CONDITIONALLY GRANT and Opinion Filed July 20, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00639-CV

IN RE DALLAS COUNTY SHERIFF MARIAN BROWN, IN HER OFFICIAL CAPACITY, Relator

Original Proceeding from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-07112

MEMORANDUM OPINION

Before Justices Bridges, Osborne, and Reichek
Opinion by Justice Osborne

Relator Marian Brown, in her official capacity as Dallas County Sheriff, ("Brown") seeks a writ of mandamus to compel the trial court to rule on her plea to the jurisdiction. We conditionally grant the petition.

Real parties in interest ("RPIs") brought suit against Brown complaining of conditions in the Dallas County Jail arising from the COVID-19 pandemic. Because the merits of the dispute are not before us in this proceeding and time is of the essence, we include here only those facts pertinent to the question of whether mandamus relief is warranted. To obtain mandamus relief, a relator must show both that the trial court clearly abused its discretion and that the relator has no adequate

remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *In re Tex. Am. Express, Inc.*, 190 S.W.3d 720, 723–24 (Tex. App.—Dallas 2005, orig. proceeding).

RPIs filed suit on May 21, 2020, seeking injunctive relief and to certify a class, alleging the following claims:

- Count I: Violation of Article 1, sections 13[1] and 19[2], of the Texas Constitution
- Count II: Public Health Nuisance
- Count III: Negligence and Gross Negligence.

RPIs alleged that Brown failed to perform ministerial acts required by Texas law, including maintaining the jail "in a clean and sanitary condition in accordance with standards of sanitation and health," *see* TEX. LOC. GOV'T CODE § 351.010(4), and abating a "public health nuisance existing in or on a place the person possesses as soon as the person knows that the nuisance exists," *see* TEX. HEALTH & SAFETY CODE § 341.012(a). The petition also included a section in which RPIs pleaded that

[1] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13.

[2] "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19.

"Sovereign Immunity Does Not Apply." With exhibits, the petition exceeded 1,000 pages because RPIs attached the reporter's record from a four-day hearing in a related federal court proceeding, also brought by Dallas County Jail detainees complaining of conditions at the jail arising from COVID-19. *See Sanchez v. Brown*, No. 3:20-cv-00832-E, 2020 WL 2615931 (N.D. Tex. May 22, 2020) (mem. op. and order) (request for preliminary injunctive relief denied). RPIs also attached affidavits and declarations by witnesses who expressed opinions about COVID-19 and its spread or provided factual information about conditions at the jail.

The following day, Brown filed a plea to the jurisdiction on the ground of governmental immunity. Brown contended the court lacked subject matter jurisdiction because:

- there is no private cause of action for equitable relief under the Texas Constitution,
- RPIs "have not pled, and cannot prove" a use or condition of property sufficient to waive immunity under the Texas Tort Claims Act, and
- RPIs have not identified any ministerial duty imposed on Brown sufficient to support an ultra vires claim.

Brown asserted that her response to the challenges posed by a public health emergency involved the exercise of discretion and judgment, triggering the sovereign immunity doctrine. *See Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017) (explaining that sovereign immunity extends to certain discretionary acts, but

not to actions made without legal authority or to failures to perform purely ministerial acts).

RPIs responded by filing their "Brief on the Court's Jurisdiction to Enjoin Defendant's Ultra Vires Conduct." They argued:

- Brown is not immune from suit for equitable relief under the Texas Constitution because she has no power to commit acts contrary to the guarantees found in the Texas Bill of Rights,
- the ultra vires exception to immunity authorizes injunctive relief to compel performance of Brown's ministerial duties, and
- because the harm to RPIs results from the inherently dangerous conditions at the Dallas County Jail and the use of property that is inherently dangerous, the Texas Tort Claims Act waives any immunity defense.

The trial court heard Brown's plea on May 26, but deferred ruling at the hearing because technical problems had prevented receipt of some of the parties' submissions. By email two days later, the trial court informed the parties, "I hereby deny Defendant's Plea to the Jurisdiction. [RPIs' counsel], please circulate an order and efile it. In light of this ruling, you are ordered to confer on expedited discovery, if needed." RPIs' counsel sent a proposed order denying the plea to Brown's counsel, who promptly approved its form. But RPIs never tendered the proposed order to the trial court despite follow-up emails by Brown's counsel. Brown's counsel then filed a copy of the proposed order with the trial court.

Although the trial court had not yet signed the order, Brown filed a notice of appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting interlocutory

appeal of order that grants or denies a plea to the jurisdiction by a governmental unit). Meanwhile, RPIs submitted a different proposed order—without circulation to Brown—that deferred a ruling on the plea to the jurisdiction and permitted additional discovery.

The trial court signed RPIs' proposed order deferring the ruling on June 16, 2020. This order provides in part:

> The Court is persuaded to "exercise[ ] its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable." *Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Considerations include evidence indicating that the Sheriff intends to make evidence-based arguments for the first time on appeal, Plaintiffs' amendment of their verified petition with updated information regarding COVID-19 in the Dallas County Jail and with additional allegations regarding the Sheriff's violation of mandatory duties imposed on her by the Texas Commission on Jail Standards under chapters 251–301 of the Texas Administrative Code, the need for discovery to fairly identify, address, and resolve any fact dependent claims and arguments the Sheriff may raise regarding immunity, and growing concern about the still-increasing number of COVID-19 cases and the rising rate of new cases in the Dallas County Jail. The Court accordingly has concluded it should make the jurisdictional determination sought by the Plea after a fuller development of the case through expedited discovery requested by Plaintiffs, evidence presented at a hearing to be conducted on the Plea and Plaintiffs' application for temporary injunction, and further briefing by the parties of the issues raised by the Plea and any amendment to it in light of the evidence.

The order provides that Brown's plea to the jurisdiction is "taken under advisement pending the completion of appropriate discovery, further briefing, and an evidentiary

hearing on any fact issues raised with respect to the Plea and Plaintiffs' application for a temporary injunction."

RPIs filed a first amended verified petition on June 1 and a second amended verified petition on June 22. Although RPIs added updated information about the spread of COVID-19 in the community and in the jail, a recent executive order from the governor, and other factual information, and alleged new violations of the Texas Administrative Code,[3] they did not alter either the factual or legal basis for their claims, that is, that Brown violated statutory and constitutional provisions, maintained a public health nuisance, and was negligent and grossly negligent in carrying out her ministerial duties in operating the jail and protecting detainees from the spread of COVID-19.

Brown contends that the effect of the trial court's order deferring its ruling on her plea is to deprive her of her substantial right to an accelerated interlocutory appeal. *See In re Prudential*, 148 S.W.3d at 136 (mandamus review "may be essential to preserve important substantive and procedural rights from impairment or loss"). We agree. *See City of Galveston v. Gray*, 93 S.W.3d 587, 591–92 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (granting alternative request for

[3] RPIs added allegations that Brown violated sections 273.3, 275.1, 275.4, and 279.3 of the Texas Administrative Code, found in Title 37, Part 9 (Texas Commission on Jail Standards), addressing regular observation by corrections officers (37 TEX. ADMIN. CODE § 275.1), supervision by "an adequate number of jailers to comply with state law" (*id.* § 275.4), following medical instructions of designated physicians (*id.* § 273.3), and facility maintenance (*id.* § 279.3).

mandamus and holding that trial court abused its discretion in refusing to rule on pleas to jurisdiction and permitting plaintiff to conduct discovery on liability). The trial court cited "the need for discovery to fairly identify, address, and resolve any fact dependent claims and arguments the Sheriff may raise regarding immunity" as the reason for deferring its ruling on the plea. But the order did not identify any such "fact dependent claims," and in any event, in deciding the plea to the jurisdiction, the trial court must take RPIs' detailed factual allegations in the petition as true. *See Chambers v. Tex. Dep't of Pub. Safety*, 392 S.W.3d 755, 757 (Tex. App.—Dallas 2012, no pet.) (when reviewing a plea to the jurisdiction, "we may not weigh the claims' merits") (citing *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002)). In their response to Brown's plea to the jurisdiction, RPIs acknowledged that "[b]ecause the Sheriff has not challenged Plaintiffs' jurisdictional allegations, Plaintiffs need not adduce evidence to support jurisdiction," and noted that "[a]lthough it is unnecessary because the Sheriff does not contest Plaintiffs' allegations, they are fully supported by the evidence attached to and referenced in the Verified Petition."

On this record and at this stage, the question to be answered is not whether Brown has, in fact, complied with the duties imposed by constitution, statute, or regulation. The question is whether Brown is immune from RPIs' claims that she

has not. This is a matter for the trial court in the first instance, and we express no opinion on its proper resolution.[4]

We conclude the trial court abused its discretion in deferring its ruling on Brown's plea to the jurisdiction. Further, there is no adequate remedy at law because without a ruling by the trial court, Brown will not be able to avail herself of her statutory right to an interlocutory appeal. *See City of Galveston*, 93 S.W.3d at 592–93. Accordingly, we conditionally grant Brown's petition for a writ of mandamus and direct the trial court to (1) vacate its June 16, 2020 order deferring a decision on Brown's plea, and (2) rule on the plea to the jurisdiction. We are confident the trial court will comply with this order; a writ will issue only if it does not.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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[4] In so concluding, we reject both Brown's argument that the trial court is bound by its initial email informing the parties of its ruling, and RPIs' argument that their amended pleading renders Brown's plea moot. Even assuming the email constituted an "order," a trial court may reconsider its interlocutory orders at any time before it renders judgment. *See, e.g.*, *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam). And although RPIs correctly note the general rule that a plaintiff "may amend its petition in such a way as to render an interlocutory appeal moot, thereby depriving the appellate court of jurisdiction," RPIs did not do so here. RPIs rely on *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 8–9 (Tex. App.—Houston [1st Dist.] 2007, no pet.), in support of their argument, where the court also explained that an appeal becomes moot "when the court's action on the merits cannot affect the rights of the parties." But in that case, the issue was whether the plaintiff's attempted abandonment of its quantum meruit claim mooted the City's appeal, and the court concluded it did not. *See id.*; *cf. City of Hidalgo Ambulance Serv. v. Lira*, 17 S.W.3d 300, 304 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.) (trial court did not err by denying plea to jurisdiction as moot where petition had been amended to exclude theory on which plea was based). Here, in contrast, no claim has been omitted or abandoned in the amended petition. *Cf. Lira*, 17 S.W.3d at 304 ("The plea addressed a claim of waiver of liability that was no longer in the petition; it was indeed moot.").