

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION
BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

OCT 25 2017

GARY M. JOHNSON,

Plaintiff/Appellee,

vs.

STATE OF OKLAHOMA, ex. rel., OKLAHOMA
DEPARTMENT OF PUBLIC SAFETY,

Defendant/Appellant.

Case No. 115,924

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE GEARY L. WALKE, JUDGE

AFFIRMED

Stephen G. Fabian, Jr.,
Oklahoma City, Oklahoma,

For Plaintiff/Appellee,

Joanne Horne,
OKLAHOMA DEPARTMENT OF
PUBLIC SAFETY,
Oklahoma City, Oklahoma,

For Defendant/Appellant.

Opinion by Bay Mitchell, Presiding Judge:

¶1 Defendant/Appellant State of Oklahoma, *ex. rel.*, Oklahoma Department of Public Safety (DPS) appeals from an order awarding Plaintiff/Appellee Gary M. Johnson (Driver) \$8,299.66 in attorney and expert witness fees. We find the trial court properly awarded fees pursuant to 12 O.S. 2011 §941(B) because DPS had no reasonable basis for revoking Driver's license; further, we find the amount awarded was not an abuse of discretion. We affirm.

¶2 Driver was arrested on November 16, 2014 for driving under the influence. On March 24, 2016, DPS issued an order revoking Driver's license. Pursuant to newly decided case law directly controlling Driver's case, DPS issued a new order setting aside the revocation on April 26, 2016. Despite the fact that Driver's license revocation had been set aside, DPS issued a notice to Driver on June 4, 2016, apparently due to a clerical error, titled "Confirmation Notice and Reinstatement Requirements" (the Notice). The Notice informed Driver that his license had been revoked for a period of 180 days beginning May 23, 2016 and that it was unlawful for him to drive during that period. The Notice also included a list of conditions to be completed and fees to be paid by Driver in order to reinstate his license after the 180-day period expired. Driver notified his attorney, who purchased a Motor Vehicle Report (MVR). The MVR indicated that Driver was indeed under revocation.

¶3 Driver filed an appeal in district court. When DPS learned of the proceeding, it sent Driver's attorney a letter stating, "This will acknowledge receipt of your appeal in

the above captioned case. Our records have been updated to reflect the proper Implied Consent Order that sets aside [sic] the revocation stemming from your client's 11/16/2014 stop." The letter was unsigned, and no set aside order was attached to the letter or sent separately to Driver or his attorney. Driver's attorney purchased another MVR, which confirmed that the revocation had been removed from Driver's record. The court held a hearing on Driver's appeal on July 11, 2016. After the hearing, the court sustained Driver's petition and, in an order dated July 20, 2016, the court set aside "the revocation of [Driver's] license dated June 4, 2016[.]" This order was not appealed by DPS.

¶4 Driver then filed an application for attorney fees and costs. Driver cited 12 O.S. 2011 §941(B) as authority for the award, which provides, in pertinent part, as follows:

The respondent in any proceeding brought before any state administrative tribunal by any state agency, board, commission, department, authority or bureau authorized to make rules or formulate orders shall be entitled to recover against such state entity court costs, witness fees and reasonable attorney fees if the tribunal or a court of proper jurisdiction determines that the proceeding was brought without reasonable basis or is frivolous[.]

After a hearing, the court found that DPS revoked Driver's license without a reasonable basis and, accordingly, Driver was entitled to an award of attorney fees and costs under §941(B). The court awarded \$6,799.66 in attorney fees and \$1,500.00 in expert witness fees, for a total of \$8,299.66. DPS appeals.

¶5 Statutory construction presents a question of law that we review *de novo*. *Humphries v. Lewis*, 2003 OK 12, ¶3, 67 P.3d 333, 335. Likewise, the question of whether a party is entitled to attorney fees is a legal question reviewed *de novo*. *State ex. rel. Dep't of Transp. v. Cedars Grp., L.L.C.*, 2017 OK 12, ¶10, 393 P.3d 1095, 1100. Under that standard, we claim plenary, independent and non-deferential authority to reexamine the trial court's legal rulings. *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶14, 859 P.2d 1081, 1084. However, we review the question of whether an attorney fee award is reasonable only to determine if the court abused its discretion. *Finnell v. Seismic*, 2003 OK 35, ¶8, 67 P.3d 339, 342.

¶6 DPS argues the court erred as a matter of law by expanding the "without reasonable basis" language in §941(B) to include clerical errors. We find *Miller v. State ex. rel. Dep't of Pub. Safety*, 1996 OK CIV APP 71, 926 P.2d 797, instructive. There, another division of this Court found that the trial court had evidence from which it could conclude that revocation proceedings were brought without a reasonable basis where DPS admitted it lacked authority to revoke an out-of-state motorist's license or have him disqualified in his home state. *Id.*, ¶8, 926 P.2d at 800. Here, DPS revoked Driver's license, even after case law directly controlling Driver's case directed the revocation to be set aside.¹ DPS did not dispute that its actions were unjustified. The determination of whether a particular action is "reasonable" is within the trial court's

¹ We reject DPS' claim that the Notice sent to Driver was not an actual revocation: the MVR purchased by Driver's attorney showed that Driver's license had in fact been revoked.

discretion. Here, the trial court found that DPS' clerical error was not a reasonable basis to revoke Driver's license; that finding will not be disturbed on appeal.

¶7 DPS also argues the case was mooted when it corrected Driver's record and there should have been no hearing on Driver's appeal. We disagree. "[V]oluntary cessation of challenged conduct does not deprive a tribunal of its power to conduct appellate review." *State ex. rel. Oklahoma Firefighters Pension and Retirement System v. City of Spencer*, 2009 OK 73, ¶5, 237 P.3d 125, 129. "A claim may be mooted where subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*, ¶5 n.16, 237 P.3d at 129 n.16 (citations omitted).

¶8 Here, DPS revoked Driver's license, despite its knowledge of controlling case law. The letter received by Driver's attorney from DPS claiming to have corrected the record was unsigned and included no official set-aside order. At the attorney fees hearing, Driver's attorney noted the difficulty he had experienced communicating with DPS and argued that he proceeded with the appeal so he could get an order from the court and "feel a little more secure from the standpoint of my client's welfare in the future." The court noted that, after DPS caught and corrected the mistake, nothing happened, "[e]xcept that you showed up and the two of you argued for two hours about what happened in the past and why you should or shouldn't be here instead of saying, 'Judge, we fess up. There should be an order so that this man isn't stopped wrongfully[.]'"

Under these circumstances, Driver's appeal was not mooted by DPS' correction, and it was not error for the court to hear Driver's appeal.

¶9 Further, although Driver's attorney could have, as DPS suggests, called DPS directly in an attempt to resolve the matter, as noted above, the record shows that Driver's attorney had a difficult time resolving issues and communicating with DPS. It was not unreasonable for Driver's attorney to file a petition to correct DPS' actions. We also reject DPS' claim that the court should not have awarded fees because Driver was unharmed by the error. Section 941(B) does not require harm for an award under its provisions. Even if it did, the trial court could reasonably conclude that the uncertainty and stress created by the Notice was harmful in itself.

¶10 Finally, we reject DPS' claim that there was insufficient evidence to support the amount of the trial court's award. DPS agreed that the hourly rates submitted by Driver's attorney were reasonable. The record shows that the court awarded less than requested, excluding any time expended by Driver's attorney before receipt of the Notice, as well as time spent by Driver's attorney responding to DPS' application for attorney fees. DPS presents no argument or evidence to support its claim that the hours expended were unreasonable. Accordingly, we find the attorney fee award was not an abuse of discretion.

¶11 AFFIRMED.

BUETTNER, C.J., and SWINTON, J., concur.