesville Police Department, to deliver a certain videotape in its possession to the Bartlesville Examiner-Enterprise newspaper. The District Attorney's motion to stay the writ was denied for lack of standing. On review, we agree with the district court and find that the District Attorney has no standing to seek a post-judgment stay or to prosecute this appeal.

BACKGROUND

This appeal, filed by the District Attorney's Office for the 11th Judicial District of Oklahoma ("District Attorney"), seeks review of the district court's decision issuing and refusing to stay the enforcement of a writ of mandamus commanding the co-defendant, the Bartlesville Police Department ("BPD") to deliver a certain videotape in its possession to the Plaintiff/Appellee, Stephens Media, LLC, d/b/a Bartlesville Examiner-Enterprise ("Examiner"). As part of the appellate record in this case, the Court has had available the amicus briefs of various professional associations and organizations which added to the Court's understanding of some of the broader policy issues involved.

The videotape at issue is a surveillance tape, obtained by BPD from a local hospital, depicting certain BPD officers accused of using excessive force on a handcuffed citizen. The videotaped actions of the officers led to the termination of

employment of three officers, and the placing of a fourth officer on administrative leave. Two of the terminated BPD officers were also charged with assault and battery. At the time this appeal was commenced, one of the officers was convicted of that criminal charge, while the second was awaiting trial.

BPD secured a copy of the videotape by way of a search warrant served on the hospital. The videotape was turned over to the Oklahoma State Bureau of Investigation. After the investigation was completed and charges were filed, the Examiner filed a petition for declaratory and injunctive relief and for a writ of mandamus seeking the production of the videotape under the Oklahoma Open Records Act. The City of Bartlesville, BPD, and District Attorney were named as defendants.

Following a number of hearings in which all of the defendants participated, the trial court issued a writ of mandamus commanding only BPD to deliver the videotape to the Examiner. BPD complied with the writ and immediately delivered the videotape to the Examiner, which in turn released it to the public.¹

As the videotape was being delivered to the Examiner, District Attorney filed a motion to stay enforcement of the writ. The trial court denied the motion

¹ Indeed Exhibit 3, which was admitted at the February 28, 2012 motion hearing without objection, includes correspondence from counsel for the BPD and City to the Examiner, stating, "The law does provide that if the Court finds that the public interest outweighs the reason for denying the furnishing of the video, then the Court can order the City to furnish the video. **If such an order is obtained, the City will certainly comply.**" (Emphasis added).

for lack of standing. District Attorney then filed its petition in error, challenging both decisions. BPD did not appeal the district court's decision issuing the writ, did not request a stay in the enforcement of the writ, and has not joined District Attorney in this appeal.

The Examiner moved to dismiss this appeal, raising the threshold issue of District Attorney's standing to appeal. The Supreme Court has deferred consideration of the dismissal motion to this stage of the proceedings.

STANDARD OF REVIEW

The dispositive issue presented to this Court is standing. Standing refers to a person's legal right to seek relief in a judicial forum. *It may be raised as an issue at any stage of the judicial process by any party or by the court sua sponte. Matter of the Estate of Doan*, 1986 OK 15, ¶ 7, 727 P.2d 574, 576.

Whether District Attorney has standing to challenge the trial court's writ of mandamus directing BPD to deliver the videotape in BPD's possession, or to seek a stay in the enforcement of the order with which BPD has already complied, are questions of law. We independently determine legal issues *de novo*, and as an appellate court claim for ourselves "plenary, independent and non-deferential authority to re-examine [the] trial court's legal rulings." *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084.

Standing determines whether a person is the proper party to seek adjudication of an issue; it does not decide the merits of an issue itself.² The key element is whether the party whose standing is challenged “has sufficient interest or stake in the outcome.” *Indep. School Dist. No. 5 v. Spry*, 2012 OK 98, ¶ 3, 292 P.3d 19, 20. “Only one whose substantial rights are injuriously affected may appeal from a decision,” regardless of whether the decision is legally correct. *Rowe v. Rowe*, 2009 OK 66, ¶ 9, 218 P.3d 887, 890.

ANALYSIS

While the merits of the court’s decision to order release of the videotape by BPD is not at issue, it is nevertheless instructive to review the relevant provisions and purpose of the Oklahoma Open Records Act, 51 O.S.2011 & Supp. 2012 §§ 24A.1 through 24A. 29 (the “Act”).

I. THE OKLAHOMA OPEN RECORDS ACT

The Act provides that “[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours.” 51 O.S.2011 § 24 A.5. “Record” is defined by the Act as “all documents . . . regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or

² Much of District Attorney’s brief is devoted to addressing the merits of the court’s decision that the videotape was indeed a record maintained by law enforcement which was subject to disclosure under the Act.

possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.” 51 O.S.2011 § 24A.3(1). The Act does not apply to records “specifically required by law to be kept confidential.” 51 O.S. 2011 § 24A.5(1).

The purpose of the Act is “to ensure and facilitate the public’s right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power.” 51 O.S. 2011 § 24A.2. Each public body subject to the Act is responsible for making records available to the public. *See* 51 O.S. 2011 §24A.5(5).

“Unless a record falls within a statutorily prescribed exemption in the Act, the record must be made available for public inspection.” *Citizens Against Taxpayer Abuse, Inc. v. City of Okla. City*, 2003 OK 65, ¶ 12, 73 P.3d 871, 875. “Any person denied access to records of a public body or public official . . . may bring a civil suit for declarative or injunctive relief, or both,” and, “[i]f successful, shall be entitled to reasonable attorney fees.” 51 O.S.2011 § 24A.17(B). In ruling on a request for disclosure the public body and the reviewing court must consider that, pursuant to the intent of the Act, disclosure of information is to be favored over a finding of exemption. *Tulsa Tribune Co. v. Okla. Horse Racing Comm’n*, 1986 OK 24, ¶ 23, 735 P.2d 548, 555 (superceded by statute on other grounds).

II. THE DISTRICT ATTORNEY LACKS STANDING

Standing has traditionally been defined as whether a party has sufficient interest in an otherwise justiciable controversy to obtain judicial resolution of the controversy. *See Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, 280 P.3d 328; *Fent v. Contingency Review Bd*, 2007 OK 27, ¶ 7, 163 P.3d 512, 519. The Court has consistently held that standing to raise issues in a proceeding must be predicated on an interest that is “direct, immediate and substantial.” *Wells Fargo Bank, N.A.* at ¶ 7, 280 P.3d at 332 (quoting *Estate of Doan* at ¶ 7, 727 P.2d at 576).

Here, the order makes it crystal clear that District Attorney has no standing to contest the writ, whether by stay at the trial court level or on appeal. **On its face, the writ is directed solely at BPD and specifically excludes any application of its provisions, or of the Act, to the Office of the District Attorney.** The writ issued by the trial court provides:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Defendant, Bartlesville Police Department, shall immediately upon receipt of this Writ produce copies of the videotapes or DVD video surveillance videos seized under SW-11-81 and listed in the attached Search Warrant Return to the Plaintiff and return the Writ with a certificate of having done as commanded. Further, having found that the Plaintiff is entitled to these items from the Defendant, Bartlesville Police Department, **the Court does not reach the issue of the application of the Open Records Act to the other two Defendants, the City of Bartlesville and the District Attorney’s Office for the 11th Judicial District.**

(Emphasis added).

District Attorney, in his quest to continue a conversation in which he is not involved, and despite the clear language of the writ, has attempted to advance the argument that he 'still has a dog in the fight' by suggesting that the trial court (1) was wrong in its interpretation of the Act that the videotape was a record subject to the Act under the Oklahoma Supreme Court holding in *Fabian & Associates, P.C. v. State ex rel. Dept. of Public Safety*, 2004 OK 67, 100 P.3d 703³; (2) erred by considering hearsay evidence proffered by the attorney for the victim depicted in the videotape that he waived any claim of confidentiality; and (3) erred because pre-trial disclosure of videotape evidence like the kind at issue here could hamper future criminal prosecutions in other cases.⁴

The burden is on the party invoking a court's jurisdiction to establish its standing to seek relief in the court. *Toxic Waste Impact Group, Inc. v. Leavitt*, 1994 OK 148, ¶ 8, 890 P.2d 906, 910-11. Establishing standing to obtain judicial review of a decision requires three essential elements:

First, the [party] must have suffered an 'injury in fact'—an invasion of a legally-protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.' . . .'
Second, there must be a causal connection between the injury and the

³ The Court in *Fabian* made clear that an examination of the Act, beyond the immediate facts of the specific case before it, required that videotapes in the possession of a law enforcement agency that contain facts concerning an arrest are open for public inspection pursuant to § 24A.8 (A)(2) of the Act.

⁴ It must be noted here that District Attorney admitted that his office had played portions of the videotape in question at a local meeting of the Fraternal Order of Police Lodge 117 and that many of those who were present had no direct involvement in the case.

conduct complained of. . . . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be redressed by a favorable decision.”

Id. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1994)).

Specifically with regard to standing to appeal, the Supreme Court has held that “one must be aggrieved by a court’s decision in order to bring an appeal from it,” with the “appropriate inquiry on a standing question” being whether “the [appellant] has in fact suffered injury to a legally protected interest as contemplated by statutory or constitutional provisions.” *Rowe v. Rowe*, 2009 OK 66 at ¶¶ 8 and 9, 218 P.3d at 890-91. Furthermore, “[a]s a general rule, this court will not decide abstract or hypothetical questions that are not directly related to the granting of actual relief.” *Morton v. Adair County Excise Bd.*, 1989 OK 174, ¶ 10, 780 P.2d 707, 711.

None of the arguments advanced by District Attorney meet the test outlined in Oklahoma jurisprudence. None demonstrate that a legally protected interest, held by District Attorney, was infringed by the trial court’s issuance of the writ to BPD, and none involve the other defendants to the litigation who clearly have no interest in continuing to litigate this matter. Accordingly we hold that District

Attorney has failed to show a legal right to seek relief from the trial court orders at issue here.⁵

III. RIGHT TO AWARD OF FEES

In its brief on appeal, Examiner has requested an award of appellate attorney fees. It does not cite as authority § 24A.17 of the Open Records Act, but seeks its appellate fees instead pursuant to 20 O.S.2011 § 15.1, characterizing the arguments advanced by the District Attorney in this appeal as frivolous, not well grounded in the facts presented in the record, and not supported under Oklahoma law. We would characterize the appeal as meritless. However, we deny the request at this time due to Examiner's failure to file a separate motion for appellate fees as required by Supreme Court Rule 1.14(B)(amended by order of the Supreme Court, at 2013 OK 67). Inasmuch as the amended, current version of Rule 1.14 did not become effective until August 1, 2013—which was after briefing was complete—our denial is **without prejudice** to Examiner's filing a separate motion in compliance with the Rule.

We further note, however, that had we reached the merits of Examiner's attorney fee request under 20 O.S.2011 § 15.1 (and not under 51 O.S.2011 §

⁵ It is difficult to see how District Attorney could as a practical matter receive any of the relief he requested on remand since the tape has already been produced and made available to the public, and the prosecution of the subject officers has long since been completed. Additionally, since the trial court made no determination that District Attorney had any obligation to produce the tape or any other material in his possession there was no demonstrated disruption of District Attorney's policy or practice that was immediately impaired.

24A.17), we likely would have been constrained to deny the application based on the lack of an authorizing statute allowing this Court to make such an award against a state agency. “Attorney’s fees may not be awarded unless the recovery is authorized by statute or bargained for in a contract.” *Allen v. State ex rel. Board of Trustees*, 1988 OK 99, ¶ 17, 769 P.2d 1302, 1309. While 20 O.S.2011 § 15.1 allows an appellate court to tax appellate attorney fees as costs if the court finds an appeal meritless, the statute “does not abrogate” a state agency’s immunity from civil liability. *Id.*; see also *Tellier, L.S., Annot., “Liability of State, or Its Agency or Board, for Costs in Civil Action to Which It is a Party,”* 72 A.L.R.2d 1379 at §2 (“such authorization must be express and cannot be implied. . . . [G]eneral statutes providing for the imposition of costs cannot ordinarily be construed as showing a legislative intention to include the state within their terms”).

CONCLUSION

We find that Appellant, the District Attorney’s Office for the 11th Judicial District, Oklahoma, does not have standing to prosecute an appeal from the writ, and that the decision of the trial court denying District Attorney’s motion to stay the enforcement of the writ, issued against the Bartlesville Police Department, was correct. The decision denying the motion to stay the writ is affirmed, and District Attorney’s appeal is dismissed.

TRIAL COURT ORDER AFFIRMED; APPEAL DISMISSED.

GOODMAN, J., and RAPP, J., concur.

October 2, 2013

I, Michael S. Richie, Clerk of the Appellate Courts of the State of Oklahoma do hereby certify that the above and foregoing is a full, true and complete copy of the _____

Op 17

_____ in the _____ entitled cause, as the same remains on file in my office.

In Witness Whereof I hereunto set my hand and the Seal of said Court at Oklahoma City, this _____ day of _____

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Clerk

Alley

By

DEPUTY