

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)
)
 Appellant,)
)
 -vs-) No. S-2007-389
)
 GREGORY MILES PARKS,)
)
 Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 16 2007

MICHAEL S. RICHIE
CLERK

ORDER GRANTING MOTION TO DISMISS APPEAL

The State of Oklahoma, Appellant, filed this appeal from an order of the District Court of Grady County granting the defendant's plea of immunity and motion to dismiss in Case No. CF-2006-411. The Appellee has filed a motion to dismiss the appeal claiming the State has no legal authority by which it can be maintained. Appellee also claims the appeal is frivolous and asks to be awarded attorney fees. The State has filed a response to the motion to dismiss.

In Case No. CF-2006-411, the defendant, Appellee, was charged with and bound over for trial on the offenses of Count 1 - Peace Officer Engaging in Illegal Gambling, a felony; and Count 2 - Willful Neglect of Duty, a misdemeanor. The charges arose from allegedly illegal gambling activities at the Elks Lodge in Chickasha, Oklahoma. Multiple cases have been filed and multiple defendants have been charged with offenses relating to the illegal gambling activities. For purposes of this matter it is not in dispute that, at the preliminary hearing of another defendant charged in the illegal gambling cases, the Appellee was forced

to testify about the very charges on which Appellee had been bound over for trial in Case No. CF-2006-411. After his testimony at that preliminary hearing, Appellee filed a pleading entitled "Motion to Set Aside Information, Abate Prosecution, Dismiss With Prejudice, And Brief in Support." Appellee argued that because he was compelled to testify at that preliminary hearing, he was immune from further prosecution on the transactions, matters or things concerning which he had testified, therefore Case No. CF-2006-411 had to be dismissed. The District Court agreed with Appellee, and ordered Case No. CF-2006-411 dismissed. The State has filed this matter attempting to appeal from the District Court's order.

The Notice of Intent to Appeal filed by the State to initiate this appeal states that the appeal is filed pursuant to 22 O.S.Supp.2002, § 1053, 22 O.S.2001, § 1053.1, and Rules 1.2(A)(3)(b) and 2.1(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). The State's Petition in Error indicates the appeal is filed pursuant to 22 O.S.Supp.2002, § 1053, and Rule 1.2(A)(3)(b), *Rules, supra*.

In the motion to dismiss this appeal, Appellee correctly argues that no appellate right by the government exists, absent express legislative intent. *State v. Sayerwinnie*, 2007 OK CR 11, ¶4, 157 P.3d 137, 138. The State can only bring this appeal if it is authorized by 22 O.S.2001, § 1053.1, or by one of the limited instances in 22 O.S.Supp.2002, § 1053. This statutory authority cannot be enlarged by construction. *State v. Hammond*, 775 P.2d 826, 828 (Okl.Cr.1989). The Legislature has not written Section 1053 with an express

provision for the State to appeal from an order of the trial court finding the defendant has immunity from prosecution for the charges pending against him, and dismissing those charges. The question is whether this appeal falls within one of the statutorily authorized State appeals.

The Appellee first argues 22 O.S.2001, § 1053.1¹ is inapplicable to the instant case, and is not proper authority to sustain this appeal, because the District Court did not render any statute unconstitutional. The State contends Section 1053.1 may be appropriate authority to sustain this appeal because the District Court's order effectively rendered 21 O.S.2001, § 961 unconstitutional. We find Section 1053.1 is not proper authority to support this appeal. The District Court read Section 27 of Article II of the Oklahoma Constitution in context with 21 O.S.2001, § 961 to find that the forced testimony had triggered immunity for Appellee. The District Court's ruling applied Section 27 of Article II of the Oklahoma Constitution in addition to or instead of 21 O.S.2001, § 961, and did not render 21 O.S.2001, § 961 unconstitutional.

The Appellee next argues that none of the subsections of 22 O.S.Supp.2002, § 1053² are applicable to the instant case, and are not proper

¹ 22 O.S.2001, § 1053.1 provides: "[a]ny final judgment entered by a district court in a criminal action rendering an act of the State Legislature to be unconstitutional shall be automatically appealed to the Court of Criminal Appeals, unless said act has been previously declared unconstitutional by said Court of Criminal Appeals. Such appeals shall be by the district attorney upon a reserved question of law.

² 22 O.S.Supp.2002, § 1053 provides that: "[a]ppeals to the Court of Criminal Appeals may be taken by the state or a municipality in the following cases and no other:

1. Upon judgment for the defendant on quashing or setting aside an indictment or information;
2. Upon an order of the court arresting the judgment;

authority to sustain this appeal. In its response, the State does not claim that subsections 2, 4, or 5 are applicable, but argues that subsections 1 and 3 are appropriate statutory grounds for this appeal.

The State contends 22 O.S.Supp.2002, § 1053(1) is proper because the District Court order granting Appellee immunity and dismissing Case No. CF-2006-411 was based upon Appellee's "Motion to Quash, Set Aside Information . . ." The State also contends 22 O.S.2001, § 493 lists grounds upon which an Information must be set aside, but does not limit other reasons for setting aside an Information. However, even though Appellee's motion asked to quash or set aside the Information in this case, the District Court's ruling was not that the Information should be set aside, but that the case could not be further prosecuted because of immunity. Moreover, this Court has consistently interpreted Section 1053(1) in light of 22 O.S.2001, § 493, insofar as Section 493 is the only statutory authority for the quashing or setting aside an Information. *State v. Campbell*, 1998 OK CR 38, ¶7, 965 P.2d 991, 992. If a trial court's granting of a plea of former jeopardy does not fall within Section 1053(1), then likewise, the District Court's granting of Appellee's claim of immunity cannot fall within the statutory language allowing the State to appeal judgment for the defendant on quashing or setting aside and information. *Id.*

3. Upon a question reserved by the state or a municipality;

4. Upon judgment for the defendant on a motion to quash for insufficient evidence in a felony matter; and

5. Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice. Priority shall be given to such an appeal, and the order staying the proceedings shall be entered pending the outcome of the appeal.

The State contends it has properly reserved a question of law pursuant to 22 O.S.Supp.2002, § 1053(3). The State claims it has complied with the Rules of this Court concerning the filing of pleadings to initiate this appeal. The State also claims it has complied with the requirements of *Campbell, supra*, in order to bring this appeal on a reserved question of law. *Campbell*, 1998 OK CR 38 at ¶¶8-10, 965 P.2d 991, 992-93. Appellee notes that nowhere in the State's pleadings to initiate this appeal does it specifically set forth a question of law reserved for this Court to answer. In *Campbell*, the pleadings filed to initiate the State's appeal were not challenged. The Notice of Intent to Appeal on a reserved question of law must be filed with the reserved question specifically stated. *City of Elk City v. Taylor*, 2007 OK CR 15, ¶8, fn.2, 157 P.3d 1152, 1154. Even though Appellant's pleadings to initiate this appeal comply with this Court's Rules, they do not specifically state the question of law reserved and do not meet the requirements for bringing an appeal under Section 1053(3). *Id.*

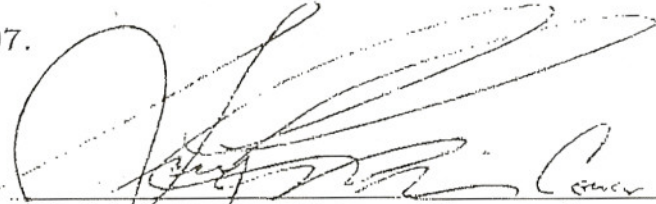
The State has not established that the legislature expressly intended to authorize a government appeal of this type. *Sayerwinnie*, 2007 OK CR 11 at ¶4, 157 P.3d at 138. Therefore the Appellee's motion to dismiss this appeal must be, and is hereby, **GRANTED**.

We do not find that the filing of this appeal was frivolous or in bad faith, and do not find that Appellee has cited valid authority for awarding attorney fees in criminal cases. See *Pitts v. State*, 2003 OK CR 21, ¶12, 78 P.3d 551, 554-55. Therefore, the Appellee's request for appellate attorney fees should be,

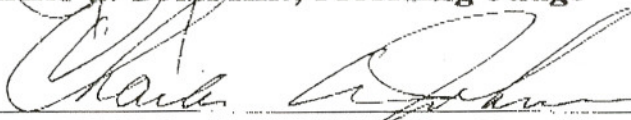
and is hereby, **DENIED**.

IT IS SO ORDERED.

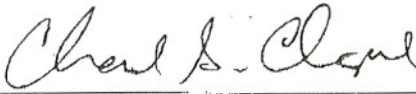
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this ¹⁶16 day
of August, 2007.



GARY I. LUMPKIN, Presiding Judge



CHARLES A. JOHNSON, Vice Presiding Judge



CHARLES S. CHAPEL, Judge

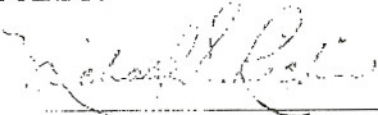


ARLENE JOHNSON, Judge



DAVID B. LEWIS, Judge

ATTEST:



Clerk

RA