IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOE PANICARO,
Appellant,
vs.
STOREY COUNTY; STOREY COUNTY OFFICE OF HUMAN RESOURCES; AND KEITH LOOMIS, ESQ.,
Respondents.

No. 79953-COA

FILED

APR 12 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DISMISSING IN PART, AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Joe Panicaro appeals from a district court order denying a petition for a writ of mandamus that sought to compel disclosure of public records and from a post-judgment order denying a motion for an order to show cause. First Judicial District Court, Storey County; James Todd Russell, Judge.

Panicaro filed a petition for a writ of mandamus in the district court against respondents Storey County, the Storey County Office of Human Resources, and Keith Loomis, Esq., who is a Storey County deputy district attorney, seeking to compel disclosure of certain public records. In his petition, Panicaro alleged that respondents failed to timely respond to his request to inspect certain public records pursuant to the Nevada Public Records Act (NPRA), which is codified at NRS Chapter 239, and to post schedules of the fees for providing copies of public records at certain locations as required by the NPRA. Respondents then filed a motion to dismiss in which they invited Panicaro to inspect the records at issue at a

mutually agreed upon time and place and further indicated that the missing fee schedules would be posted immediately. Based on their willingness to take these steps, respondents argued that Panicaro's petition was moot and that dismissal was therefore required.

At the resulting hearing, respondents represented that the missing fee schedules had been posted, and then the parties mutually agreed on a time and place for Panicaro to inspect the records. As a result, the district court concluded that Panicaro's petition was moot and should be dismissed, but directed Panicaro to inform the court if any issues arose at the records inspection. The district court also essentially found that Panicaro was justified in filing his petition based on respondents' delayed response to his records request, which the district court attributed to a miscommunication. Nevertheless, the district court reasoned that respondents could have taken steps to prevent the situation, and as a result, the court concluded that Panicaro was entitled to attorney fees and costs even though it declined to consider his request to recover the copy costs he incurred in connection with the litigation. As a result, the court orally granted the request to dismiss the petition as moot and granted Panicaro's request for attorney fees and costs, with the exception of copy costs.

Before any written orders memorializing these rulings were filed, Panicaro filed a motion seeking an order to show cause why respondents should not be held in contempt, asserting that he appeared to inspect the records and learned that respondents had redacted certain information and withheld some records on confidentiality grounds. Despite the filing of this request, the district court later entered written orders awarding Panicaro his requested attorney fees and costs, aside from his

copy costs, and dismissing the petition as moot without addressing his request for a show cause order. Thereafter, the district court entered a post-judgment order that denied Panicaro's motion for an order to show cause, finding that respondents provided documents that were responsive to Panicaro's request and never waived their ability to invoke the confidentiality privilege to withhold information in response to a public records request. This appeal followed.

On appeal, Panicaro maintains that it was an abuse of discretion for the district court to dismiss his writ petition as moot when he had previously informed the court in his request for an order to show cause that, after he inspected the records, a dispute arose between the parties concerning respondents' assertion of the confidentiality privilege. *See Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877, 266 P.3d 623, 626 (2011) (providing that a district court's order denying a writ petition is generally reviewed for an abuse of discretion).

Initially, a review of the record on appeal reflects that the district court specifically directed Panicaro to inform the court of any issues that arose at the records inspection, and that Panicaro informed the court of such issues in his motion for an order to show cause at a time when the district court's oral decision to dismiss Panicaro's petition as moot remained subject to reconsideration since the court had yet to enter a written order. *See Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 451, 454, 92 P.3d 1239, 1243, 1245 (2004) (providing that dispositional court orders must be entered before they become effective and that, before such an order is entered, the district court remains free to reconsider its oral pronouncement). Thus, we agree with Panicaro that the district court's

subsequent decision to enter a written order dismissing the petition as moot without first addressing the issues Panicaro had brought before it—as directed at the hearing on the motion to dismiss—was problematic.

Nevertheless, we conclude that any error or abuse of discretion in dismissing the petition under these circumstances was harmless, because, on appeal, Panicaro has not demonstrated that respondents' assertion of the confidentiality privilege was improper, and as a result, he has not established that he was harmed when the district court dismissed his petition. *Cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Indeed, Panicaro does not attempt to challenge any of respondents' reasons for asserting the confidentiality privilege with respect to any particular record. Instead, Panicaro asserts that, pursuant to the supreme court's decision in *Clark County Office of the Coroner/Medical Examiner v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020), respondents waived the confidentiality privilege because they did not respond to his request to inspect the records at issue here within the five-day period for doing so, *see* NRS 239.0107(1)(d) (providing that, when a governmental entity denies a public records request, it must provide notice of the denial and a citation to supporting legal authority within five days of receiving the public records request),[1] or otherwise assert the

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[1]Following the commencement of the underlying proceeding, the Nevada Legislature amended the NPRA, effective October 1, 2019. *See* 2019 Nev. Stat., ch. 612, § 7, at 4007-08. Those amendments do not affect the disposition of the present case, however, because they only apply to actions filed after their effective date and did not substantively change the

confidentiality privilege until after extensive correspondence and litigation between the parties had taken place.

To support this position, Panicaro quotes a heading from the *Coroner/Medical Examiner* decision, which states that "[a] governmental entity does not waive a legal basis for withholding records by failing to cite the legal authority in its initial five-day response to a records request, if it provides some legal basis in its first response." 136 Nev. at 48, 458 P.3d at 1053. But despite this heading, *Coroner/Medical Examiner* does not hold that a governmental entity must assert its legal basis for withholding records in the initial five-day response. To the contrary, the supreme court in *Coroner/Medical Examiner* simply refused to read a rule into the NPRA that would require a governmental entity to assert a legal basis for withholding public records in its initial five-day response to avoid waiving it. 136 Nev. at 46-47, 48-50, 458 P.3d at 1051, 1053-54. That decision was based on the supreme court's prior decision in *Republican Attorneys General Association v. Las Vegas Metropolitan Police Department*, which similarly refused to read a rule into the NPRA providing that a governmental entity waives its legal basis for withholding records by failing to provide an initial response to a records request within the five-day period for doing so. 136 Nev. 28, 30-31, 458 P.3d 328, 330-31 (2020).

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statutory provisions with which we are concerned here. *See id.* § 11, at 4008; *see also Las Vegas Metropolitan Police Dep't v. Ctr. for Investigative Reporting, Inc.*, 136 Nev. 122, 126 n.3, 460 P.3d 952, 956 n.3 (2020) (reaching a similar conclusion concerning the application of NRS 239.011(2) in a proceeding filed before the amendments' effective date).

While neither *Coroner/Medical Examiner* nor *Republican Attorneys General* directly address what happens when a governmental entity waits until after the parties have exchanged extensive correspondence and engaged in litigation to assert a legal basis for withholding records, as respondents did in the present case, the supreme court's rationale in those decisions demonstrates that waiver does not apply under such circumstances. Indeed, the supreme court's decisions in *Coroner/Medical Examiner* and *Republican Attorneys General* were based on the fact that waiver is not an enumerated remedy in the NPRA, that the Nevada Legislature specifically considered adding a waiver provision to the statute and declined to do so, and that it would be inappropriate to require disclosure of Nevadans' private information based on a governmental entity's failure to assert a legal basis for withholding the records within a certain period. 136 Nev. at 48-50, 458 P.3d at 1053-54; 136 Nev. at 31-33, 458 P.3d at 331-333.

Thus, we reject Panicaro's argument that respondents waived their ability to assert the confidentiality privilege. And combined with Panicaro's failure to challenge the specific grounds on which respondents asserted the records at issue here were confidential, we conclude that he has not established that he was harmed when the district court dismissed his petition without first resolving the parties' dispute concerning respondents' assertion of the confidentiality privilege. As a result, we affirm the court's dismissal order. *Cf.* NRCP 61.

Panicaro next argues that the district court abused its discretion by refusing to consider his request to recover his copy costs. *See Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 89,

343 P.3d 608, 614 (2015) (reviewing a district court order denying a request for costs pursuant to the NPRA for an abuse of discretion). Below, the district court orally found that Panicaro was entitled to costs pursuant to the NPRA. And while the court awarded him certain of his costs based on this statute, it refused to consider Panicaro's request to recover the copy costs he incurred in connection with his petition.

Under the NPRA, if a records requester prevails in an action to obtain access to public records, "the requester is entitled to recover his or her costs . . . in the proceeding from the governmental entity whose officer has custody of the book or record." NRS 239.011(2). Here, in refusing to consider Panicaro's request for copy costs, the district court disregarded NRS 239.011(2) insofar as that statute expressly authorizes a prevailing record requester to recover his or her costs in the proceeding. Thus, we conclude that the district court abused its discretion by refusing to consider this request and we therefore reverse this decision with regard to the copy costs, and remand this matter to the district court to determine whether Panicaro should be awarded his copy costs.[2] *Blackjack Bonding*, 131 Nev. at 89, 343 P.3d at 614.

Lastly, although Panicaro challenges the post-judgment order denying his motion for an order to show cause, we lack jurisdiction to hear that challenge because such orders are not substantively appealable. *See*

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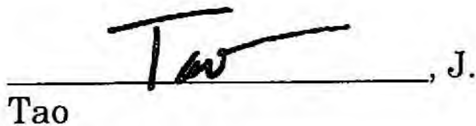
[2]While this court generally will not grant a pro se appellant relief without providing the respondent an opportunity to file an answering brief, NRAP 46A(c), directing an answering brief would be futile here given that the district court disregarded NRS 239.011(2) to the extent it refused to consider whether to award Panicaro his copy costs.

NRAP 3A(b) (setting forth orders and judgments from which an appeal may be taken); *see also Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013) (recognizing that Nevada's appellate courts lack jurisdiction to consider appeals not authorized by statute or court rule). Accordingly, we dismiss this appeal to the extent Panicaro challenges the post-judgment order denying his motion for an order to show cause. *Brown*, 129 Nev. at 345, 301 P.3d at 851.

It is so ORDERED.[3]

_______________, C.J.
Gibbons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cc: Hon. James Todd Russell, District Judge
Joe Panicaro
Lemons, Grundy & Eisenberg
Storey County Clerk

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[3]Having reviewed Panicaro's remaining arguments, we conclude that they either are not properly before us or do not provide a basis for relief.