TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00314-CV

Randy Travis, Appellant

v.

Texas Department of Public Safety and the Texas Attorney General, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 353RD JUDICIAL DISTRICT
NO. D-1-GN-13-001617, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING

MEMORANDUM OPINION

In this appeal from a summary judgment granted to the Texas Attorney General in a case involving the Texas Public Information Act (PIA), Randy Travis seeks to withhold from public disclosure a redacted version of the dashboard recording of his August 2012 arrest for driving while intoxicated. The Attorney General, in a letter opinion issued after Travis pleaded guilty to the DWI charge, determined that the dashboard recording, with certain portions redacted for privacy reasons, was subject to disclosure under the PIA as part of a completed investigation. Travis filed the underlying suit in Travis County District Court seeking a declaration that the redacted dashboard recording be withheld in its entirety. The district court granted the Attorney General's motion for summary judgment. For the reasons set forth below, we will affirm.

Background

On August 7, 2012, a witness called 911 to report a one-vehicle accident on FM 922 outside Tioga, Texas.[1] When Texas Department of Public Safety officers arrived at the scene, they found an unclothed and apparently intoxicated Travis, the driver of the vehicle. Travis's blood was later tested and shown to have a blood-alcohol content of greater than .015. Ultimately, Travis was arrested and charged with "Driving While Intoxicated BAC >=0.15." He was also charged with "Retaliation" for threatening to kill the arresting officer.[2]

Shortly after Travis's arrest, DPS received PIA requests seeking, among other information not at issue here, the dashboard recording of the arrest. Based on its understanding that the information was, at that time, protected under the PIA's law-enforcement exception,[3] DPS asked the Attorney General for an open-records letter ruling about withholding the requested information.[4] Because the criminal charges against Travis were still pending, the Attorney General advised that the information be withheld under PIA's law-enforcement exception.[5]

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[1] Tioga is about 60 miles north of Dallas.

[2] According to Travis, who claims he does not remember the events of August 7, 2012, his combativeness and other actions that night resulted from possible medical conditions, including a concussion. He also explains that, in 2013, he was hospitalized for viral cardiomyopathy after a viral upper respiratory infection and suffered a stroke. Since that time, he explains, he has been unable to sing or speak and has difficulty walking.

[3] *See* Tex. Gov't Code § 552.108.

[4] *See id.* § 552.301(a) (requiring governmental body to seek decision from Attorney General regarding information it wishes to withhold).

[5] *See* Tex. Att'y Gen. OR2012-13643 (citing Tex. Gov't Code § 552.108(a)(1) (creating exception to disclosure for information held by law-enforcement agency dealing with "detection, investigation, or prosecution of crime")).

Some time thereafter, the State agreed to drop the retaliation charge against Travis in exchange for a guilty plea on the DWI charge and assessment of various other punishments, including a fine, probated jail time, and community service. The trial court presiding over the criminal case also granted Travis's motion for a protective order, "finding" that the dashboard recording was protected from public disclosure under "the doctrine of common-law privacy" and Travis's "right to privacy guaranteed to all citizens by the [U.S. and Texas] Constitution[s]." The trial court also "found" that the dashboard recording was "confidential and therefore excepted from the requirements of the [PIA]." Ultimately, the trial court vacated this protective order after the Dallas Court of Appeals, in an original proceeding brought by the Department, held that the PIA prohibited the trial court from ordering the dashboard recording destroyed.[6]

The day after Travis's guilty plea, the Department received another PIA request, this one requesting "the arrest reports from [Travis's arrest on August 7, 2012]," as well as "any patrol car dashcam videos from that night." As it had before, the Department sought an open-records letter ruling regarding the request, but the Attorney General's response this time was that only some portions of the requested information were protected from disclosure. Specifically, the Attorney General's letter opinion noted that the responsive information consisted of a completed investigation and that the PIA requires disclosure of completed investigations under section 552.022(a)(1) unless the information is confidential.[7]

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[6] *See In re Texas Dep't of Pub. Safety*, 416 S.W.3d 912, 913–14 (Tex. App.—Dallas 2013, no pet.) (orig. proceeding) (citing Tex. Gov't Code § 552.022(b) ("A court . . . may not order a governmental body . . . to withhold . . . any category of public information described in Subsection (a) . . . unless the . . . information is confidential under [the PIA] or other law.")).

[7] *See* Tex. Att'y Gen. OR2013-07330, at 2; *see also* Tex. Gov't Code § 552.022(a)(1) (providing that, "excepted as provided by Section 552.108," "a completed . . . investigation made

The Attorney General's letter opinion did, however, acknowledge that certain aspects of the dashboard recording were confidential and, thus, not subject to disclosure. For example, the Attorney General explained that Travis's medical records, emergency-services records, and prescription-medication information were confidential under the Texas Medical Practices Act and the Health and Safety Code.[8] The Attorney General also determined, relevant here, that certain aspects of the dashboard recording—anything showing Travis's unclothed body from the waist down[9]—implicated Travis's constitutional privacy interests. The remainder of the dashboard recording, the Attorney General continued, did not implicate his privacy interests, nor was it confidential under his common-law right to privacy.[10] Accordingly, the Attorney General concluded that, except for the medical information and the portions of the video showing Travis's unclothed body from the waist down, the Department could not withhold the requested information.[11] In other

. . . by a governmental body" is "not excepted from required disclosure unless made confidential under [the PIA] or other law"); *Abbott v. Dallas Area Rapid Transit*, 410 S.W.3d 876, 880 (Tex. App.—Austin 2013, no pet.) (describing section 552.022 categories of information as "core public information" that must be disclosed unless "expressly confidential under other law" (citing *Texas Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 114 (Tex. 2011)).

[8] *See id.* at 3 (citing Tex. Gov't Code § 552.101; Tex. Occ. Code § 159.002(b)–(c)).

[9] Although the letter opinion does not explicitly describe the portions of the dashboard recording that implicate Travis's constitutional privacy interests, the Attorney General asserts, and Travis does not seem to disagree, that the letter opinion is referring to any part of the recording depicting the lower half of Travis's unclothed body.

[10] *See* Tex. Att'y Gen. OR2013-07330, at 5–6 (citing Tex. Gov't Code § 552.101; *Ramie v. City of Hedwig Vill.*, 765 F.2d 490 (5th Cir. 1985) (regarding constitutional privacy interests); *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976) (regarding common-law privacy)).

[11] *See id.*

words, the Attorney General informed the Department that is must release a redacted version of the dashboard recording.

Travis filed suit for declaratory relief in Travis County District Court, challenging the Attorney General's letter ruling and seeking judgment that the redacted dashboard recording be withheld in its entirety under the PIA and the protective order issued by the trial court in the criminal matter.[12] In the alternative, Travis asked for judgment that portions of the redacted dashboard recording be withheld. Thereafter, the State moved for summary judgment on the grounds that the requested information is not excepted from required disclosure under section 552.101 because Travis failed to demonstrate that any of the information falls under the exceptions for common-law and constitutional privacy. The State also moved for summary judgment on Travis's claims for monetary damages and attorney fees, asserting that such claims are barred by sovereign immunity. The district court granted the State's motion, and Travis now appeals from that judgment.

Discussion

Travis purports to assert only three challenges to the district court's summary judgment, but he raises several issues in his brief. Travis urges this Court, in making its decision here, to take into account that the release of the redacted audio-visual recording of Travis's arrest will be more intrusive than the release of the written transcript of that same recording, and that we also take into account Travis's inability to speak and, thus, inability to "defend himself" in the wake of the redacted dashboard recording's release. Travis also contends that he raised questions of fact

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[12] *See* Tex. Gov't Code § 552.3215(a), (e) (allowing action for declaratory judgment against governmental body that violated PIA by person who claims to be victim of violation).

regarding his common-law privacy and Fourth Amendment right to privacy claims that preclude summary judgment on those claims. Finally, Travis contends summary judgment was improper because his claim for common-law privacy was previously adjudicated in the criminal proceeding and, further, that the redacted dashboard recording constitutes an audio-visual depiction of his medical and mental conditions.

Nature of recording and Travis's ability to "defend himself"

First, Travis urges us to apply a separate standard of review to PIA requests for audio-video recordings because, he asserts, videos inherently possess a greater capacity for harm. Although he acknowledges that the PIA offers no such alternative standard of review, he suggests that we create one given that the dashboard recording at issue here was requested for its shock value and not the underlying information. We decline to do so. As Travis acknowledges, the PIA provides no such alternative and, more importantly, "a bedrock policy of the PIA as currently written is that 'we may not consider the requesting party's purpose or use for the information.'"[13]

Travis also asks us to consider his inability to speak in the wake of the redacted dashboard recording's release. He asserts—although acknowledging that there is no case law to support such an argument—that it would be "patently unfair, and a violation of both his common law and constitutional rights to privacy, to permit release of the [redacted dashboard recording] of

[13] *City of Carrollton v. Paxton*, 490 S.W.3d 187, 204–05 (Tex. App.—Austin 2016, no pet. h.) (quoting *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995) (citing Tex. Gov't Code § 552.222))); *see Industrial*, 540 S.W.2d at 685 (noting that PIA "makes clear that the motives of the individual requestor are not relevant to the determination of whether the matter requested is 'public information'"); *but see City of Carrollton*, 490 S.W.3d at 204–205 (noting exception where purpose involves violent acts that are the concern of *Cox Tex. Newspapers*).

his arrest knowing that he is not able to speak and explain or defend himself." While we understand that Travis objects to the release of the redacted dashboard recording—which was, in fact, redacted to account for his privacy—we are bound by law to construe the PIA as written and as construed by precedent.

Common-law privacy

Common-law privacy protects core public information from mandatory disclosure under the PIA if "(1) the information contains highly intimate or embarrassing facts about a person's private affairs, the publication of which would be highly objectionable to a reasonable person; and (2) the information is not of a legitimate concern to the public."[14]

Estoppel arguments

Travis asserts that during the prosecution of his DWI arrest, the Attorney General acknowledged that the dashboard recording contained information that was highly intimate with embarrassing facts, the publication of which would be highly objectionable to a reasonable person.[15] Having so acknowledged Travis's common-law privacy rights in the recording in Travis's criminal trial, Travis urges here, the Attorney General is estopped from arguing otherwise in this case. Relatedly, Travis contends that the Attorney General is collaterally estopped from challenging the privacy issue because the trial court in the criminal proceeding made the same finding in the protective order. In sum, Travis claims, the positions taken in the prosecution of his DWI arrest established his right to privacy in the redacted dashboard recording as a matter of law. We disagree.

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[14] *See Industrial*, 540 S.W.2d at 682–83, 685.

[15] *See id.* at 682–83, 685.

Initially, we emphasize that the redacted version of the dashboard recording that is at issue here is different from the unredacted dashboard recording that was the subject of the criminal proceedings. To that extent, Travis is not even addressing the same information. Regardless, however, the statement Travis attributes to the Attorney General was, in fact, made by the Grayson County prosecuting attorney in Travis's criminal trial in response to Travis's motion to destroy the dashboard recording. But even assuming that the Attorney General could somehow be held to the statement, Travis's characterization of the statement's scope is overly broad. The prosecution does not concede or suggest that *all* of the information on the dashboard recording is highly intimate or embarrassing: "The State . . . concedes that . . . the video tapes at issue do indeed contain highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person." As such, the Attorney General's position in this case—i.e., that the *redacted* version of the dashboard recording does not contain the highly intimate or embarrassing information that the unedited recording did—is not "clearly inconsistent" with the position taken by the prosecutor in the criminal trial, a requirement of judicial estoppel.[16]

The doctrine of collateral estoppel is likewise inapplicable here because there is no valid and final judgment making this determination.[17] The criminal trial court's protective order, which does make the privacy determination at issue here, was vacated after the Dallas Court of

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[16] *See, e.g.*, *Ferguson v. Building Materials. Corp. of Am.*, 295 S.W.3d 642, 644–45 (Tex. 2009) (judicial estoppel precludes party who successfully maintains position in one proceeding from afterwards adopting "clearly inconsistent" position in another proceeding).

[17] *See* Restatement (Second) of Judgments § 27 (1982); *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985) (citing *id.*); *see also, e.g.*, *Van Dyke*, 697 S.W.3d at 384 ("Collateral estoppel . . . precludes the relitigation of identical issues of fact or law that were actually litigated and essential to the judgment in a prior suit.").

Appeals held that, under the PIA, the criminal trial court could not order the destruction of the dashboard recording where the Attorney General contended it was public information subject to disclosure.[18] A judgment that has been vacated has no legal effect,[19] much less a conclusive effect.[20] To that extent—assuming a protective order would qualify as a final judgment—the vacated protective order can be collaterally attacked.[21]

Private information

Travis asserts that the district court failed to properly allocate the burden of proof on his common-law privacy claim because it granted summary judgment despite the fact that he had raised a fact question on the only element of that claim for which he had the burden of proof—i.e., that the redacted dashboard recording contained highly intimate or embarrassing facts about a his private affairs.[22] We disagree.

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[18] *See In re Texas Dep't of Pub. Safety*, 416 S.W.3d at 913–14.

[19] *Cessna Aircraft Co. v. Aircraft Network, LLC*, 345 S.W.3d 139, 147 (Tex. App.—Dallas 2011, no pet.).

[20] *See U.S. Phillips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592, 598 (Fed. Cir. 1995) (stating that "vacated judgment has no collateral estoppel . . . effect"); *see also In re Guardianship of E.F.L.*, No. 05–14–00476–CV, 2015 WL 4652780, at *1 (Tex. App.—Dallas 2015, no pet.) (mem. op.) ("An order setting aside a previous order returns the parties to the positions they occupied before the initial order was entered and leaves the case as if no order had been entered." (citing *Curry v. Bank of Am., N.A.*, 232 S.W.3d 345, 351 (Tex. App.—Dallas 2007, pet. denied)).

[21] *See PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 271–72 (Tex. 2012) (noting that void judgments can be attacked collaterally); *J.J. Gregory Gourmet Servs., Inc. v. Antone's Imp. Co.*, 927 S.W.2d. 31, 34 (Tex. App.—Houston [1st. Dist.] 1995, no writ) (holding that judgment reversed on appeal is not final for purposes of issue preclusion).

[22] *See Industrial*, 540 S.W.2d at 685 (requiring person requesting information to show "special circumstances which make such private facts a matter of legitimate public concern").

As noted in *Industrial*'s description of the doctrine, as well as in the tort elements from which the doctrine is taken, only information that is kept private, not information that is readily made public, is protected.[23] There is no need, or reason, to protect information that is already public or, similarly, information that the person in question leaves open to the public eye.[24] Thus, even if we assume that the contents of the redacted dashboard recording contain information that is highly intimate and embarrassing to Travis, those facts were not private as a matter of law because Travis put himself in public by driving unclothed while intoxicated.[25]

In a related issue, Travis claims that summary judgment was improper because he "reported facts that evidence" he was under "job-related stress" and "extreme emotional duress" when the dashboard recording was taken, and further that "some of his reactions during the arrest may relate[]" to a combination of prescription medications, wine consumption, and a concussion. Travis seems to premise his argument here on the Attorney General's reference, in its motion for summary judgment, to two open-records decisions from the Attorney General holding that job-related stress, disabilities, and specific illnesses are highly intimate information protected by common-law privacy.[26] Thus, we take his argument to be that he has either raised a fact issue on or conclusively established the intimate/embarrassing prong of the *Industrial* test. However, as

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[23] *See id.* at 682–83.

[24] *See id.* at 683.

[25] *See* Restatement (Second) of Torts § 652D cmt. b (1977) (person cannot complain when his photograph is taken while he is walking down public street).

[26] *See* Tex. Atty. Gen. ORD-470 (1987) (fact that employee broke out in hives as result of severe emotional job-related stress is highly intimate fact); Tex. Atty. Gen. ORD-455 (1987) (illnesses, operations within past year, and physical handicaps are intimate personal information).

discussed above, the dashboard recording does not contain information regarding his private affairs as a matter of law.

Fourth Amendment privacy—voluntary actions

The Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion."[27] It does not, however, protect a person who knowingly engages in activity in the open: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[28]

In his summary-judgment response, Travis asserted that he had a right to privacy in his unclothed body under the Fourth Amendment that the Attorney General's motion for summary judgment did not address. On appeal, while acknowledging that his actions in this case took place out in the open, Travis nevertheless contends that he raised a fact question regarding whether those actions were voluntary, and thus knowing. Specifically, he asserts on appeal that when the dashboard recordings were taken he was exhausted, intoxicated, sleep-deprived, medicated, and suffering from a post-collision concussion; therefore, his actions at the time of the dashboard recording could not have been voluntarily or knowing. We disagree that Travis has raised an issue here.

First, we point out that the Attorney General's letter ruling has directed that the Department not disclose those portions of the video recording that show Travis's unclothed body from the waist down. But more to the point here, nothing in Travis's summary-judgment response

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[27] *Katz v. United States*, 389 U.S. 347, 361 (1967) (noting that to assert Fourth Amendment claim, person must have actual, subjective expectation of privacy in thing searched or seized, and expectation must be one that society recognizes as reasonable).

[28] *Id.*

or attached evidence raises a question regarding the voluntariness of his actions in the dashboard recording. Travis did not assert in the pleadings below that his actions in the dashboard recording were involuntary, nor did he offer proof that he was exhausted, sleep-deprived, medicated, or concussed at the time the dashboard recording was taken. And even though the summary-judgment evidence shows that he was intoxicated before and when the recording was taken, his guilty plea to the DWI charges is an admission that he had been "voluntarily operating a motor vehicle while intoxicated."[29] Thus even if he had raised the issue that his actions were involuntary, it could not have been as a result of his intoxication as a matter of law. More significant, however, is that Travis did not present this voluntariness issue to the district court in his summary-judgment pleadings and evidence. We cannot reverse a summary judgment on an issue that was not expressly presented to the trial court.[30]

Medical information

Travis contends that the redacted dashboard recording is protected from disclosure because it reveals confidential information regarding his medical and psychological condition at the time of the arrest that the Attorney General deemed was protected from disclosure under the Texas Medical Practices Act (MPA) and the Health and Safety Code.[31] We disagree.

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[29] *Farmer v. State*, 411 S.W.3d 901, 905 (Tex. Crim. App. 2013).

[30] *See* Tex. R. Civ. P. 166a(c).

[31] *See* Tex. Att'y Gen. OR2013-07330, at 3; *see also* Tex. Occ. Code §§ 159.001–168.202 (Texas Medical Practices Act).

Although information that is confidential under the MPA and Health and Safety Code is protected from disclosure under the PIA,[32] nothing in the redacted dashboard recording falls within these protections. The MPA provides that a "record of the identity, diagnosis, evaluation, or treatment of a patient by a physician" is confidential.[33] Relatedly, the Health and Safety Code provides that a "communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential," and the "records of the identity, evaluation or treatment of a patient in an emergency situation" are confidential. The redacted dashboard recording does not include the communications or records described above.

We overrule Travis's issues on appeal.

Conclusion

Having overruled each of Travis's issues, we affirm the district court's judgment.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: August 18, 2016

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[32] *See* Tex. Gov't Code § 552.101 (excepting from disclosure "information considered to be confidential by law, either constitutional, statutory, or judicial decision").

[33] Tex. Occ. Code § 159.002(b).