

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DANIEL K. HOLTZCLAW,)
)
 Appellant,)
)
 v.) Case No. F-2016-62
)
 THE STATE OF OKLAHOMA,)
)
 Appellee.)

REPLY TO STATE'S DIRECTED RESPONSE TO
DEFENDANT'S MOTION TO UNSEAL THE PROCEEDINGS

Appellant, Daniel K. Holtzclaw, by and through his undersigned appellate counsel replies to the State of Oklahoma's directed Response to Defendant's Motion to Unseal the Proceedings, filed under seal on February 15, 2018. It is Appellant's further request that this Court enter a final ruling on the disposition of the information brought forth by the State in its sealed motion in this Court, filed on May 4, 2017; and that the Court set a briefing schedule for the filing of the State's response to the Brief of Appellant, filed in this Court on February 1, 2017.

At the outset, Appellant believes some clarification is in order. There are actually two inter-related but ultimately separate issues that must be addressed. One issue is Appellant's Motion to Unseal the Proceedings, filed under seal in this Court on August 2, 2017. The other issue, which is more paramount and central to the pending appeal, is what to do with the information the State of Oklahoma filed under seal in this Court on May 4, 2017, asking for an *in camera* determination of whether this information may be disclosed to Appellant. Appellant's arguments on this latter issue are contained within Appellant's Objection to Judge Henderson's *ex Parte* Findings of Fact and Conclusions of Law (hereinafter "Objection"), filed under seal in this Court on August 29, 2017.

In its Response to Defendant's Motion to Unseal the Proceedings

(hereinafter "Directed Response"), the State of Oklahoma narrowed its argument to "the limited question of whether the sealed documents/information should remain sealed from public view," addressing Appellant's arguments in his Objection only "where necessary to comply with this Court's directive." *Directed Response* at 1-2. In so doing, however, the State conflates two different arguments Appellant made on the separate issues into an argument that Appellant has never made [REDACTED]

[REDACTED] Appellant's motion twice specifically acknowledged that the information brought forth by the State may remain sealed until a final determination is made as to whether that information is protected from disclosure by law and, if so, whether disclosure is nonetheless required by the United States Constitution.¹ *See Motion to Unseal* at 7-8, 10.

One thing the State is absolutely correct about is that "circumstances have

¹ That Appellant's argument was directed at everything else but the allegedly protected information is self-evident from the following observation: What is truly unusual about the issue in this case, however, is not that the issue has arisen on appeal, or even that it was at the behest of the State, not the defense, but that the secrecy that is arguably necessary to protect the privileged information from disclosure has been expanded to cover the whole process. In the ordinary course of legal proceedings, the request for access to protected information, and what defense counsel expects to find in that protected information, is open and public, not under seal. The request for the information is not sealed. The State's argument, if any, that the information is legally protected, and the basis therefor, is not sealed. The fact that the court will be reviewing the information is not under seal, and hearings about whether the information is protected and/or discoverable are not kept secret from either the public or the defense. And once it is determined that the confidential information must be provided to the defense, it is allowed to be offered openly and publicly into evidence at trial.

Motion to Unseal at 5.

changed since the filing of the defendant's Motion [to Unseal Proceedings] on August 2, 2017." *Directed Response* at 3. At the time of filing the Motion to Unseal, all Appellant's counsel knew about the information brought forth by the State was that it pertained to Elaine Taylor. Counsel knew nothing of the nature and quality of the material, except that it supposedly involved "personnel records" and that it must have been at least minimally relevant for the State to have come forward with the information in the first instance. After the matter was remanded to the district court on May 30, 2017, a secret *ex parte* hearing was held on June 26 and 27, 2017, without the knowledge, presence, or participation of Appellant or his counsel. It was this level of secrecy, causing grave "concerns that a binding ruling detrimental to Appellant's constitutional rights will be entered without Appellant's ability to even be heard," *Motion to Unseal* at 9, that prompted Appellant to file his Motion to Unseal the Proceedings, wherein he specifically requested "an opportunity to cross-examine [the witnesses presented at the *ex parte* hearing] and/or to offer argument to the trial court" before a final ruling is entered, *id.* at 11. This request was frustrated, however once the district court rendered a decision on the merits in orders filed in this Court on August 8 and 10, 2017.

Since the filing of the Motion to Unseal, however, Appellant was eventually allowed to inspect the transcript and exhibits (but still has not seen the actual documents filed by the State on May 4, 2017) of the secret *ex parte* hearing held on June 26 and 27, 2017. Pursuant to this Court's July 20, 2017, Clarification Order (see p. 5, granting either party 30 days to file objections to Judge Henderson's Findings of Fact and Conclusions of Law), Appellant filed his Objection on August 29, 2017. Moreover, in an order filed on August 24, 2017, at least some of the pleadings have been ordered unsealed. Accordingly, because (1) the proceedings have been at least partially unsealed, (2) counsel has had an

opportunity to read the transcripts of the *ex parte* hearing and to file objections to the district courts findings and conclusions, and (3) said findings and conclusions were nevertheless entered without Appellant having any opportunity to participate in the decision-making process, Appellant's Motion to Unseal Proceedings has largely been rendered moot.

What is far more paramount at this time is a final ruling on the disposition of the information the State filed in this Court under seal on May 4, 2017. It is now over a year since Appellant filed his brief in chief, and almost ten months since the State filed its sealed motion. Under the Court's original Remand Order and subsequent Clarification Order, the briefing in this case is currently stayed, pending a final determination of the disposition of the sealed information. Appellant would therefore respectfully request that this Court "cut to the chase," as it were, and enter a final ruling on the disposition of the sealed information. If it is determined that the information is not protected from disclosure by law, then the Court can further order that all the pleadings, transcripts, and exhibits be ordered unsealed. If, on the other hand, it is determined that the information is protected from disclosure by law and that, as the district court found, Appellant is not entitled to disclosure of any of the evidence, despite the State's admissions to the contrary, then this issue can be put to bed and a final deadline set for the State's answer brief. If only part of the information is determined to be discoverable, then the Court can order disclosure of that information, with guidance over how it can be used (*i.e.*, can Appellant share the information with his expert to see if there is anything of value to add to the Application for Evidentiary Hearing filed simultaneously with Appellant's brief in chief, and can Appellant have leave to supplement said Application?) from that point. A final ruling on the disposition of the evidence will therefore both also essentially decide Appellant's Motion to Unseal the

Proceedings, as well as put this case back on track to a more timely resolution of the issues raised on appeal.

Appellant has already set out his legal arguments and authority regarding the sealed information in his Objection filed on August 29, 2017, and will not further waste the Court's time by repeating it here. However, there are two points raised by the State in its Directed Response that must be addressed. First, the State argues that this Court "generally upholds a district court's findings [at a remanded evidentiary hearing] when they are supported by the record." *Directed Response* at 8 (citing *Warner v. State*, 2006 OK CR 40, ¶¶ 92-105, 144 P.3d 838, 873-75). The State fails to note a glaring difference between the hearing held in *Warner* and other such cases, in which both parties are given a full and fair opportunity to participate, cross-examine witnesses, and provide the court with legal citations and argument, and the secretive *ex parte* hearing that took place in this case. Appellant's first opportunity to present any evidence, legal authority, or argument in favor of his position came when he filed his objection to the findings and conclusions. Accordingly, deference to the trial court's one-sided findings and conclusions would not be proper in this instance. Indeed, it does not even seem possible to both defer to the trial court's *ex parte* findings and also give due consideration to Appellant's counter-arguments, which the district court refused to even hear.

Second, the State argues that Appellant "wholly fails to show why the City (of Oklahoma City) should be forced to release confidential personnel information - information to which he has access - to the public when the Legislature has clearly given the City the option of deciding when and how much of such material may be kept confidential." *Directed Response* at 16. As already noted, the State here conflates Appellant's argument in his Objection that he is entitled to this information with his argument in the Motion to Unseal the

Proceedings that everything else *but* this material should be unsealed. The State is correct in noting that "the appropriate body to make the discretionary determination whether they are released to the public is the 'public body' that generated them; here, the City of Oklahoma City." *Id.* at 16 (citing OKLA. STAT. tit. 51, § 24A.7(A) (Supp. 2014)). What the State fails to recognize, however, is that not only has the city of Oklahoma City not stated a formal determination to keep this information confidential, the City has acted in a manner directly contrary thereto. [REDACTED]

[REDACTED]

[REDACTED] Nothing in the Open Records Act gives a state agency or entity the right to disseminate public information to some people but not to others.

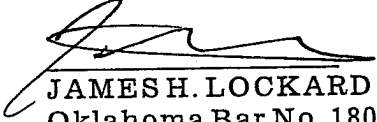
Finally, even if it is determined that all of the sealed information is protected from disclosure by law, Appellee has still not countered, despite numerous opportunities to do so, Appellant's argument that disclosure is constitutionally mandated. *See Objection* at 9-11. This Court has held that "the State, like defendants, must raise proper objections and preserve errors and/or opportunities, otherwise they are waived." *A. J. B. v. State*, 1999 OK CR 50, ¶ 9, 992 P.2d 911, 912. Indeed, the State conceded from the outset that Appellant was entitled to disclosure of at least *some* of this information [REDACTED]


[REDACTED]

Based on the foregoing, Appellant respectfully requests that this Court enter a final ruling on the disposition of the sealed information and set a briefing schedule for supplementing the Application for Evidentiary Hearing, if allowed, and for the State's answer brief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on the date of filing of the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the Office of the Attorney General of the State of Oklahoma.


JAMES H. LOCKARD