

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Marc Dann et al., :
Appellants-Appellants, :
v. : No. 11AP-598
Ohio Elections Commission, : (C.P.C. No. 09CVF-08-11046)
Appellee-Appellee. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on May 17, 2012

Dann, Doberdruk & Wellen LLC, and Grace M. Doberdruk,
for appellants.

Michael DeWine, Attorney General, Erick D. Gale and
Michael J. Schuler, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Appellants, Marc Dann, Dann for Ohio Committee ("committee") and Mary Beth Snyder, appeal from a judgment of the Franklin County Court of Common Pleas affirming the decision of appellee, Ohio Elections Commission ("OEC"). The OEC found that appellants violated R.C. 3517.13(O) by using campaign funds for the personal use of the campaign beneficiary. This case presents the question of whether the lower court abused its discretion when it found reliable, probative, and substantial evidence supporting the OEC's decision that appellants violated R.C. 3517.13(O) by spending approximately \$40,000 in campaign funds on a closed-circuit video monitored security

system, new windows, and other improvements to the personal residence of then Attorney General Marc Dann. Because we find that the lower court did not abuse its discretion, we affirm.

Factual Background and Procedural History

{¶ 2} Marc Dann was Ohio Attorney General from January 2007 through April 2008. Within months after becoming the state attorney general, Mr. Dann received threats against his life and the safety of his family. The Ohio State Highway Patrol ("OSHP"), Ohio Bureau of Criminal Investigation and Identification ("BCI & I") and staff of the Ohio Attorney General's office developed and implemented a security plan. That plan provided for 24-hour law enforcement protection for Mr. Dann and his residence in Trumbull County. Law enforcement personnel were also assigned to provide transportation and protection for Mr. Dann's wife and his two children. This included transportation to work, school and extra curricular activities, and errands. Mr. Dann did not participate in developing this security plan. Governor Ted Strickland authorized the expenditure of public funds for this purpose from a state fund for executive protection.

{¶ 3} Sometime thereafter, Mr. Dann became concerned about the continued use of public funds to pay for the law enforcement personnel protecting his residence. In addition, the 24-hour security caused significant inconvenience to Mr. Dann and his family and intruded upon their privacy. Therefore, Mr. Dann asked if there was an alternative to having security personnel stationed at his home. Staff of the Ohio Attorney General's office, in conjunction with BCI & I and the OSHP developed a revised plan that involved the installation of a closed-circuit video monitored security system at his home and other improvements, including new windows. Again, Mr. Dann did not participate in the development of this revised plan. Mr. Dann decided to implement this plan. He also

decided to use campaign funds to pay for these improvements. Appellant, Ms. Snyder, was a deputy treasurer of the committee and she signed the checks that paid for these improvements.

{¶ 4} The committee filed campaign finance reports with the Ohio Secretary of State that listed the expenditures for the purchase and installation of the security system and other improvements to Mr. Dann's personal residence. These expenditures totaled approximately \$40,000.

{¶ 5} After the secretary of state's audit of the committee's 2007 campaign finance reports, the secretary of state questioned the legality of the committee's expenditures for these improvements to Mr. Dann's personal residence. The secretary of state requested additional information to determine whether the expenditures were permissible under Ohio law. Mr. Dann responded by arguing that the expenditures were permissible because they were necessitated by his duties as a public office holder. The secretary of state disagreed. The secretary of state contended that these expenditures were not a permissible use of campaign funds because they constituted expenditures for personal use, a violation of R.C. 3517.13(O). Mr. Dann refused to refund the committee the amount of these expenditures.

{¶ 6} The secretary of state filed a complaint with the OEC naming appellants and the committee's former treasurer, Bruce Lev, as respondents.¹ The complaint alleged that appellants violated R.C. 3517.13(O) by using campaign funds to pay for the security system, new windows, and other improvements at Mr. Dann's residence.² The OEC held a

¹ Mr. Lev subsequently was dismissed as a named party.

² The complaint also alleged that appellants violated R.C. 3517.13(O) by using campaign funds to pay expenses on multiple wireless cell phone numbers.

hearing on the matter. At the time of the hearing, the security system and other improvements remained in Mr. Dann's residence even though he was no longer attorney general. The parties submitted documentary evidence and a joint stipulation of facts; no other evidence was presented. The OEC also heard oral arguments of counsel. The OEC rejected appellants' contention that the expenditures at issue met the "duties of public office" exception contained in R.C. 3517.13(O)(2). The OEC found that the expenditures constituted a conversion of campaign funds for personal use in violation of R.C. 3517.13(O).³ The OEC fined the committee and Mr. Dann \$1,000 each and Ms. Snyder \$250 for this violation. Appellants appealed to the Franklin County Court of Common Pleas pursuant to R.C. 119.12. The lower court affirmed the OEC's decision.

{¶ 7} Appellants now appeal and assign the following errors:

[1.] The trial court committed prejudicial error when finding that Appellants Marc Dann, Dan for Ohio, and Mary Beth Snyder violated R.C. 3517.13(O) by paying for a home security system.

[2.] The trial court committed prejudicial error when finding that Appellant Marc Dann converted campaign funds for personal use because the trial court erroneously based its decision on federal advisory opinion 2009-08, which did not exist at the time appellants purchased the security system, to declare that while it was permissible to use campaign funds for security upgrades that the amount of money spent by appellants in 2007 was excessive since it was more than the amount discussed in the advisory opinion.

[3.] The trial court committed prejudicial error by not determining that R.C. 3517.13(O) is unconstitutionally vague.

³ The OEC also found that appellants violated R.C. 3517.13(O) by improperly paying personal cell phone bills with campaign funds. For this violation, the OEC issued a public reprimand. Appellants did not appeal that determination.

Standard of Review

{¶ 8} In an administrative appeal pursuant to R.C. 119.12, the court of common pleas reviews an order to determine whether it is supported by reliable, probative, substantial evidence, and is in accordance with the law. *Levine v. State Med. Bd. of Ohio*, 10th Dist. No. 10AP-962, 2011-Ohio-3653, ¶ 12. The Supreme Court of Ohio has defined the concepts of reliable, probative, and substantial evidence as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm., 63 Ohio St.3d 570, 571 (1992).

{¶ 9} The standard of review is more limited on appeal to this court. Unlike the lower court, this court does not determine the weight of the evidence. *Rosford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707 (1992). In reviewing the court of common pleas' determination that the commission's order is supported by reliable, probative, and substantial evidence, this court's role is confined to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.*, 80 Ohio App.3d 675, 680 (10th Dist.1992). The term abuse of discretion connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). However, on the question of whether the commission's order is in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

First Assignment of Error

{¶ 10} In their first assignment of error, appellants contend that the lower court erred when it determined there was reliable, probative, and substantial evidence supporting the OEC's finding that appellants violated R.C. 3517.13(O) by using approximately \$40,000 in campaign funds to pay for a closed-circuit video monitored security system, new windows, and other improvements in Mr. Dann's personal residence. Appellants advance two arguments in support of this contention. First, appellants contend that because they believed the use of campaign funds for these purposes was permissible, they could not have violated R.C. 3517.13(O). Second, appellants argue that the use of campaign funds to pay for the security system, new windows, and other improvements was permissible because these improvements were "legitimate and verifiable ordinary, and necessary" expenses connected to the "duties as the holder of public office" under R.C. 3517.13(O)(2). We find that neither argument supports reversal of the lower court's judgment.

{¶ 11} R.C. 3517.13(O) provides in relevant part:

(O) No beneficiary of a campaign fund or other person shall convert for personal use, and no person shall knowingly give to a beneficiary of a campaign fund or any other person, for the beneficiary's or any other person's personal use, anything of value from the beneficiary's campaign fund, including, without limitation, payments to a beneficiary for services the beneficiary personally performs, except as reimbursement for any of the following:

* * *

(2) Legitimate and verifiable ordinary and necessary prior expenses incurred by the beneficiary in connection with duties as the holder of a public office, including, without limitation, expenses incurred through participation in nonpartisan or bipartisan events if the participation of the holder of a public office would normally be expected[.]

{¶ 12} R.C. 3517.13(O) expressly prohibits a beneficiary of a campaign fund or other person from converting campaign funds for personal use. There is no "knowing" requirement for a campaign beneficiary or other person who converts campaign funds for personal use. Because Mr. Dann is the campaign fund's beneficiary, the statute's plain language does not require proof that he knowingly converted campaign funds for personal use to establish a violation. Nor is such a requirement implied. Therefore, we reject appellants' argument as to Mr. Dann.

{¶ 13} Although R.C. 3517.13(O) does expressly impose a "knowingly" requirement on any person who gives campaign funds to a campaign fund's beneficiary for the beneficiary's personal use, all that is required is that the person knowingly engaged in the conduct, not knowledge that the conduct violates the statute. *See State v. Pinkney*, 36 Ohio St.3d 190, 198 (1988) ("Knowledge that certain conduct is unlawful is not a necessary element for conviction based on actions done 'knowingly.' "). Here, appellants do not dispute that they knowingly used campaign funds to pay for the security system, new windows, and other improvements for Mr. Dann's personal residence. Therefore, appellants' first argument is fundamentally flawed.

{¶ 14} Appellants also argue that the use of campaign funds to pay for the security system, new windows, and other improvements at Mr. Dann's personal residence was permissible under R.C. 3517.13(O)(2) because they were "legitimate and verifiable ordinary and necessary" expenses connected with the duties of the office holder. Appellants present a plausible argument, supported by some evidence in the record, that these expenses might qualify under R.C. 3517.13(O)(2). However, we are presented with a more narrow question. We must decide whether the lower court abused its discretion in finding reliable, probative, and substantial evidence in support of the OEC's

determination that these expenses were not "legitimate and verifiable ordinary and necessary" expenses incurred by Mr. Dann because of his duties as the state attorney general or that the OEC's decision was contrary to law.

{¶ 15} The terms legitimate, verifiable, ordinary and necessary are not defined in the Revised Code. However, the OEC has defined these terms in the context of R.C. 3517.13(O)(2) in a number of advisory opinions. In this context, "legitimate" has been defined to mean "true or valid in the sense that the expenditure is truly related to a duty of a public office," Ohio Elections Commission Advisory Opinion 87ELC-13, and "conforming to recognized principles or accepted rules and standards." 87ELC-04. In addition, to be legitimate there must be some "vital nexus" between the expense and the duties of the office holder. 91ELC-1. "Verifiable" means "able to be proven to be true, confirmed or authenticated." 87ELC-04. An "ordinary" expense is one that is "customary and usual," and a "necessary" expense is one that is "appropriate and helpful to accomplishing a particular end." 87ELC-04 and 87ELC-14. These definitions are consistent with the ordinary meaning of these words.

{¶ 16} It is undisputed that the expenses at issue here were verifiable. However, the parties dispute whether the expenses were legitimate, ordinary and necessary. After reviewing the administrative record, the lower court determined that there was reliable, probative, and substantial evidence supporting the conclusion that using approximately \$40,000 of campaign funds for the purchase and installation of a closed-circuit video monitored security system, new windows, and other improvements to Mr. Dann's personal residence was not legitimate, ordinary and necessary. We find no abuse of discretion by the lower court.

{¶ 17} Although the installation of a security system at Mr. Dann's residence is understandable given the nature of the threats, evidence regarding the nature, extent, and cost of the closed-circuit video monitored system in Mr. Dann's residence is reliable, probative, and substantial evidence supporting the OEC's determination that these expenditures were not legitimate, ordinary and necessary to the duties of the state attorney general. This was a very expensive home security system. It was also unusual because the system was monitored by local law enforcement through a closed-circuit video system. In addition, evidence reflecting the installation of new windows and upgraded doors in his home also support the OEC's conclusion that these expenses were not legitimate, ordinary and necessary to Mr. Dann's public duties.

{¶ 18} Appellants emphasize that Mr. Dann used campaign funds to pay for the security system, new windows, and other improvements to save the public the cost of a 24-hour security detail and to reduce the inconvenience and loss of privacy experienced by Mr. Dann and his family. However, an understandable motive does not authorize what the law prohibits. Given the evidence before the OEC, the lower court did not abuse its discretion when it determined there was reliable, probative, and substantial evidence supporting the OEC's decision. Therefore, we overrule appellants' first assignment of error.

Second Assignment of Error

{¶ 19} By their second assignment of error, appellants contend that the lower court erred when it affirmed the OEC's decision based in part upon Federal Election Commission Advisory Opinion 2009-08 ("F.E.C. AO 2009-08"), which had not been issued when appellants used campaign funds to pay for the security system and other improvements to his residence. More specifically, appellants argue that it was error for

the lower court to compare the costs of the security upgrades addressed in F.E.C. AO 2009-08 with the costs of installing the security system, new windows and other improvements in Mr. Dann's residence. We disagree.

{¶ 20} We note that appellants cited to F.E.C. AO 2009-08 to support their argument that it was permissible to use campaign funds to pay for the security system and other improvements at Mr. Dann's residence. F.E.C. AO 2009-08 involved a congressman who wished to use campaign funds to pay for enhanced security at his home. The Federal Elections Commission concluded that because the need for enhanced security at his home was due to legitimate threats stemming from his role as a member of congress and a candidate, the use of campaign funds to pay for the upgrades did not constitute personal use of campaign funds.

{¶ 21} The lower court distinguished the facts at issue in F.E.C. AO 2009-08 from the facts in the case at bar. Notably, the security upgrade at issue in F.E.C. AO 2009-08 cost between \$6,000 and \$7,500 and did not involve any structural improvements to the congressman's home. In contrast, approximately \$40,000 of campaign funds were spent on Mr. Dann's residence, which included some structural improvements (the installation of new windows). The lower court did not err by noting these factual differences. Moreover, the Federal Elections Commission was interpreting federal law, not Ohio law. Because the lower court did not improperly distinguish F.E.C. AO 2009-08 nor abuse its discretion, we overrule appellants' second assignment of error.

Third Assignment of Error

{¶ 22} By their third assignment of error, appellants contend that the lower court erred when it failed to find R.C. 3517.13(O) facially unconstitutional based upon the

doctrine of vagueness. Appellants argue that because R.C. 3517.13(O) does not specifically define what conduct is prohibited, it is vague and, therefore, facially unconstitutional.

{¶ 23} Appellants did not present a facial constitutional challenge to R.C. 3517.13(O) in the lower court. A constitutional issue not raised below " 'need not be heard for the first time on appeal.' " *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶ 21 (10th Dist.), quoting *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus. "[A] party's failure to challenge 'the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure.' " *State v. Harris*, 10th Dist. No. 08AP-723, 2009-Ohio-1188, ¶ 3 citing *Awan*, syllabus. Because appellants did not present a facial challenge to R.C. 3517.13(O) before the lower court, they have waived that argument.

{¶ 24} Even if appellants had not waived this argument, a facial challenge to R.C. 3517.13(O) is unfounded. As noted by appellee, courts routinely reject vagueness challenges when the availability of an advisory opinion would alleviate any alleged vagueness concern. *U. S. Civ. Serv. Comm. v. Natl. Assn. of Letter Carriers, AFL-CIO*, 413 U.S. 548, 580 (1973) (rejecting vagueness challenge to Hatch Act, in part because federal employees could obtain advisory opinions from the civil service commission on the legality of their proposed course of political campaign activities); *Arnett v. Kennedy*, 416 U.S. 134, 160 (1974) (finding it "important in rejecting the respondents' vagueness contentions" the governmental body was "available to counsel employees who seek advice on the interpretation of" the statute and regulations at issue); *McConnell v. Fed. Election Comm.*, 540 U.S. 93, 170 (2003) (rejecting vagueness challenge and noted that "should plaintiffs feel that they need further guidance, they are able to seek advisory opinions for clarification and thereby 'remove any doubt there may be as to the meaning of the law' "),

quoting *U. S. Civ. Serv. Comm.* at 580; *Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 817 (D.C.Cir.2001), (rejecting vagueness challenge in part because administrative advisory opinion procedure existed to resolve any ambiguity).

{¶ 25} Here, it is undisputed that appellants could have sought an advisory opinion from the OEC before expending campaign funds for these purposes. Therefore, even if it had not been waived, appellants' facial challenge to R.C. 3517.13(O) on vagueness grounds would fail. For these reasons, we overrule appellants' third assignment of error.

{¶ 26} Having overruled appellants' three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 27} Since I respectfully disagree with the majority of this panel, I dissent.

{¶ 28} The issue before the trial court and before us on appeal is much more an issue of law than an issue of fact. I, therefore, would not apply an abuse of discretion standard to this case.

{¶ 29} I believe that this case should be put in the proper context. Marc Dann was serving as attorney general for the state of Ohio. Some of his official positions had upset persons affiliated with gambling interests which led to credible threats upon his life and the well-being of his family. As a result, the state of Ohio began expending significant funds to increase the security around Dann and his family.

{¶ 30} The Ohio legislature reduced funding for those purposes and for many other purposes in an attempt to balance the state budget. Dann then attempted to reduce the

burden on the state budget by finding a way to pay for the needed security with private funds. He is not a wealthy man, so he could not pay for the needed security enhancements out of his own funds. As a result, he turned to remaining funds in his campaign account. He did this based upon his own interpretation of R.C. 3517.13(O)(2).

{¶ 31} R.C. 3517.13(O) reads:

(O) No beneficiary of a campaign fund or other person shall convert for personal use, and no person shall knowingly give to a beneficiary of a campaign fund or any other person, for the beneficiary's or any other person's personal use, anything of value from the beneficiary's campaign fund, including, without limitation, payments to a beneficiary for services the beneficiary personally performs, except as reimbursement for any of the following:

(1) Legitimate and verifiable prior campaign expenses incurred by the beneficiary;

(2) Legitimate and verifiable ordinary and necessary prior expenses incurred by the beneficiary in connection with duties as the holder of a public office, including, without limitation, expenses incurred through participation in nonpartisan or bipartisan events if the participation of the holder of a public office would normally be expected;

(3) Legitimate and verifiable ordinary and necessary prior expenses incurred by the beneficiary while doing any of the following:

(a) Engaging in activities in support of or opposition to a candidate other than the beneficiary, political party, or ballot issue;

(b) Raising funds for a political party, political action committee, political contributing entity, legislative campaign fund, campaign committee, or other candidate;

(c) Participating in the activities of a political party, political action committee, political contributing entity, legislative campaign fund, or campaign committee;

(d) Attending a political party convention or other political meeting.

For purposes of this division, an expense is incurred whenever a beneficiary has either made payment or is obligated to make payment, as by the use of a credit card or other credit procedure or by the use of goods or services received on account.

{¶ 32} Specifically, Dann interpreted R.C. 3517.13(O)(2) to allow the security expenditure as legitimate, verifiable, ordinary and necessary. The threats were a result of his public stands as attorney general and therefore were incurred "in connection with duties as the holder of a public office." The need to protect public office holders is not in dispute. The use of funds for that purpose is legitimate.

{¶ 33} Dann and his campaign committee kept careful records of the expenditures to enhance security at Dann's home. The expenditures were duly reported in campaign filings. The reporting requirements in the statute were satisfied.

{¶ 34} No evidence was presented at any time to prove that the security upgrades at Dann's home increased its value. Dann and his committee agreed that if the residence were sold and the value of the home had in fact been increased by the security upgrade, any funds received as a result of the increase in value would be returned to the committee.

{¶ 35} Dann's interpretation of R.C. 3517.13(O) was consistent with the interpretation of analogous federal statutes by the Federal Elections Commission. Members of the United States House of Representatives had had expenditures for security from campaign funds approved.

{¶ 36} To the limited extent that a factual issue plays into the interpretations of R.C. 3517.13(O), both the Ohio Elections Commission and the common pleas court below apparently found that Dann received a financial benefit from the security upgrades. There is simply no evidence in the record to support such a finding. Indeed, any

homeowner in Ohio knows that not everything you spend on your house increases its fair-market value and some expenditures can reduce its fair-market value.

{¶ 37} To the extent the Ohio Elections Commission and the court below interpreted R.C. 3517.13(O) to mean that an office holder who has been threatened with death cannot expend campaign funds, at a significant saving of public funds, to protect himself and his family from death or great bodily harm, I believe the court below and the Ohio Elections Commission misinterpreted R.C. 3517.13(O). Unfortunately, the majority of the panel supports what to me is a clear misinterpretation of the statute.

{¶ 38} I also note that, under the interpretation of R.C. 3517.13(O) used by the Ohio Elections Commission in this case, a serious question is raised as to whether a political campaign can expend any funds for security purposes. For instance, can off-duty police officers be used to provide security for the Governor of Ohio or other office holders at a campaign event if the campaign fund picks up all or part of the cost? Can police be used to escort political parades when the candidates or their campaign funds pick up part of the cost for police protection and traffic control? Can any high profile political figure use campaign funds to pay for a bodyguard or other persons necessary to protect the political figure? Participation in campaign events is not literally a duty of the office holder. Providing protection of the person of the office holder is providing a personal benefit to the office holder.

{¶ 39} Our ruling provides guidance as to the law to be applied to all political figures, not just Marc Dann. I fear we are giving the wrong guidance.

{¶ 40} Again, I respectfully dissent.
