

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 18 2017

DANIEL K. HOLTZCLAW,)
)
 APPELLANT,)
)
 v.)
)
 THE STATE OF OKLAHOMA,)
)
 APPELLEE.)

Case No. F-2016-62

FILED UNDER SEAL

**EMERGENCY MOTION REQUESTING GUIDANCE REGARDING
TRANSMITTAL OF RECORD OF REMANDED EVIDENTIARY HEARING**

Comes now the State of Oklahoma, by and through Attorney General Mike Hunter, and respectfully asks this Court to provide guidance to the District Court and, if deemed necessary, issue further directives regarding the *in camera* proceedings ordered in this case. The State once again notes the exceptional circumstances presented by this case and the equally unique methods that have been necessary to both protect the defendant's constitutional rights and uphold Oklahoma law regarding confidential personnel records. The Office of the Attorney General has yielded its strong commitment to transparency only because the law required it, and does not – in any general sense – advocate the sealing of documents, *ex parte* hearings, or closure of proceedings to the public except in the most extraordinary cases. This has been one of them. Good faith has guided every movement in this litigation to ensure that the Constitution and laws of this State are fully enforced and the rights of all interested parties protected. The District Court determined there was no feasible way to comprehensively explore

whether the material at issue was legally protected from public disclosure without doing so within an environment that itself was free from any risk of public disclosure. As discussed below, however, another peculiar question on which the District Court seeks direction arose at the end of the remanded proceedings to which only this Court can provide a clear answer. The State provides the following information:

1. On May 4, 2017, the State filed with this Court under seal a motion with accompanying documents. The motion and documents were provided this way based upon the State's belief, upon investigation, that documents were accumulated as a result of an unfinished personnel review. As such, the documents were protected from any public disclosure – even from the defendant in this case and his counsel – by Oklahoma law as confidential personnel records. *See* 51 O.S.Supp.2014, § 24A.7(A). Part of the material generated, however, appeared to have potential value to a specific claim the defendant has pending before this Court and upon which he has requested an evidentiary hearing. Because the State was forbidden by law from turning any of the material over to the defendant, the undersigned provided it all to this Court and requested that a neutral judicial determination be made regarding the defendant's access. The State also asked that an interim protective order be placed on the material due to its status as

confidential personnel records.

2. On May 30, 2017, this Court issued a sealed *Order Remanding Cause To District Court of Oklahoma County For In Camera Hearing, Granting State's Motion For Interim Protective Order and Holding Appeal In Abeyance Pending Outcome Of The In Camera Hearing* (hereafter, "Order"). This Court granted the State's request for an interim protective order "governing [the State's motion filed May 4, 2017] and the documentation, materials, reports and other information contained therein" (Order, p. 7). Among the other directives contained therein, this Court ordered that after the *in camera* hearing and orders issued by the trial court, "the Clerk of this Court shall deliver copies of the record [of the *in camera* hearing] to Holtzclaw's appellate counsel and the Attorney General" (Order, p. 6). A briefing schedule was also set forth that, in relevant part, permits the defendant "to supplement his Application for Evidentiary Hearing" based upon the record of the *in camera* hearing in the District Court (Order, p. 6). A copy of this sealed Order was transmitted to "the District Court of Oklahoma County, the Honorable Timothy R. Henderson, District Judge; the Court Clerk of Oklahoma County; Appellant; and counsel of record" (Order, p. 8).
3. On June 8, 2017, the Honorable Timothy R. Henderson, District Judge, issued a sealed *Order Setting Hearing* pursuant to this Court's Order of May

30, 2017. Judge Henderson's order was served on the Honorable Mike Hunter, Attorney General; Gayland Gieger, Oklahoma County Assistant District Attorney; and the undersigned. A hearing date was set for June 26, 2017.

4. On June 26-27, 2017, an *in camera* evidentiary hearing was held before Judge Henderson on the questions submitted by this Court in the Order. Three witnesses testified about the materials submitted to this Court. Neither the defendant nor his counsel were present and, due to the nature of the proceedings, the hearing was closed to the public. Pursuant to this Court's Order, a court reporter recorded the hearing and received exhibits. The District Court's review of the materials was exhaustive and the contents of the materials provided to this Court on May 4, 2017, were deeply explored on the record.
5. The *in camera* proceedings have concluded, and the transcripts and record of the hearing were filed under seal with the District Court Clerk on July 17, 2017. The District Court is now in the process of preparing the requisite Findings of Fact and Conclusions of Law pursuant to this Court's Order (*see* Order, p. 6).

DISCUSSION

On June 27, 2017, after the close of evidence at the *in camera* hearing pursuant to this Court's Order, the undersigned was requested to seek guidance

from this Court regarding the following question: In the event the District Court decides that all of the material is protected by law, yet none or only some of it discoverable (a question that must be answered under the Order), must/should the defendant gain access to the entire record of the hearing?

The District Court has declined the undersigned's invitation to postpone the current schedule, or request from this Court any additional time, before announcing its Findings of Fact and Conclusions of Law. The triggering event for transmittal of the record to the parties, therefore, remains intact; hence, this Motion Requesting Guidance. Barring any further Order of this Court, the defendant and his counsel will receive information about confidential personnel records protected by law even if such (or portions thereof) is deemed by the District Court to be not discoverable (*see* Order, pp. 5-6).

As the State noted from the outset, the way this issue developed was highly unusual and had it arisen under usual circumstances, *i.e.*, before a trial is held, would have been easier handled. Faced with legally protected material to which the defendant might have a constitutional right of access on appeal, the State submitted all of it to this Court requesting a remand to the District Court for a judicial *in camera* inspection to determine whether, and to what extent, the defendant was entitled to it. *See Frederick v. State*, 2001 OK CR 34, ¶¶ 87-90, 37 P.3d 908, 933-34; *Amos v. District Court of Mayes County*, 1991 OK CR 74, ¶ 2,

814 P.2d 502, 502-503. And this Court remanded the matter to the District Court to make those findings. However, the unique nature of the materials, particularly how they were generated and why, required the District Court to do more than merely inspect them. The District Court decided that testimony was also required to adequately answer the questions posed by this Court in the Order and directed the State to assist in carrying out that effort.

The District Court was charged with the ultimate determination whether the material was, in fact, protected from disclosure by Oklahoma law and to what extent, if any, the defendant may be constitutionally entitled to it (Order, p. 5). Witnesses were therefore called, and the prosecutor facilitated the District Court's inquiry by thoroughly examining those witnesses in an *ex parte* proceeding. To answer these questions, inquiry of the witnesses by both the prosecutor and the District Court about the materials necessarily involved delving into information protected, or potentially protected, by 51 O.S.Supp.2014, § 24A.7(A). Thus, the District Court interpreted this Court's Order as permitting neither the presence of the defendant nor his counsel during the *in camera* proceedings. All of the witnesses had to explain when and why the documents were produced in order to determine whether they were within the scope of a personnel record/review. One witness – who served a dual purpose of shining light on both the issue of personnel records and whether his notations on a document provided to this

Court had exculpatory/impeachment value – testified about each one of the comments to help the District Court (and this Court) better understand the context in which those comments were offered. The witness ultimately explained whether each comment was intended to be negative, that is, substantively inaccurate; neutral such that the matter might have been better explained and/or included a minor mistake immaterial to the immediate context of the document; or a positive affirmation. The testimony was therefore detailed. But the record of the remanded proceedings reflects that all of the commentary was almost certainly made in the context of a legally protected confidential employee review process and included within the materials provided to this Court. And no court has yet determined the defendant or his counsel may see any of it.

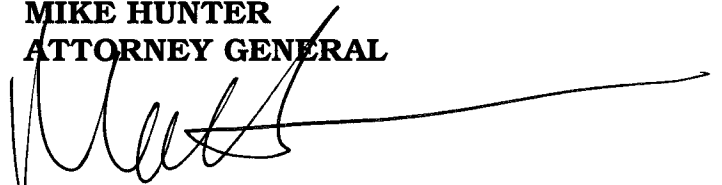
The *ex parte* nature of the hearing was consistent with this Court's description in the Order of the materials (of which the defendant and his counsel were made aware) and its declination to provide the actual materials to the defendant and his counsel in the first instance before a final judicial determination was made concerning the extent of his access. The Order does not, however, provide guidance regarding the record of the *in camera* proceedings to the extent the District Court determines the defendant is not entitled to some, or any, of the materials if they are protected and non-discoverable because that record now – as described above – effectively reveals their contents. It is in this

spirit that the State requests guidance from this Court of the potentially problematic nature of transmitting the record of the remanded proceedings to both parties upon the Clerk's receipt of the District Court's written findings of fact and conclusions of law (see Order, p. 6). Redaction of the material deemed non-discoverable from that which is discoverable by the defendant prior to transmittal could be a viable option provided that everything transmitted, i.e., discoverable material that also qualifies as a confidential personnel record, remains subject to a protective order. Guidance is needed to determine whether a complete unredacted transcript, as well as a redacted version, based on the findings and conclusions of the District Court, should be prepared and provided to this Court.

Based on the foregoing, the State seeks direction from this Court concerning how the record of the proceedings from the *in camera* hearing should be ultimately prepared and transmitted pursuant to the Order.

Respectfully submitted,

**MIKE HUNTER
ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read 'Matthew D. Haire', written over the printed name of the Assistant Attorney General.

**MATTHEW D. HAIRE, OBA #14916
ASSISTANT ATTORNEY GENERAL**

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CERTIFICATE OF MAILING

On this 18th day of July, 2017, a true and correct copy of the foregoing was mailed to:

James H. Lockard, OBA # 18099
Michael D. Morehead, OBA # 18114
Homicide Direct Appeals Division
P.O. Box 926
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MATTHEW D. HAIRE