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IN THE
COURT OF APPEALS OF INDIANA

SHARON DICKERSON, et al,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 45A04-0703-CV-124
	)	
LAKE COUNTY, INDIANA and	)	
STATE OF INDIANA,	)	
	)	
Appellees.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffrey J. Dywan, Judge
Cause No. 45D11-0509-PL-110

November 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Sharon Dickerson and other taxpayers (the "Taxpayers") appeal the dismissal of their complaint against Lake County, Indiana and the State of Indiana.

We affirm.

ISSUE

Whether the Taxpayers lacked standing to bring their action.

FACTS

Article 8, Section 1 of the Indiana Constitution sets forth the duty of the General Assembly "to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." *See also* Ind. Code § 20-49-3-2 (Chapter 3 "is in furtherance of the duties that are imposed exclusively upon the general assembly by the Constitution of the State of Indiana in connection with . . . maintenance of a general and uniform system of common schools[.]"). In support of this aim, Article 8 provides for the Common School Fund (the "Fund"), the principal of which "shall remain a perpetual fund, which may be increased, but shall never be diminished," with the income "inviolably appropriated to the support of Common Schools, and to no other purpose whatever." IND. CONST., art. 8, § 3; *see also* I.C. § 20-49-3-2 (Chapter 3 "is in furtherance of the duties that are imposed exclusively upon the general assembly by the Constitution of the State of Indiana in connection with . . . investment and reinvestment of the [Fund].").

Regarding revenue sources for the Fund, Section 2 of Article 8 provides the following:

> The Common School fund shall consist of the Congressional Township fund, and the lands belonging thereto;
>
> The Surplus Revenue fund;
>
> The Saline fund and the lands belonging thereto;
>
> The Bank Tax fund, and the fund arising from the one hundred and fourteenth section of the charter of the State Bank of Indiana;
>
> The fund to be derived from the sale of County Seminaries, and the moneys and property heretofore held for such Seminaries; from the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue;
>
> All lands and other estate which shall escheat to the State, for want of heirs or kindred entitled to the inheritance;
>
> All lands that have been, or may hereafter be, granted to the State, where no special purpose is expressed in the grant, and the proceeds of the sales thereof; including the proceeds of the sales of the Swamp Lands, granted to the State of Indiana by the act of Congress of the twenty eighth of September, eighteen hundred and fifty, after deducting the expense of selecting and draining the same;
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> Taxes on the property of corporations, that may be assessed by the General Assembly for common school purposes.

(Emphasis added).

In 2003, the General Assembly passed House Enrolled Act 1001. Section 115(b) of House Enrolled Act 1001 stated:

> After June 30, 2002, and before July 1, 2005, the treasurer of state may not transfer any amount in the abandoned property fund to the common school fund. If any money was transferred before June 30, 2003, in a manner that is inconsistent with this subsection, the treasurer of state shall take the

> necessary action to restore the money to the abandoned property fund and transfer the money as required under subsection (a).

Section 115(a) of House Enrolled Act 1001 provided that any abandoned-property funds exceeding $500,000 shall be transferred to the state general fund. Section 115, however, expired on July 1, 2004. *See* 2003 Ind. Legis. Serv. 224.

In 2003, the then-treasurer of state, as the exclusive custodian of the Fund, pursuant to Indiana Code section 20-49-3-4, sought an advisory opinion from the Office of the Attorney General regarding the lawfulness of Section 115 given the prohibition on diminishing the principal of the Fund under Section 3. The then-treasurer stated that he was "reluctant" to make transfers out of the Fund without an "assurance that the transfers would be lawful." (State's App. 78). On June 17, 2003, the Office of the Attorney General advised that "to the extent that Section 115(b) of House Enrolled 1001 . . . requires the Treasurer to diminish the principal of the Common School Fund, it violates Article 8 of the Indiana Constitution." (State's App. 78).

On May 1, 2006, the Taxpayers filed a declaratory judgment action pursuant to Indiana Trial Rule 57 and the Uniform Declaratory Judgment Act, Indiana Code section 34-14-1-1, *et seq*. The Taxpayers sought to "stop Lake County government from diverting and wasting funds mandated for public education under Art. VIII, § 2 of the Indiana Constitution . . . ." (State's App. 70).

The Taxpayers alleged in their complaint that the State violated Article 8, Section 3 of the Indiana Constitution by 1) transferring $25 million for the Fund to the state general fund pursuant to House Enrolled Act 1001 and diverting revenue intended for the

Fund as provided for in Section 2 of Article 8 of the Indiana Constitution; 2) failing to "adequately track revenue sources constitutionally mandated for deposit in the [Fund]"[1] (State's App. 75); and 3) allowing amounts paid for bail to be used to satisfy civil judgments against criminal defendants, pursuant to Indiana Code sections 35-33-8-7[2] and 35-33-8-8.[3]

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[1] Indiana Code section 20-49-3-16 provides:

> (a) All fines, forfeitures, and other revenue that, by law, accrue to the fund shall be collected as provided by law. The money shall be paid into the state treasury and becomes a part of the fund in the custody of the treasurer of state. The county auditor shall keep a record of all fines and forfeitures and all other revenue that, by law, accrues to the fund. Semiannually on May 1 and November 1, the county auditor shall issue the county auditor's warrant payable to the treasurer of state in an amount equal to the total collections in the six (6) months preceding of fines and forfeitures and all other revenue that, by law, accrues to the fund or to the permanent endowment fund.
> (b) At the time of payment of principal, interest, or accretions to the treasurer of state, the county auditor shall file a report with the auditor of state. The report must set forth the amount of the following:
>
> (1) The county's common school fund.
> (2) Interest on the county's common school fund.
> (3) Fines and forfeitures from the county.
> (4) All other accretions included in a payment from the county to the treasurer of state.
>
> Forms for making the report shall be furnished by the auditor of state.
> (c) All money collected as interest on the fund shall be paid into the state treasury and shall be distributed for the uses and purposes provided by law.

[2] Indiana Code section 35-33-8-7 provides, in relevant part, as follows:

> (b) In a criminal case, if the court having jurisdiction over the criminal case receives written notice of a pending civil action or unsatisfied judgment against the criminal defendant arising out of the same transaction or occurrence forming the basis of the criminal case, funds deposited with the clerk of the court under section 3.2(a)(2) [providing that the trial court may require a defendant to execute 1) a bail bond by depositing cash or securities with the clerk of the court in an amount not less than 10% of the bail; and 2) an agreement allowing the court to retain all or part of the deposit to pay fines, costs, fees, and restitution, if any] of this chapter may not be declared forfeited by the court, and the court shall order the deposited funds to be held by the clerk. If there is an entry of final judgment in favor of the plaintiff in the civil action, and if the deposit and the bond are subject to forfeiture, the criminal court shall order payment of all or any part of the deposit to the plaintiff in the action, as is necessary to satisfy the judgment. The court shall then order the remainder of the deposit, if any, and the bond forfeited.

* * *

As to Lake County, the Taxpayers alleged that it violated Article 8, Section 3 by failing to "collect all monies due to the [Fund] from the cities and towns under its jurisdiction"; and not attempting "to collect the 90% portion of forfeited cash bail bonds." (State's App. 76).

The Taxpayers requested that the trial court order Lake County and the State to cease diminishing the funds held in the Fund; declare Indiana Code sections 35-33-8-7 and 35-33-8-8 unconstitutional; order the State "to develop accounting and auditing procedures which adequately protect the [Fund]"; and award the Taxpayers costs and fees pursuant to Indiana Code section 34-14-1-10.

On June 19, 2006, the State filed a motion to dismiss pursuant to Indiana Trial Rule 12(B)(1) and (6) and memorandum in support thereof. The State asserted that the Taxpayers are "not a real party in interest because they do not have a personal stake in

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> (d) After a bond has been forfeited under subsection (b), the clerk shall mail notice of forfeiture to the defendant. In addition, unless the court finds that there was justification for the defendant's failure to appear, the court shall immediately enter judgment, without pleadings and without change of judge or change of venue, against the defendant for the amount of the bail bond, and the clerk shall record the judgment.
> (e) If a bond is forfeited and the court has entered a judgment under subsection (d), the clerk shall transfer to the state common school fund:
>
> (1) any amount remaining on deposit with the court (less the fees retained by the clerk); and
> (2) any amount collected in satisfaction of the judgment.

[3] Indiana Code section 35-33-8-8 provides, in relevant part, as follows:

> (b) In a criminal case, if the court having jurisdiction over the criminal case receives written notice of a pending civil action or unsatisfied judgment against the criminal defendant arising out of the same transaction or occurrence forming the basis of the criminal case, funds deposited with the clerk of the court under section 3.2(a)(2) of this chapter may not be declared forfeited by the court, and the court shall order the deposited funds to be held by the clerk. If there is an entry of final judgment in favor of the plaintiff in the civil action, and if the deposit is subject to forfeiture, the criminal court shall order payment of all or any part of the deposit to the plaintiff in the action, as is necessary to satisfy the judgment. The court shall then order the remainder of the deposit, if any, forfeited.

the outcome of this action and do not have an immediate danger of sustaining direct injury"; the Taxpayers lacked standing; the matter is moot; the Taxpayers' "request for injunctive relief is improper pursuant to the Separation of Powers Doctrine"; and the Taxpayers failed to state a claim upon which relief may be granted because the State is not subject to declaratory action under the Uniform Declaratory Judgments Act. (State's App. 1, 2).

The Taxpayers filed a response to the State's motion to dismiss on July 18, 2006. The Taxpayers argued that they "are attempting to procure enforcement of a public duty and therefore have standing to prosecute th[eir] claim." (State's App. 27). The State followed with a reply on July 25, 2006. Finding that the Taxpayers lacked standing to bring their claim for declaratory relief, the trial court dismissed the Taxpayers' complaint on October 6, 2006.

On November 13, 2006, Lake County also filed a motion to dismiss and memorandum in support thereof. Lake County argued that the Taxpayers lacked "standing to bring their claim for declaratory and injunctive relief . . . ." (State's App. 52). The Taxpayers filed their opposition to Lake County's motion to dismiss on December 13, 2006, and Lake County filed its reply on December 21, 2006. On January 10, 2007, the trial court dismissed the Taxpayers' complaint as to Lake County for lack of standing.

DECISION

The Taxpayers assert that the trial court erred in dismissing their complaint under Trial Rule 12(B)(6) for lack of standing. Specifically, the Taxpayers argue that they have standing under the public-standing doctrine.

A motion to dismiss for lack of standing is properly brought under Trial Rule 12(B)(6). *State ex rel. Steinke v. Coriden*, 831 N.E.2d 751, 754 (Ind. Ct. App. 2005), *trans. denied*.

> When reviewing a ruling on a T.R. 12(B)(6) motion, we must take as true all allegations upon the face of the complaint. We may dismiss only if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint.

Id. (citations omitted).

"[W]hile we do not test the sufficiency of the facts alleged with regards to their adequacy to provide recovery, we do test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred." *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 890 (Ind. Ct. App. 2007). Although we review the pleadings in a light most favorable to the nonmoving party and draw every reasonable inference in favor of that party, we "need not accept as true conclusory, nonfactual assertions or legal conclusions." *Id.*

We review a trial court's dismissal for lack of standing de novo. *Steinke*, 831 N.E.2d at 754. Whether the Taxpayers have standing is a question of law, which "does not require deference to the trial court's determination." *Id.*

> Under our general rule of standing, only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered

> or were in immediate danger of suffering a direct injury as a result of the complained of conduct will be found to have standing. Absent this showing, complainants may not invoke the jurisdiction of the court. It is generally insufficient that a plaintiff merely has a general interest common to all members of the public.

State ex re. Cittadine v. Indiana Dep't of Transp., 790 N.E.2d 978, 979 (Ind. 2003) (internal citations omitted).

Under the public-standing doctrine, however, "a limited exception [is] carved out of the general standing requirement." *Smith v. City of Hammond*, 848 N.E.2d 333, 340 (Ind. Ct. App. 2006). Namely, "'[w]hen a case involves enforcement of a public rather than a private right the plaintiff need not have a special interest in the matter nor be a public official.'" *Cittadine*, 790 N.E.2d at 980 (quoting *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 n.3 (Ind. 1990)). Thus, "the public standing doctrine eliminates the requirement that the relator have an interest in the outcome of the litigation different from that of the general public." *Id.* Furthermore, "the principles embodied in the public standing doctrine have also frequently been applied in cases challenging the constitutionality of governmental action, statutes, or ordinances." *Id.* at 981.

> However, persons availing themselves of the public standing doctrine nevertheless remain subject to various limitations. . . . [A]lthough the Indiana Declaratory Judgment Act expressly authorizes Indiana courts "to declare rights, status, and other legal relations whether or not further relief is or could be claimed," Ind. Code § 34-14-1-1, to the extent that persons claiming public standing may be seeking only declaratory relief, they must be persons "whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise . . . ." I.C. § 34-14-1-2.

Id. at 984 (citations to cases omitted).

A person is "affected" where they have "some personal or property interest in the outcome of the appeal." *Lake County Plan Comm'n v. County Council*, 706 N.E.2d 601, 602-03 (Ind. Ct. App. 1999), *trans. denied*. A controversy is "real" if the person seeking declaratory relief has a "'direct personal interest'" in the matter. *Id.* at 603 (citing *City of Hammond v. Bd. of Zoning*, 152 Ind.App. 480, 284 N.E.2d 119, 126 (1972)). Thus, any case brought pursuant to the Indiana Declaratory Judgment Act may be neither moot nor seeking only an advisory opinion. *City of Hammond*, 284 N.E.2d at 126 (citing *Rauh v. Fletcher Sav. & Trust Co.*, 207 Ind. 638, 194 N.E. 334, 336 (1935)).

An "'advisory opinion" is such where "the plaintiff has not a concrete legal interest sufficient to warrant an action or else the defendant has no tangible conflicting interest; . . . the court's judgment, if rendered, would not change or affect legal relations.'" *Id.* Whether a party is seeking a declaratory judgment, rather than an advisory opinion, hinges on "whether the plaintiff and the defendant have a sufficient and adequately conflicting legal interest to justify the rendering of a judgment and whether the judgment applies to a concrete factual issue . . . ." *Id.*

Accordingly, the party seeking declaratory relief

> must have a substantial present interest in the relief sought, <u>not merely a theoretical question or controversy but a real or actual controversy</u>, or at least the "ripening seeds of such a controversy," and that a question has arisen affecting such right which ought to be decided in order to safeguard such right.

Town of Munster v. Hluska, 646 N.E.2d 1009, 1012 (Ind. Ct. App. 1995) (emphasis added) (quoting *Morris v. City of Evansville*, 180 Ind. App. 620, 390 N.E.2d 184, 186 (1979)).

Moreover, "[w]hile the availability of taxpayer or citizen standing may not be foreclosed in extreme circumstances, it is clear that such status will rarely be sufficient." *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995) (emphasis added); *see also Embry v. O'Bannon*, 798 N.E.2d 157, 167 (Ind. 2003) (reiterating that public standing is limited to extreme circumstances) (Sullivan, J., concurring). To invoke the exercise of judicial power, a private individual "must ordinarily show that some direct injury has or will immediately be sustained." *Id.* "'[I]t is not sufficient that he has merely a general interest common to all members of the public.'" *Id.* (quoting *Terre Haute Gas Corp. v. Johnson*, 221 Ind. 499, 45 N.E.2d 484, 486 (1942)).

1. Section 115 House Enrolled Act 1001

Here, the Taxpayers challenged Section 115 of House Enrolled Act 1001 as unconstitutional. Section 115 of House Enrolled Act 1001, however, expired on July 1, 2004.

Hence, any issue regarding monies allegedly being diverted pursuant to this act is moot. *See Gibson v. Hernandez*, 764 N.E.2d 253, 255 ("The long-standing rule in Indiana courts has been that a case is deemed moot when no effective relief can be rendered to the parties before the court."). Accordingly, the Taxpayers fail to show a "direct personal interest" in the relief sought. *See City of Hammond*, 284 N.E.2d at 126; *see also Hluska*, 646 N.E.2d at 1012.

2. Accounting

As to the State's "accounting and auditing procedures," (State's App. 77), the Taxpayers argue that the State violates Article 8, Section 7 of the Indiana Constitution

"by maintaining a system of accounting and auditing that does not adequately track revenue sources constitutionally mandated for deposit" in the Fund. Taxpayer's Br. 75. We disagree.

Article 8, Section 7 of the Indiana Constitution does not require the State to track revenue sources as asserted by the Taxpayers. Rather, it provides that "[a]ll funds, held by the State, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created." IND. CONST., art. 8, § 7.

Thus, the Taxpayers raise merely a theoretical controversy. *See Hluska*, 646 N.E.2d at 1012. Additionally, the Taxpayers also have failed to allege or demonstrate any direct injury as a result of the State's accounting procedures. *See Pence*, 652 N.E.2d at 488 (finding that private individuals must show that they have or will sustain a direct injury).

3. Bail Schemes

Finally, the Taxpayers also seek a declaration that Indiana Code sections 35-33-8-7 and 35-33-8-8 are unconstitutional because they provide for bail bonds to be applied toward judgments and fees, with any remainders forfeited and paid into the Fund.[4] The

[4] We note that one of the Taxpayers, Herbert Smith, has challenged Indiana's statutory bail scheme several times in the past. *See Smith v. City of Hammond*, 388 F.3d 304 (7th Cir. 2004) (where Smith brought a suit under 42 U.S.C. § 1983, alleging that the trial court's refusal to accept a surety bond issued by Smith deprived him of his property interest in his bondsman license, the United States Court of Appeals for the Seventh Circuit held that dismissal of Smith's action was required; Smith did not hold a protected due process property interest in his license; Smith was not entitled to a preliminary injunction; Smith lacked standing; and Smith courted sanctions due to his frivolous litigation); *Lake County Clerk's Office v. Smith*, 766 N.E.2d 707 (Ind. 2002) (finding Smith failed to carry his burden of proving that Indiana's statutory bail scheme violates the Equal Protection Clause of the United States Constitution and Article 1, Section 23 of the Indiana Constitution); *Smith v. Lake County, et al.*, 863 N.E.2d 464 (Ind. Ct. App. 2007) (affirming, after remand, summary judgment against Smith on his complaint in favor of

Taxpayers assert that this statutory scheme is unconstitutional as it conflicts with Article 8, Section 2 of the Indiana Constitution, providing that the Fund shall be derived from "the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue[.]"[5]

Again, the Taxpayers fail to allege or demonstrate that any direct injury or harm has or will be sustained under Indiana's bail scheme, *see Pence*, 652 N.E.2d at 488; the Taxpayers fail to demonstrate that their rights have been affected by Indiana's bail scheme, *see Cittadine*, 790 N.E.2d at 984; and the Taxpayers fail to demonstrate or allege "extreme circumstances, which are required to grant [them] taxpayer standing." *See Smith v. City of Hammond*, 848 N.E.2d 333, 340 (Ind. Ct. App. 2006) (finding Smith could not assert taxpayer or citizen standing in challenging the trial court's failure to immediately transfer forfeited bond money to the Fund pursuant Indiana Code section 35-33-8-7(e)(2) because he failed to allege extreme circumstances or an adequate remedy), *trans. denied*.

Given the reasons cited above, we find that the Taxpayers lack standing to pursue their action. Accordingly, we find no error in dismissing their complaint.

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defendants on the basis that Smith's claim regarding enforcement of Indiana Code section 35-33-8.5-4 is barred by res judicata and remanding for a hearing on damages pursuant to Indiana Appellate Rule 66(E) for Smith's frivolous appeal), *reh'g denied*; *Smith*, 848 N.E.2d at 340-41 (noting Smith's repeated challenges to "the constitutionality of the Indiana bail scheme under both Title 27 and Title 35" and therefore remanding to the trial court to determine whether sanctions are warranted); *Finlon v. Golec*, No. 45A03-0503-CV-123 (Ind. Ct. App. Sept. 23, 2005).

[5] We note that "bail" is "[a] security . . . required by a court for the release of a prisoner who must appear at a future time," whereas a fine is a "pecuniary criminal punishment . . . ." BLACK'S LAW DICTIONARY 150, 664 (8th ed. 2004). *See also* IND. CONST. art 1, § 16 (providing, "Excessive bail shall not be required. Excessive fines shall not be imposed.").

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.