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DARNALL RANCH, INC., APPELLANT, V. BANNER COUNTY BOARD OF EQUALIZATION, APPELLEE.

789 N.W.2d 26

Filed October 1, 2010. Nos. S-09-1246 through S-09-1251.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

Appeals from the Tax Equalization and Review Commission. Reversed and vacated.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

James L. Zimmerman, Banner County Attorney, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

The Banner County assessor set the 2005 valuation on certain parcels of property owned by Darnall Ranch, Inc. (DRI). DRI protested those valuations. At a hearing, the Banner County Board of Equalization (Board) agreed with the valuations placed on the properties. DRI appealed to the Tax Equalization and Review Commission (TERC). Meanwhile, in a separate case, the Nebraska Court of Appeals voided the valuations,[1]

[1] *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (2009).

concluding that the Board violated the Open Meetings Act (Act).[2] TERC overruled the Board's motion to dismiss based on the Court of Appeals' action and, following a hearing, affirmed the county assessor's valuations for three parcels, and reversed the county assessor's valuations and set new values for the remaining three parcels. DRI appeals.

BACKGROUND

DRI operates a ranch in Banner County, Nebraska. At issue on appeal are six parcels of land owned by DRI. In each instance, the parcel was valued by the county assessor for the 2005 tax year and that valuation was protested by DRI. And in each instance, a hearing was held before the Board regarding that protest, with the Board rejecting the protest and adopting the county assessor's valuation. DRI then appealed to TERC.

While DRI's appeal to TERC was pending, a separate suit against the Board was proceeding in the Banner County District Court regarding alleged violations of the Act by the Board. And in *Wolf v. Grubbs*,[3] the Nebraska Court of Appeals concluded that the Board had committed violations of the Act and voided all valuations set at meetings which violated the Act, including valuations on the parcels owned by DRI which are at issue in this case.

After the decision in *Wolf*, the Board filed a motion to dismiss DRI's appeal. DRI objected. TERC concluded that it had jurisdiction over the appeals and overruled the Board's motion. Following a hearing on all six parcels at issue, TERC issued opinions upholding the county assessor's valuation with respect to three parcels and reversing the county assessor's valuation and setting a new value on the other three parcels. DRI appeals with respect to all six parcels.

ASSIGNMENTS OF ERROR

On appeal, DRI assigns, consolidated and restated, that TERC erred in (1) concluding it had jurisdiction and therefore

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[2] See Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 2008 & Supp. 2009).

[3] *Wolf v. Grubbs, supra* note 1.

denying the motions to dismiss, (2) applying an incorrect standard of review, (3) holding that DRI had been given valid notice of the decision of the Board, (4) the valuations of its property, and (5) not taxing the costs of the action against the Board. In addition, DRI contends that Neb. Rev. Stat. § 77-5007(13) (Reissue 2009)[4] is unconstitutional.

STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[5] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[6] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[7]

ANALYSIS

DRI first contends that TERC erred by not dismissing its appeals for a lack of jurisdiction after the Court of Appeals' decision in *Wolf*. We agree with DRI that TERC lacks jurisdiction.

[4] As an initial matter, we note that DRI opposed the Board's motion to dismiss for lack of jurisdiction before TERC, but now argues that, in fact, TERC did lack jurisdiction. But because this court must determine whether it has jurisdiction over this appeal before it reaches the legal issues presented for review,[8] DRI's change of position is immaterial.

In concluding that it had jurisdiction subsequent to the Court of Appeals' decision in *Wolf*, TERC relied upon this court's 1883 decision in *Sumner & Co. v. Colfax County*.[9] In *Sumner & Co.*, this court held that the failure to act on a property

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[4] See 2010 Neb. Laws, L.B. 877, § 7.

[5] *Fort Calhoun Bapt. Ch. v. Washington Cty. Bd. of Eq.*, 277 Neb. 25, 759 N.W.2d 475 (2009).

[6] *Id.*

[7] *Id.*

[8] See *Carmicheal v. Rollins, ante* p. 59, 783 N.W.2d 763 (2010).

[9] *Sumner & Co. v. Colfax County*, 14 Neb. 524, 16 N.W. 756 (1883).

owner's protest was for all "practical intents and purposes a denial and rejection of the . . . application."[10] TERC reasoned that because the Board's original decisions had been voided, and because the Board could no longer hear DRI's 2005 protests,[11] it was as though the Board had failed to hear DRI's protests at all. And under *Sumner & Co.*, such inaction was a rejection of DRI's protests.

On appeal, the Board now agrees that TERC had jurisdiction under *Sumner & Co.*, while DRI contends that TERC lacks jurisdiction. DRI argues that the relevant language from *Sumner & Co.* is dicta and contrary to this court's decision in *Falotico v. Grant Cty. Bd. of Equal*.[12] We held in *Falotico* that an increase in property valuation was void where the county clerk failed to give notice to the taxpayers within the statutorily required 7 days after the board made its decision. Because the increase was void, the property valuation reverted back to the previous year's valuation.

We disagree with TERC's conclusion that *Sumner & Co.* is applicable in this case. *Sumner & Co.* dealt with the inaction of a county board. In this case, though, the county board did act. But because of the violations of the Act, those actions were later declared void.

We instead conclude that *Falotico* governs situations such as the one presented, where a county board's action is void. In *Falotico*, we noted that compliance with the notice provision at issue was necessary to provide a property owner with the process due under the statutes and that where a board's actions were void, TERC lacked jurisdiction over the property owner's appeal. In such circumstances, we further noted, any increase in a property valuation was similarly voided.

In the same way that the property owner's right to process and the protections offered therein was violated in *Falotico*, DRI's right to the protections of the Act was violated in this case. Therefore, in conformity with *Falotico,* we conclude that

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[10] *Id.* at 525, 16 N.W. at 756.

[11] See Neb. Rev. Stat. § 77-1502 (Reissue 2009).

[12] *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001).

TERC lacks jurisdiction over DRI's appeal as a result of the Board's failure to comply with the Act. As such, DRI's 2005 valuations are voided and revert to the valuations placed on the property at issue in 2004. We therefore reverse TERC's decisions in this case, vacate the decision of the Board denying DRI's protests, and declare as void the actions of the county assessor increasing the valuations of the subject properties for the purposes of taxation as of January 1, 2005.

CONCLUSION

Because TERC lacks jurisdiction over these appeals, we reverse TERC's decisions, vacate the decisions of the Board, and void the 2005 valuations of DRI's properties.

REVERSED AND VACATED.

STATE OF NEBRASKA, APPELLEE, V. APRIL DINSLAGE, ALSO KNOWN AS APRIL CLEARY, APPELLANT.

789 N.W.2d 29

Filed October 1, 2010. No. S-10-252.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Sentences: Probation and Parole.** Whether a condition of probation imposed by the sentencing court is authorized by statute is a question of law.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact.
4. **Drunk Driving: Blood, Breath, and Urine Tests: Proof.** The State is not required to prove a temporal nexus between a breath test and the defendant's alcohol level at the moment he or she was operating the vehicle.
5. ____: ____: ____. Matters of delay between driving and testing are properly viewed as going to the weight of the breath test results, rather than to the admissibility of the evidence.
6. **Criminal Law: Statutes: Legislature: Intent.** Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the