

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cesar Barros, :
 :
 Appellant :
 :
 v. :
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 :
 City of Allentown, and Allentown :
 Police Department, and James B. :
 Martin, in his official capacity as Chief : No. 1592 C.D. 2011
 District Attorney for the County : Submitted: February 17, 2012
 of Lehigh :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE MCGINLEY

FILED: July 5, 2012

Cesar Barros (Petitioner), *pro se*, appeals the Order of the Court of Common Pleas of Lehigh County (common pleas court) which sustained Preliminary Objections of the City of Allentown (City), and dismissed Petitioner’s Petition for Review of the Final Determination of the District Attorney’s Office under the Right-to-Know-Law (RTKL).¹

I. Procedural History

A. Prior Matter

Petitioner is an inmate confined in the State Correctional Institution at Smithfield in Huntingdon, Pennsylvania. On June 8, 2008, the Petitioner requested

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §67.101-67.3104. The RTKL repealed the former Right-to-Know Law, Act of June 21, 1957, P.L. 390, *as amended*, formerly 65 P.S. §§66.1-66.4.

that the Allentown Police Department (APD) provide him with a complete copy of Criminal File #99-85124 under the Criminal History Records Information Act (CHRIA).²

On January 20, 2009, Petitioner filed a Petition for Review with this Court and stated the APD did not acknowledge his request or respond. This Court transferred the matter to the common pleas court because it involved a local government agency.

The APD argued that Petitioner did not have personal jurisdiction to sue because the APD is not a legal entity that can be sued, and because Petitioner did not serve original process on the City. The APD also stated that Petitioner could access all records available to him via the RTKL.

The common pleas court determined:

The first question is whether the APD can be sued, and thus whether the Petitioner properly obtained personal jurisdiction to file suit. The APD is a subdivision of the City of Allentown, and therefore is immune from suit. A properly filed suit would have named the City of Allentown as the defendant. Having named the subdivision instead, the Petitioner failed to obtain personal jurisdiction over a proper defendant, and the petition is dismissed for that reason alone.

Petitioner's failure to name a proper defendant affects the second question: whether Defendant was properly served. It is impossible to gain personal jurisdiction over a defendant that cannot be sued, even via proper service.

² 18 Pa. C.S. §§9101-9183.

Here, because the APD is an improper defendant, Petitioner cannot have properly served the APD. Also, although Petitioner claims APD has waived its challenge of personal jurisdiction by appearing at a hearing, it is impossible for an improperly named party to waive a challenge of personal jurisdiction.

Even if APD were a proper defendant, service would be defective here. Rule 400(b)(1) of the Pennsylvania Rules of Civil Procedure states that any competent adult can serve process in a civil action, while Rule 402 states that process may be served by handing an original copy to the defendant or by delivery to an agent of a defendant. The Supreme Court has stated that the “rules relating to service of process must be strictly followed, and jurisdiction of the court over the person of the defendant is dependent upon proper service having been made.” *Sharp v. Valley Forge Medical Center and Heart Hospital, Inc.*, 221 A.2d 185, 187 (Pa. 1966). Pennsylvania courts have found service to be defectively served when sent by certified mail. See *Colucci v. McConnell*, 1996 WL 305 675 (Pa. Com. Pl. 1996). Here, Petitioner claims he served process via certified mail. Per *Colucci*, certified mail service is defective service. Therefore, the service in this case is defective, and there is no personal jurisdiction over a proper defendant.

Common Pleas Court Opinion, April 4, 2011, Discussion at 3-4; Supplemental Reproduced Record (S.R.R.) at 21b-22b.

On May 6, 2011, Petitioner appealed the common pleas court’s denial of his request for a copy of his criminal file to this Court. In *Cesar Barros v. Allentown Police Department*, No. 851 C.D. 2011, filed January 30, 2012, this Court affirmed.

B. Present Matter

On April 11, 2011, Petitioner filed a Right-to-Know request with the City.³

On May 9, 2011, Petitioner's request was granted in part and denied in part by the City, Office of City Solicitor. A letter to Petitioner from Frances A. Fruhwirth, Assistant City Solicitor, stated that 32 pages in the file were deemed subject to disclosure under the CHRIA and were provided to Petitioner. The letter stated that Social Security Numbers on some of the information were redacted under §708(b)(6) of the RTKL, 65 P.S. §67.708(b)(6). The 32 pages consisted of a two-page Incident Report and Petitioner's own criminal history.

Petitioner was advised that he had a right to appeal the partial denial of access to requested information within fifteen days to the District Attorney of Lehigh County and that he had a right to appeal the redaction of Social Security Numbers to the Office of Open Records in Harrisburg. On May 17, 2011, the Office of the District Attorney of Lehigh County received Petitioner's appeal.

³ Petitioner's request stated the following:

To whom it may concern:

I, Cesar Barros, hereby request a complete copy of the above Criminal Complaint File under the Criminal History Record Information Act, [18] Pa.C.S. §§ 9109-9183, and under the Right-to-Know-Law, 65 P.S. Section 67.101 et seq.

Petitioner's Right-to-Know Request, April 11, 2011, at 1; S.R.R. at 33b.

In a Final Determination on May 31, 2011, the District Attorney denied the Petitioner access to criminal records, other than those records the City released to the Petitioner in response to his RTKL request. The District Attorney reasoned:

After a review of CHRIA and File #99-85124,” [sic] I have determined that requested information that was not disclosed to Mr. Barros [Petitioner] is exempt from disclosure under CHRIA and meets the statutory definitions of “intelligence information, investigative information, or treatment information,” which was the basis for the City’s partial denial.

I also find that the information is exempt under the following sections of the RTKL” Section 708(b)(5) “a record of an individual’s medical, psychiatric or psychological history...;” Section 708(b)(16)(ii) “a record of an agency relating to or resulting in a criminal investigation, including...investigative materials, notes, correspondence, videos and reports;” Section 708(b)(16)(vi)(A) “a record that, if disclosed, would do any of the following...reveal the institution, progress or result of a criminal investigation;” and Section 708(b)(6)(i)(A) “a record containing all or part of a person’s Social Security number, driver’s license number...or other personal identification number.”

In addition, I have determined that Rule 160 of the Rules of Juvenile Court Procedure limits public access to juvenile record information and that the complainant, Mr. Barros [Petitioner], is not among the enumerated parties who are permitted by the Rule to inspect juvenile records.

I also find that information sought under the RTKL would have been given to the requester in the discovery stage of his case in Lehigh County Court.

Final Determination by James B. Martin, District Attorney, June 2, 2011, at 3; S.R.R. at 74b.

On June 15, 2011, Petitioner filed a Petition for Review with the common pleas court.

On June 30, 2011, the City filed its Motion⁴ to dismiss Petitioner's petition for review.

The City's motion to dismiss alleged:

1. The Plaintiff, Cesar Barros (the "Petitioner"), an inmate, requested a complete copy of his Criminal File #99-85124 from the Defendant, City of Allentown (the "City) and its Police Department under the Right-to-Know Law, 65 P.S. Section 67.101 et. seq. (RTKL), and the Criminal History Record Information Act, 18 Pa. C.S.A. [sic] Section 9101 et. seq. (CHRIA).
2. Under Section 503(d)(2) of the RTKL, 65 P.S. Section 67.503(d)(2), the District Attorney of the County, or his designee, shall hear appeals under Chapter 11 of the RTKL relating to access to criminal investigative records in possession of a local agency, such as the City.

⁴ Because preliminary objections are not permitted in statutory appeals, the common pleas court erred when it dismissed Barros's appeal on the City's preliminary objections. We find this error to be harmless, where the court could have treated the preliminary objections as a motion to dismiss. *See Strickland v. University of Scranton*, 700 A.2d 979 (Pa. Super. 1997). Accordingly, and because the parties are not prejudiced as a result, we will treat our review of the common pleas court's order as though the City filed a motion to dismiss and will review the common pleas court's order as though the City filed a motion to dismiss and will review the common pleas court's order for an abuse of discretion or error of law. *Brown v. Levy*, 25 A.3d 418 (Pa. Cmwlth. 2011).

3. This is a statutory appeal to this Court authorized by Section 1302(a) of the RTKL, 65 P.S. Section 67.1302(a), from the Final Determination of the District Attorney denying the Petitioner's request for access to criminal investigative records in possession of a local agency, such as the City.

4. The Pennsylvania Rules of Civil Procedure do not apply to statutory appeals.

5. Because the use of Preliminary Objections under Pa. R.C.P. [sic] 1028 is not permitted in this statutory appeal, the City files this Motion in the nature of Preliminary Objections pursuant to Lehigh County Local Rule of Civil Procedure 208.3(b) as follows:

A. The City Police Department is not a proper party Defendant

(1) The City Police Department is a department within the City.

(2) The City Police Department does not exist as a separate corporate, municipal or legal entity subject to suit.

WHEREFORE, the Defendant, the City of Allentown, respectfully requests this Honorable Court to dismiss the Allentown Police Department as a named party Defendant in the appeal.

B. James B. Martin, Esquire, in his capacity of District Attorney, lacks standing and is not a proper named Defendant

(1) The District Attorney, or his designee, adjudicated the partial denial of access to the Police Department criminal records under Section 503(d)(2) of the RTKL, 65 P.S. Section 67.503(d)(2).

(2) As such, the District Attorney's Office, which performed an adjudicatory function, lacks standing to participate in the appeal

under Section 1303 of the RTKL, 65 P.S. Section 67.1303.

WHEREFORE, the Defendant, the City of Allentown, respectfully requests this Honorable Court to dismiss James B. Martin, Esquire in his official capacity as Chief District Attorney for the County of Lehigh as a named party Defendant in the appeal.

C. There is an identical prior action pending warranting dismissal of this action

(1) On or about January 20, 2009, the Petitioner filed a Petition for Review with the Commonwealth Court alleging that the City Police Department did not acknowledge or respond to his request for a complete copy of his Criminal Complaint File #99-85124 under the CHRIA, a true and correct copy of which is attached hereto as Exhibit "A".

(2) The matter was remanded and decided by the Honorable J. Brian Johnson of this Court at Lehigh County Court of Common Pleas No. 2009-C-0196, the Docket Entries for which action are attached hereto as Exhibit "B".

(3) The Petitioner's appeal of this Court's decision to deny the Petitioner access to the requested records, filed on May 6, 2011, with the Commonwealth Court is presently pending before the appellate Court.

(4) The requirements of the defense of *lis pendens* (pendency of a prior action)- the prior case is the same, the parties are the same and the relief requested is the same- are met and this second case requesting the same records under the RTKL and CHRIA should be dismissed.

WHEREFORE, the Defendant, the City of Allentown, respectfully requests this Honorable Court to enter judgment against the Plaintiff, Cesar Barros, and in favor of the Defendant, City of Allentown, and to dismiss Petition for Review with prejudice.

Motion in the Nature of Preliminary Objections of the Defendant, City of Allentown, to Petition for Review, June 30, 2011, at 1-3; Supplemental Record at 94b-96b.

Petitioner filed a Motion for Leave to File an Application to Amend the Caption and a Motion for Leave to File Preliminary Objections on July 12, 2011. On July 15, 2011, the City answered the Petitioner's Motion for Leave to Amend the Petition for Review.

On July 20, 2011, the District Attorney's Office appeared and joined in the City's motion to dismiss.

On July 21, 2011, the common pleas court entered an Order which granted the City's Motion and dismissed the Petitioner's Petition for Review because Petitioner's "appeal of this Court's decision to deny access to the requested records is pending appeal and therefore Plaintiff's [Petitioner's] present Petition For Review is impermissible." The trial court also denied the Motion for Leave to Amend the Caption as moot because his Petition for Review had been dismissed.

II. Issues Presented

Petitioner raises⁵ two issues on appeal.⁶ Initially, Petitioner contends the common pleas court erred because it applied the wrong legal standards when it granted the motion to dismiss. Petitioner also contends that the common pleas court erred when it denied his motion to amend the caption.

A. Issues Raised in Motion to Dismiss.

1. Whether Petition was Barred by Lis Pendens?

The common pleas court sustained the City's Motion and dismissed the Petitioner's Petition for Review because the prior case, *Cesar Barros v. Allentown Police Department*, No. 851 C.D. 2011, was pending before this Court. That is no longer true. On January 30, 2012, this Court adopted in full the Opinion

⁵ This Court's standard of review in a RTKL case is whether an error of law was committed, constitutional rights were violated, or necessary findings of fact are supported by substantial evidence. *Chester Community Charter School v. Hardy ex rel. Philadelphia Newspaper, LLC*, 38 A.3d 1079, 1082 n.4 (Pa. Cmwlth. 2012). Our scope of review is plenary. *Id.*

⁶ The City contends that this appeal should be quashed as untimely filed. The common pleas court's Order which dismissed Petitioner's Petition for Review under the RTKL was entered on July 21, 2011. A Notice of Appeal shall be filed within thirty days after the entry of the order from which the appeal is taken. Pa.R.A.P. 903(a). The date of entry of an Order, not controlled by the Rules of Civil Procedure, is the day the clerk of the court mails or delivers copies of the Order to the parties. Pa.R.A.P. 108(a); *Gomory v. Commonwealth, Department of Transportation*, 704 A.2d 202 (Pa. Cmwlth. 1997).

The City noted that the thirty day period expired on August 20, 2011, a Saturday. As such, the date the Notice to Appeal should have been filed was Monday, August 22, 2011. 1 Pa.C.S. §1908. This appeal was filed on Tuesday, August 23, 2011, and the City maintains that it was untimely.

Petitioner's Notice of Appeal was dated August 18, 2011.

Pursuant to the "prisoner mailbox rule," documents are deemed filed on the date when an incarcerated individual placed them in the hands of prison authorities for mailing. *See Commonwealth v. Castro*, 766 A.2d 1283, 1287 (Pa. Super. 2001). Therefore, Petitioner's appeal was timely filed.

of the common pleas court and affirmed because the service in that case was defective and there was no personal jurisdiction over a proper defendant.

Further, even if it were true, this case does not meet the definition of *lis pendens*. The purpose of the *lis pendens* doctrine is to protect a defendant from being forced to defend multiple suits on the same cause of action at the same time. *Feldman v. Lafayette Green Condominium Association*, 806 A.2d 497 (Pa. Cmwlth. 2002). The doctrine applies where the prior action and the subsequent action involve the same parties, the same cause of action and the same relief. *Id.* Here, the rights asserted in the present controversy are different in part because Petitioner claims he has a right to access these records under the RTKL and CHRIA whereas in the earlier proceeding he sought access only under the CHRIA. Because the cause in the two actions are different, *lis pendens* does not apply.

2. Whether the APD Was a Proper Party Defendant?

The City raised the issue that the APD was not a proper party defendant because it was a department within the City and not a separate legal entity.

Section 102 of the RTKL, 65 P.S. §67.102, states that a local agency is “[a]ny local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.”

The APD, which was responsible for maintaining criminal records, is a “local agency” for purposes of the RTKL. *See Times Publishing Company*,

Incorporated v. Michel, 633 A.2d 1233 (Pa. Cmwlth. 1993), *appeal denied*, 538 Pa. 618, 645 A.2d 1321, (1994) (Sheriff’s Department, which was responsible for receiving and processing applications to carry firearms was “agency” within meaning of Right-to-Know Act). Therefore, the APD was named as a proper party in a right-to-know action.

3. Whether James B. Martin, Esquire, in his Capacity of District Attorney, is a Properly Named Defendant?

The City asserted in its motion to dismiss that James B. Martin was not a properly named party.

Section 503(d) of the RTKL, 65 P.S. §67.503(d), provides the following:

Commonwealth agencies and local agencies.- Except as provided in subsection (d), the Office of Open Records established under section 1310 shall designate an appeals officer under section 1101(a)(2) for all:

...

(d) Law enforcement records and Statewide officials.-

(1) The Attorney General, State Treasurer and Auditor General shall each designate an appeals office to hear appeals under Chapter 11.

(2) The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 relating to access to criminal investigative records in possession of a local agency of that county. The appeals officer designated by the district attorney shall determine if the record requested is a criminal investigative record.

As the District Attorney, James B. Martin was the adjudicator but was not a keeper of criminal records. Therefore he was not a proper party to the

appeal. *See generally, East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496 (Pa. Cmwlth. 2010), *petition for allowance of appeal denied*, __ Pa. __, 20 A.3d 490 (2011).

B. Whether the Common Pleas Court Abused its Discretion When it Denied Petitioner’s Application to Amend Caption?

Petitioner also contends the common pleas court abused its discretion when it denied Petitioner’s application to amend caption.

A review of the caption reveals there is no difference between the caption as originally stated and the caption as amended by Petitioner. Consequently, the trial court properly dismissed the motion to amend caption albeit for a different reason. This Court may affirm on other grounds where grounds for affirmance exist. *Belitkus v. Hamlin Township*, 764 A.2d 669 (Pa. Cmwlth. 2000), *petition for allowance of appeal denied*, 565 Pa. 676, 775 A.2d 809 (2001).

Accordingly, this Court vacates and remands this case to the common pleas court for consideration on the merits of whether James B. Martin, the District Attorney, properly denied Petitioner’s request. Also, on remand, the common pleas court should grant the motion to dismiss James B. Martin and dismiss him from the case.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cesar Barros,	:
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Appellant	:
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v.	:
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City of Allentown, and Allentown	:
Police Department, and James B.	:
Martin, in his official capacity as Chief	: No. 1592 C.D. 2011
District Attorney for the County	:
of Lehigh	:

ORDER

AND NOW, this 5th day of July, 2012, the Order of the Court of Common Pleas of Lehigh County in the above captioned matter is vacated and this case is remanded to the Court of Common Pleas of Lehigh County for consideration on the merits of whether James B. Martin, the District Attorney, properly denied Petitioner's request. On remand, the Court of Common Pleas of Lehigh County is directed to grant the motion to dismiss James B. Martin and dismiss him from the case. Jurisdiction relinquished.

BERNARD L. MCGINLEY, Judge