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No. 92198-9

Appeal of Court of Appeals No. 47359-3 II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NORBERT SCHLECHT,

Petitioner,

v.

CLARK COUNTY, WASHINGTON

Respondent.

CLARK COUNTY'S ANSWER TO PETITION FOR REVIEW

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Statutes and Rules:

RAP 13.4(b)1, 6, 9

RCW 42.56.5202

I. INTRODUCTION

Schlecht, the Petitioner, does not meet the requirements set forth in RAP 13.4(b) for the Court's acceptance of a Petition for Review of the Court of Appeals' decision to deny Schlecht's Motion to Modify the July 9, 2015 ruling granting County's Motion on the Merits and terminating review of this matter.

II. ISSUE

Does Schlecht's Petition for Review meet the considerations governing acceptance of review and, if not, should the Court deny the Petition?

III. STATEMENT OF THE CASE

This appeal stems from a public records request by Schlecht dated November 8, 2013 to the Clark County Sheriff's Office seeking: 1) "[a]ny/all records identifying vehicle owners" for specific license plates Schlecht listed on his request; and 2) "any/all records identifying subjects initially described as WM 30 S carrying gas can signaling a WF curly HR M 20 S Bro shirt BJ as follows: a) PER completed at 5/9/13 7:37:07; and b) PER search completed 7:50:30."¹

¹ CP 79, lines 20-28; CP 83.

Petitioner's request for a PER, or person, search was received by the Sheriff's Office on November 20, 2013.² Upon receipt, its Records Unit reviewed the Clark Regional Emergency Services Agency (hereinafter "CRESA 911") transcript attached to Schlecht's request and identified the responding officers to the May 9, 2013, 911 call as Deputy O'Dell and Deputy Smyth.³ The Sheriff's Office Records Department then checked both officers' logs, which showed that neither had filed a report.⁴ They also confirmed that the name of either "WM carrying gas can" or "WF curly HR" was never obtained by either Deputy.⁵ The Sheriff's Office also ran the name of the person who called 911 to report the May 9, 2013 incident to make sure that neither officer had filed a report on the May 9, 2013 call under the name of the caller, rather than the suspects.⁶ None of these searches turned up any responsive documents.⁷ The Sheriff's Office then took the further step of calling CRESA 911, which is a regional public safety agency independent of Clark County, and verified that the

² CP 79, lines 26-28. Defendant notes that Plaintiff contends this record was 'backdated.' There is absolutely no evidence supporting this contention. The unsubstantiated nature of this claim is consistent with the other unsupported theories Schlecht has expounded to the trial court and in this appeal. Further, although Schlecht asserts that the received date was "backdated," he has not argued as a basis for appeal that the County's response was untimely. Indeed, the material evidence shows that the Sheriff's Office Records Unit received the request on November 20, 2013, and responded within the five-day window, as required by the Public Records Act. See *RCW 42.56.520*.

³ CP 80, lines 1-3.

⁴ CP 80, lines 3-4.

⁵ CP 80, lines 4-5.

⁶ CP 80, lines 6-8.

⁷ CP 80, lines 8-9.

PER search done by the 911 operator on the “WF curly HR” and “WM carrying gas can” was done on those identical search parameters and not by name, and that CRESA records, in fact, do not contain the actual names of these individuals.⁸

On November 22, 2013, the Sheriff’s Office responded to Schlecht’s public records request by informing him it had no responsive records.⁹ Schlecht then wrote to the Sheriff’s Office on November 27, 2013 demanding, “[i]f your position is that records do not exist under your jurisdiction then please advise which agency holds requested records.”¹⁰

On December 18, 2013, MaryAnn Gentry, the Sheriff’s Office Public Records Unit supervisor, wrote to Schlecht, confirming that Clark County had no responsive records but, to the extent Schlecht was seeking vehicle owner identity, he could obtain that information from the Washington State Department of Licensing.¹¹ Nine days later, Schlecht filed a lawsuit in Clark County Superior Court alleging Clark County had violated the Public Records Act by not producing records identifying the names of the individuals that were the subject of the May 9, 2013, 911 call.¹² On March 12, 2014, Schlecht filed a Summary Judgment Motion,

⁸ CP 80, lines 11-16.

⁹ CP 80, lines 17-19; CP 85.

¹⁰ CP 80, lines 19-21; CP 88.

¹¹ CP 80, lines 23-26; CP 90.

¹² CP 3-27.

which was heard and argued on April 11, 2014.¹³ In its Response to Schlecht's Summary Judgment Motion, Clark County submitted a declaration from MaryAnn Gentry which outlined the comprehensive steps her office had taken to locate records responsive to Schlecht's public records request.¹⁴ In what he described as a "smoking gun" in his response brief and at oral argument, Schlecht cited an email from Deputy O'Dell that the Deputy Sheriff sent in response to the inquiry from Schlecht.¹⁵ In his email, Deputy O'Dell confirmed that in responding to the May 13, 2013, 911 call, he spoke with a woman at the scene but did not file a report.¹⁶

In both his briefing and at oral argument, Schlecht posed several theories of what he assumed "probably" happened at the scene.¹⁷ Finding his theories were suppositions, rather than facts, and were not in the record before it or supported by any document he submitted, the trial court denied Schlecht's Motion for Summary Judgment.¹⁸ On May 2, 2014, Schlecht filed a Motion for Reconsideration, which was also denied by the trial court.¹⁹ Clark County then filed a Motion for Summary Judgment on June

¹³ CP 38-64.

¹⁴ CP 79-90; see also *County's Response Brief*, CP 68-78.

¹⁵ CP 94, lines 5-7; CP 110, lines 19-22; CP 113, lines 18-25; CP 114, lines 1-2.

¹⁶ CP 100; CP 110, lines 19-21.

¹⁷ CP 115, lines 4-9.

¹⁸ CP 115, lines 2-25; CP 116, lines 1-10; CP 119.

¹⁹ CP 121-132; CP 133-134; CP 167.

13, 2014, which Schlecht responded to on July 3, 2014.²⁰ The hearing, which Schlecht failed to appear for, was held on July 18, 2014, at which time the trial court granted Clark County's Motion for Summary Judgment.²¹ Schlecht appealed the trial court's dismissal of this lawsuit. County filed a response, as well as a Motion on the Merits, which was granted on July 9, 2015. Schlecht filed a motion to modify the Commissioner's July 9, 2015 ruling, which was denied by the Court of Appeals on August 18, 2015. Schlecht then filed the present Petition for Review.

IV. ANALYSIS

A petition for review will be accepted only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

²⁰ CP 142-163; CP 168-198.

²¹ CP 203; CP 204.

A. The Underlying Decision does not Conflict with any Decision of the Court of Appeals or with Supreme Court Precedent.

Contrary to Schlecht's assertion in his Petition for Review, the Court of Appeals' decision to grant County's Motion on the Merits does not conflict with Supreme Court public records case law precedent. In Public Records Act cases, the agency's burden is to establish beyond material doubt the reasonableness of its search for documents and, to do so, may rely on reasonably detailed affidavits submitted in good faith. See *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011).

Here, the trial court, as well as the Court of Appeals, found the County's search to be made in good faith after considering all the evidence, including: 1) the email referenced in Schlecht's brief, as well as 2) the agency affidavit submitted by the County. In considering the evidence, the Court applied the good faith standard test articulated by this Court in the *Neighborhood Alliance of Spokane* case. The fact the Schlecht does not agree with the Court of Appeals does not mean that the decision conflicts with precedent from this Court.

"Purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit which is accorded a presumption of good faith." *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 867, 288 P.3d 384, 389 (2012) (quoting, *Trentadue v. FBI*,

572 F.3d 794, 808 (10th Cir. 2009)) *review denied*, 177 Wn.2d 1002 (2013).

In *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000), the court addressed the same situation as in the present case. In *Smith*, the petitioner submitted a public records request to various departments of Okanogan County. After conducting a search, Okanogan County produced some records and responded that the rest of the requested records did not exist. Petitioner filed a complaint and respondent moved for dismissal on the grounds that it could not produce records it did not have. The trial court dismissed the lawsuit on those grounds, and the Court of Appeals affirmed the dismissal.

In the present matter, on three separate occasions, the trial court reviewed the steps the County took to search for responsive records, along with Schlecht's various and unsubstantiated theories about what "probably" happened at the scene of the 911 call.²² In reviewing the evidence on three separate motions brought in front of it, the trial court found Petitioner's theories were suppositions rather than facts, and were not in the record before it or supported by any document Schlecht submitted. Given the already extensive review of the evidence in this

²² CP 115, lines 4-15.

matter, it is clear that the principles Court of Appeals relied on to reach its decision in this matter complied with Supreme Court precedent.

B. Schlecht's Issues Present Neither a Significant Question of Constitutional Law nor Raise any Issue of Substantial Public Interest.

Schlecht does not assert, nor does the evidence on the record support, that the dismissal of his lawsuit raises either any constitutional issue or an issue of substantial public interest. On the contrary, the extensive review that the evidence in this matter has already been given highlights the fact that Schlecht's claims have been thoroughly reviewed in compliance with the legitimate public interest in accessing public records.

It is also clear that further review will not lead to the production of responsive documents because the material evidence shows that none exist. Therefore, the decision by the Court of Appeals to grant County's Motion on the Merits was warranted in this case.

V. CONCLUSION

There was no basis for the underlying lawsuit, there was no basis for the underlying appeal, and there is no basis for this Petition for Review. Clark County has presented material evidence submitted in good faith which shows that the public records search it conducted pursuant to Schlecht's request was reasonable beyond a material doubt, but yielded


no responsive records. Clark County has, at all times in this litigation, specifically outlined the steps it took to locate in a timely manner any responsive documents, including contacting outside agencies and conducting a comprehensive internal search. In contrast, Schlecht has provided no evidence beyond unsupported allegations that Clark County has documents responsive to his request regarding the identity of two unknown people discussed on a 911 tape and, in fact, produced an email from one of the officers who responded to the 911 call which states no report was ever made.

The material evidence shows that the Court of Appeals complied with Supreme Court precedent in upholding the dismissal of Schlecht's lawsuit. Because Petitioner has not met his burden under RAP 13.4(b) to show otherwise, Clark County respectfully requests this Court deny Schlecht's Petition for Review.

DATED this 30th day of September, 2015.

RESPECTFULLY SUBMITTED:

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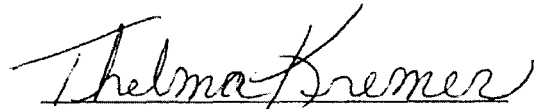
I hereby certify that on this 1st day of October, 2015, I caused to be served the foregoing *Clark County's Answer to Petition for Review*, upon the following party in the manner(s) as follows:

Plaintiff, Pro Se:

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DATED this 1st day of October, 2015.



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Attached for filing please find *Clark County's Answer to Petition for Review* regarding the following matter:

Matter: Norbert Schlecht v. Clark County, Washington
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Filier: Jane Vetto, WSBA #21649
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Please contact this office if you have any questions in this matter or any problems with the attached. Have a good day!

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