ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DEC 14 2022
JOHN D. HADDEN
CLERK

FRONTIER MEDIA GROUP, INC. and KASSIE L. DANIEL, Plaintiffs/Appellees, vs. POTTAWATOMIE COUNTY PUBLIC SAFETY CENTER TRUST and BREONNA R. THOMPSON in her official capacity as Executive Director of Pottawatomie County Public Safety Center Trust, Defendants/Appellants.	)	Case No. 119,952

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APPEAL FROM THE DISTRICT COURT OF
POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE JOHN G. CANAVAN, TRIAL JUDGE

AFFIRMED

Kathryn E. Gardner
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
Tulsa, Oklahoma — For Plaintiffs/Appellees

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

The defendants—who own and operate the Pottawatomie County jail (and whom we will refer to collectively as "the jail," "the trust," or some combination thereof)—appeal the trial court's decision that certain documents and video

recordings were subject to mandatory release pursuant to the Oklahoma Open Records Act (the ORA or the act) and the entry of a writ of mandamus in favor of plaintiffs, Frontier Media Group, Inc., and Kassie Daniel (collectively, Frontier). On review we find that the applicable records releasable under the general provisions of the ORA and that the jail is estopped from raising the question of whether it is a "law enforcement agency" under the ORA for the first time in this appeal. We also reject the jail's claims that mandamus was unavailable and, based on this record, that the judgment entered was premature. We therefore affirm the decision of the district court.

BACKGROUND

The relevant facts are not in dispute. Ronald Gene Given died after an incident that occurred while he was in custody at the county jail in Shawnee. In November 2019, Frontier made an ORA request to the jail for "access to and a copy of any and all records related to the custody of Ronald Gene Given, including the booking sheet, release sheet, any existing video of Given at the jail, mugshots and incident reports related to the use of force or injury." R. 1, *Petition*, pg. 5. After some back and forth concerning the form of the request and the means of delivery, the jail released only the booking sheet and release sheet.

Frontier filed suit, alleging that the trust had additional records in its possession that were subject to release under the ORA. Frontier sought a declaratory judgment stating that the requested records were subject to release, an injunction or writ of mandamus (or both) ordering release of the requested records, and attorney's fees.

The jail moved to dismiss. It argued that Frontier's petition failed to state a claim because the records requested were not "records" under the ORA. The trial court heard the matter on September 2, 2021. No transcript or narrative statement of the hearing is included in the record on appeal. The trial court's subsequent journal entry indicates that, while the court denied the motion to dismiss, it found that the requested records — characterized as "the video and internal investigative records" — were subject to release under the ORA. On this basis, the trial court granted a writ of mandamus, ordered the jail to release the requested records, and "declared that order to be a final judgment not allowing or requiring any further pleadings." R. 61, *Journal Entry*, pg. 2. The jail appeals.

STANDARD OF REVIEW

This appeal challenges the issuance of a writ of mandamus. Mandamus is a special proceeding invoking equity, and the standard of review applied in an appeal is based upon the nature of the decision made by the trial court. In relevant part, the trial court here granted mandamus based on a statutory interpretation as to what constitutes a "record" under the ORA. Statutory interpretation is a question of law subject to *de novo* review. *Fraternal Order of Police, Bratcher/Miner Mem'l Lodge, Lodge No. 122 v. City of Norman*, 2021 OK 20, ¶ 2, 489 P.3d 20, 22. Additionally, a question of whether a party's procedural rights were violated is reviewed *de novo*. *Shawareb v. SSM Health Care of Oklahoma, Inc.*, 2020 OK 92, ¶ 29, 480 P.3d 894, 905.

ANALYSIS

The primary argument the jail makes on appeal—and one that is threaded throughout the jail's briefing—relies on the proposition that the jail trust is a "law enforcement agency" under the ORA. Thus, we first address whether the jail should be permitted to make this argument on appeal.

Both parties place significant emphasis on the question of whether the jail trust is a "law enforcement agency" pursuant to 51 O.S. § 24A.3.[1] Title 51 O.S. § 24A.8 states distinct disclosure requirements for law enforcement agencies. *Id.* ("Law enforcement agencies shall make available for public inspection and copying, if kept, the following records ...."). The trust evidently argues that this list of specifically required disclosures is exclusive and overrides the general disclosure provisions of the ORA. For purposes of this appeal, we will assume that the distinction is as important as the trust's arguments indicate.[2]

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[1] "Law enforcement agency" is a defined term under the ORA. It "means any public body charged with enforcing state or local criminal laws *and* initiating criminal prosecutions including, but not limited to, police departments, county sheriffs, the Department of Public Safety, the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, the Alcoholic Beverage Laws Enforcement Commission, and the Oklahoma State Bureau of Investigation." 51 O.S. § 24A.3. We note it does not, as the jail concedes, include jails, jail trusts, or the Department of Corrections. Nevertheless, the jail, while admitting it is "not a classic 'law enforcement agency,'" argues that it should be considered a law enforcement agency because it is, among other things, "tasked with performing law enforcement duties ...." *Brief-in-chief*, pg. 8. For the reasons that follow, we do not decide the question here.

[2] The implication of the jail's argument on appeal is that any entity subject to the specific requirements of § 24A.8 is not subject to the more general requirements of the ORA, *i.e.*, that the specific requirements for law enforcement agencies override the general disclosure requirements for public bodies. It is not clear that this reading is consistent with the text of the statute. *See* § 24.8(B)(1) (noting that a law enforcement agency may withhold records "[e]xcept for the records listed in subsection A of this section *and those made open by other state or local laws*." (emphasis added)). Nevertheless, because (for the reasons discussed below) the jail is estopped from arguing that it is a law enforcement agency in this appeal, we do not decide the question here.

On appeal, the jail trust argues vigorously that it meets the definition of a law enforcement agency under the act. See *Brief-in-chief*, pg. 6–16. Below, however, the jail argued — every bit as vigorously — that they were *not* a law enforcement agency. Indeed, the jail's motion to dismiss explicitly denied, with emphasis, that the jail was a law enforcement agency pursuant to § 24A.3(5). R. 21, *Defendant's Motion to Dismiss*, pg. 6 ("[T]he PCPSC trust is NOT a law enforcement agency under the ORA.... Clearly, the Trust is not a police department, sheriff, or any of the listed State agencies.... [T]he general provisions of the ORA determine which of the PCPSC Trust's records are considered open, not § 24A.8."). When Frontier's response did not contest the jail's statement that it was not a law enforcement agency under the ORA, the jail included a footnote in its reply advising the court that Frontier had "concede[d] that the PCPSC Trust is not a law enforcement agency under the ORA." R. 54, *Defendant's Reply*, pg. 2.

Based on these filings, it is clear that there was complete agreement between the parties prior to the hearing that the jail did not claim to be, and was not, a law enforcement agency. If either party attempted a 180-degree shift of position at the hearing, or even argued contrary to its written submissions, we have no record of it, as no transcript or narrative statement of the proceedings is contained in the record. The appealed order does not indicate that *any* question of whether the jail was a law enforcement agency pursuant to the statutory definition was litigated at the hearing. To the contrary, the journal entry notes that "[d]uring the ... hearing ... arguments were limited to those

issues presented in the parties' briefing concerning Defendants' Motion to Dismiss...." R. 61, *Journal Entry*, pg. 2.[3]

We find it clear that the jail presents a theory of error on appeal that the record demonstrates was not presented to the trial court below. Not just that, but to the extent the issue was raised, the jail conceded a proposition precisely contrary to that which it argues before this Court. We will not review allegations of error that were not first presented to the trial court for resolution. *Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶ 24, 786 P.2d 1230, 1236. Further, "[p]arties to an action on appeal are not permitted to secure a reversal of a judgment upon error which they have invited, acquiesced or tacitly conceded in, or to assume an inconsistent position from that taken in the trial court." *Samedan Oil Corp. v. Corporation Commission*, 1988 OK 56, ¶ 7, 755 P.2d 664, 668. On these principles, we decline to entertain any argument that the jail trust is a law enforcement agency for purposes of the ORA.

This leaves two open questions.[4] The first is whether the requested records are properly considered records under the act at all. And secondly, we consider

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[3] Despite the clear language of the journal entry, the jail trust states that the court found that "the provisions of the ORA pertaining to law enforcement agencies did not apply to the [jail] trust." *Brief-in-chief*, 5-6. Curiously, the jail cites the journal entry as supporting this statement. It does not. Perhaps the jail intended to reference some statement made by the court during hearing, but again, we are without any record of what occurred at the hearing, except the journal entry itself.

[4] Our analysis as to invited error further disposes of claims that there was a "premature judgment" because the law enforcement agency issue was still open and claims that the jail trust needed "discovery" or to develop a record on the issue. *Brief-in-chief*, pg. 20. If "development of the record" was needed, any failure to allow for this was due to the jail's unambiguous submission that no such development was necessary because it did not claim to be a law enforcement agency. The same applies to the jail trust's claims that it was

whether the trial court's entry of equitable relief—a writ of mandamus—was premature.

The jail trust argues that the requested records do not fit the statutory definition of "record[s]." This is a significant question that does appear to have been litigated below. The jail seeks a narrow definition of what constitutes a "record" based on the text of 51 O.S § 24A.3.[5] Specifically, they argue that the records in question were not made "in connection with the transaction of public business, the expenditure of public funds or the administering of public property," as the act requires. *See id.*

The jail seeks to narrow a very broadly worded definition in a statute that "expressly sets forth the public policy concerning the people's right to know and be fully informed about their government." *Shero v. Grand Sav. Bank*, 2007 OK 24, ¶ 9, 161 P.3d 298, 301. We are not convinced that the jail offers the correct interpretation of the statute. Here, the surveillance video, for example, meets the definition of a "record" if it was "created ... in connection with ... the

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"precluded" from producing relevant evidence on this issue by the "premature" judgment. The trust assured the District Court that it was not a law enforcement agency. If it was error for the district court to accept or act upon this assurance, the error was invited.

[5] The Act defines "record" as:

> [A]ll documents including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property.

51 O.S.2011, § 24A.3

administering of public property." *Id.* It seems beyond dispute that the jail is "public property," and no party suggests differently below or on appeal. Thus, in order to determine whether the video recording is a record, it is helpful to ask, "Why was the camera put there in the first place?" Undoubtedly, one answer will be "to more easily *administer the property* surveilled." In the era we live in, if something is stolen, if a crime is committed, or someone is injured on property, the first question inevitably asked is: "*Is there a video recording?*" For good or for ill, the answer is often, "Yes." The very purpose of surveillance cameras is to administer the property surveilled—to create a *record* of what occurs at the location as may be needed for future use. Under this same reasoning, any investigative records created because of the incident, which occurred if at all on the jail's property, and which is alleged to have led to Mr. Given's death, are records under the act. Thus, we hold that the records sought and ordered to be

produced here—namely, "the video and internal investigative records"—are records under the act.[6,7]

The jail finally argues that Frontier showed no entitlement to mandamus, and the entry of judgment was premature. Although the jail did raise these arguments below, the argument that mandamus was inappropriate was based

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[6] This holding is consistent with the relevant case law. The Oklahoma Supreme Court has indicated that the general performance of "traditional governmental functions" is "public business" even if these functions do not involve financial or policy decisions, commercial transactions or property transactions. *Farrimond v. State ex rel. Fisher*, 2000 OK 52, ¶¶ 16-17, 8 P.3d 872, 876. See also *Oklahoma Association of Broadcasters, Inc. v. City of Norman*, 2016 OK 119, 390 P.3d 689 (holding that a video, which was neither created by a state actor nor showed any actions by the state, became a "record" when it was obtained by the police department as part of an official investigation, *i.e.*, a governmental function); *Ward & Lee, P.L.C. v. City of Claremore*, 2014 OK CIV APP 1, ¶ 12, 316 P.3d 225, 228 (holding that an arrest video constitutes a record of public business because arresting suspected criminals is a governmental function, and is therefore public business). In *Fabian & Associates, P.C. v. State ex rel. Dep't of Pub. Safety*, 2004 OK 67, 00 P.3d 703, the Court held that recordings of informed consent hearings in license revocation proceedings constituted a record of the transaction of public business, despite an argument from the Department of Public Safety that such hearings involved only the state's interaction with an individual and not the general "business of all the people of the state." *Id.* ¶ 11. The Court noted that "the outcome of whether one arrested for driving under the influence of alcohol will be permitted to continue to drive on public roads is the business of all the people of the state," and that the stated purpose of the act was "to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power." *Id.* ¶11. We see no reason why individual state interaction with an arrestee allegedly contributing to his death is not similarly a matter affecting the people of this state and part of the information they need to "intelligently exercise their inherent political power." The trust's narrow reading of § 24A.3, however, would exclude numerous state-created records that may demonstrate behavior by public bodies and their officers and employees that is closely connected to the public's exercise of its political power, even if not strictly connected to "business, money or property."

[7] We are additionally concerned that the jail has failed in this appeal to provide a sufficient record as to exactly what the records in question are. They argue on appeal that the records cannot, despite the trial court's clear finding to the contrary, be "records" pursuant to the ORA. But the jail, appellant here, does not provide us the records themselves to review. It is entirely incumbent upon the appellant to demonstrate error from the record on appeal. *Davidson v. Gregory*, 1989 OK 87, 780 P.2d 679, 682 ("An appellant bears the responsibility for incorporating into the appellate record all materials necessary to secure corrective relief from a trial court's adverse decision."). We are unable determine whether any particular record meets the statutory definition of a record if that record is not provided for our review. Affirmance is appropriate on this alternative basis.

entirely on jail's arguments that the records Frontier sought were not generally subject to release. Because we have found that they were, the court's decision in this regard is affirmed.

We must address more fully, however, the jail trust's argument that the judgment entered was premature. The jail's argument in this vein is not one of legal error, but of improper procedure. The alleged procedural error is that there was no previously noticed hearing on the question of mandamus, and the actual hearing examined only a motion to dismiss for failure to state a claim. The jail argues that, even if the court found the requested items were records subject to disclosure and rejected the jail trust's argument that mandamus was not proper, the court could not actually *order* mandamus without noticing and conducting a second proceeding.

Procedural error may be harmless for the purpose of appellate review, and a "probability of a change in the outcome of a lawsuit is the test of prejudice" when analyzing alleged errors of practice and procedure. *Shawareb v. SSM Health Care of Oklahoma, Inc.*, 2020 OK 92, ¶ 30, 480 P.3d 894. To show prejudice here, the jail must show both that it had a viable argument against mandamus and that the court's mode of procedure improperly prevented the jail from raising this argument below.

The jail's primary argument is that it should have been allowed to present its case that it *was* a law enforcement agency pursuant to statute before mandamus was granted. As noted, the jail had an opportunity to present this argument, however, but argued *exactly the opposite.* The trust's position appears

to be that it wished to argue that it was *not* a law enforcement agency during the dismissal procedure, and then reverse course immediately and argue that it *was* a law enforcement agency if Frontier's petition was not dismissed. The trial court clearly and properly understood the jail's submissions as showing that there was *no dispute* between the parties as to jail's status under § 24A.3(5). Any procedural error here was therefore invited.

Finally, we again reiterate that the jail failed to provide any transcript of the hearing, yet claims it was "precluded" from arguing at that hearing that it needed additional time to conduct discovery on such matters as whether the requested records were obtainable under the act—that is, whether the records were "connected with the transaction of public business ...." We have no way of knowing (outside the journal entry itself, which is silent on the topic) if the trust was in fact "precluded" from making these arguments at the hearing, or if it made them and was not successful. Having failed to show any error committed by the trial court in this regard, the court's order must be affirmed. *Hamid v. Sew Original*, 1982 OK 46, ¶6, 645 P.2d 496, 497 ("Legal error may not be presumed in an appellate court from a silent record. The opposite is true. Absent a record showing otherwise, this court presumes that the trial court did not err.").

CONCLUSION

We do not decide here whether a jail trust or the jail it administers is or is not a law enforcement agency for the purposes of the ORA. We merely hold that the jail trust failed to raise such an argument below and invited any error by explicitly pleading in the trial court that it was *not* a law enforcement agency.

The issues with the trial court's order here appear to be of the jail's own making. We affirm the district court's decision that the requested items were "records" pursuant to the ORA and find no error in its grant of mandamus on this record.

AFFIRMED.

WISEMAN, P.J., and BARNES, J. (sitting by designation), concur.

December 14, 2022