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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001072-MR

CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC., d/b/a KENTUCKY ENQUIRER — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 09-CI-01145

CITY OF FORT THOMAS, KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: KELLER AND LAMBERT JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: The Cincinnati Enquirer ("the Enquirer") appeals from the Campbell Circuit Court's May 10, 2010 order in favor of the City of Fort Thomas ("the City"). That order found portions of the City's investigative file regarding the death of Robert McCafferty were exempt from Kentucky's Open

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Records Act and, therefore, not available to the Enquirer. For the following reasons, we affirm in part, reverse in part and remand.

History

In June 2007, Robert McCafferty was shot and killed in the home he shared with his wife, Cheryl McCafferty, and their two children in Fort Thomas, Kentucky. On March 9, 2009, Mrs. McCafferty was convicted of first-degree manslaughter for his death. During Mrs. McCafferty's criminal trial, the trial court admitted numerous exhibits into evidence, including two videotapes. One of these depicted the exterior of the McCafferty home, via a police cruiser camera. The other depicted the exterior and interior of the home and was made during a walk-through of the home on the day of the crime.

On March 16, 2009, after the jury returned a verdict of guilty, Mrs. McCafferty entered into an agreement with the prosecutor for sentencing which resulted in a sentence of eighteen years in prison, with eligibility for parole after she had served twenty percent of that time. As part of the agreement, Mrs. McCafferty waived her right to a sentencing hearing and presentation of mitigating evidence, her right to appeal, and her right to a presentence investigation.

Also on March 16, 2009, WCPO Channel 9 News submitted a specific open records request to the City for the videotapes presented at trial. The City provided the videotapes but redacted footage which depicted the interior of the home and the bedrooms of the McCafferty children, explaining that the redacted footage would have constituted an unwarranted violation of the children's privacy.

On April 6, 2009, the Enquirer submitted a broad open records request to the City for copies of the investigation into Mr. McCafferty's death. The City denied the request and indicated to the Enquirer that the criminal proceedings against Mrs. McCafferty were not yet complete, pursuant to KRS 61.878(1)(h). The Enquirer appealed the denial to the Attorney General, arguing that the entire investigative file was subject to disclosure under the Open Records Act and that the City had failed to demonstrate that release of the information would result in harm to the law enforcement action against Mrs. McCafferty. The Enquirer also alleged that the investigative file had been disclosed to other news organizations, but not to it, citing to the videotapes that had been released to WCPO.

In response, the City argued that the investigative files would remain exempt from the Open Records Act until Mrs. McCafferty had either served her entire sentence or her time for filing an RCr[2] 11.42 motion had expired. The City further explained that it could be prejudiced by the release of the investigative file in the event that Mrs. McCafferty were to procure a new trial pursuant to a successful RCr 11.42 motion to vacate, set aside, or correct her sentence.

The Attorney General concluded that the City had sufficiently shown potential harm from the release of its investigative file and that its denial to the Enquirer was, therefore, appropriate. However, the Attorney General also indicated that the City had failed to articulate a basis for refusing to disclose to the

[2] Kentucky Rules of Criminal Procedure.

Enquirer the same videotapes it had disclosed to WCPO, and concluded that they should also be disclosed to the Enquirer.

After receiving the opinion from the Attorney General, the City provided the same videotapes to the Enquirer that it had provided to WCPO, with the same footage redacted. Meanwhile, in response to the abundant media requests for trial materials, the Campbell Circuit Court ordered the City to place any documents and physical items that had been used as evidence at trial on display so that the media could inspect, copy, and photograph them.

The Enquirer appealed from the Attorney General's opinion to the Campbell Circuit Court. In that action, the Enquirer argued that the City's investigative file was not exempt because Mrs. McCafferty had waived her right to appeal; that the City had improperly redacted portions of the videotapes which were produced for viewing; and that the City had willfully violated the Open Records Act by initially failing to produce the videotapes, for which the Enquirer sought compensation for its costs and attorney's fees. The Campbell Circuit Court found in favor of the City.

Relying upon *Skaggs v. Redford*, 844 S.W.2d 389 (Ky. 1992), the court concluded that the law enforcement action against Mrs. McCafferty was not complete because she had not waived her right to file an RCr 11.42 motion. The court further found that the City's redaction of the interior of the McCafferty home was appropriate due to the privacy interests of the children, which outweighed the

public's interest in viewing the redacted portions. Lastly, the court found that the City did not act in bad faith in failing to initially provide the videotapes to the Enquirer, nor did it willfully do so, and it was, therefore, not responsible for the Enquirer's costs or attorney's fees. This appeal followed.

Analysis

The Enquirer makes numerous arguments on appeal. It first argues that the trial court erred by applying an exemption when the record did not contain evidence supporting its application; that the trial court erred by misinterpreting KRS 61.878(1)(h); and that the trial court erred in its interpretation of *Skaggs*. We agree. The policy set forth in the Kentucky Open Records Act is that "free and open examination of public records is in the public interest." KRS 61.871.

Application of the Law Enforcement Exemption

The Kentucky Open Records Act provides for several exemptions, one of which is the law enforcement exemption:

> Records of law enforcement agencies . . . that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS

> 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action.

KRS 61.878(1)(h). KRS 61.871 provides that exemptions shall be strictly construed.

In support of its decision to withhold the investigative file in its entirety, the City articulated that Mrs. McCafferty had not waived her right to file an RCr 11.42 motion. The City further indicated that, in the event a new trial was granted and that possible new defenses were asserted, the premature release of the law enforcement records would be detrimental to any additional prosecution. The trial court agreed and cited to *Skaggs* as support.

The Kentucky Supreme Court held in *Skaggs* that a law enforcement action is not complete until the prospect of further action has passed. *Skaggs* at 390. *Skaggs* involved a death row inmate who had exhausted his post-conviction collateral attack privileges and was preparing to file a habeas corpus petition. *Id.* at 389. Skaggs sought access to his prosecution records under the Open Records Act in order to confirm the absence of any exculpatory material. *Id.* The Court, giving broad construction to the exemptions of the Open Records Act, held that "the state's interest in prosecuting the appellant is not terminated until his sentence has been carried out." *Id.* at 390. Hence, the Court held that Skaggs was not entitled to view his prosecution records until the state's prosecution was complete. *Id.*

In the case *sub judice*, the Enquirer argues that *Skaggs* is distinguishable on the facts. We agree to a limited extent. KRS 61.878(1)(h) addresses two types of records: those compiled by law enforcement agencies and those compiled by county attorneys or Commonwealth's attorneys. The first type, records compiled by law enforcement agencies, are exempt only if disclosure would cause harm by revealing the identity of an unknown informant or if disclosure of the information would harm the agency by premature release of information to be used in a prospective law enforcement action. KRS 61.878(1)(h). However, any law enforcement agency records exempted under this language are to be made public once the enforcement action is complete or a decision is made to not pursue an enforcement action. *Id.* In contrast, the second type of records, those maintained and compiled by county attorneys and Commonwealth's attorneys, are exempt and "*shall remain exempted after enforcement action . . . is completed*." *Id.* (Emphasis added).

The Court in *Skaggs* applied the standard pertinent to the records of law enforcement agencies - that withheld records shall become available after the conclusion of a law enforcement action - to records kept by the Commonwealth's attorney, which are never made available. *Skaggs*, 844 S.W.2d 389. Although *Skaggs* appears to have, in part of its analysis, applied the law enforcement exemption to its case involving a request for the Commonwealth attorney's file, we are nonetheless bound by its authority. Furthermore, although *Skaggs* is distinguishable by its facts, it successfully presents the Kentucky Supreme Court's

interpretation of what constitutes a completed law enforcement action and is, therefore, instructive for our purposes. While the defendant in *Skaggs* had exhausted all collateral remedies, Mrs. McCafferty has not. Under RCr 11.42, Mrs. McCafferty has three years, from the date of the final judgment, to file her motion. The Enquirer argues that there has been no indication from Mrs. McCafferty or her attorneys that she intends to file such a motion. However, it is not the Enquirer's perceptions of Mrs. McCafferty's intentions which define the completion of the enforcement action against her, but rather the availability to her of avenues to challenge her sentence post-conviction. Therefore, as in *Skaggs*, the prosecution against Mrs. McCafferty is incomplete and any law enforcement records exempt under KRS 61.878(1)(h) are not yet subject to disclosure.

We now address the Enquirer's second argument on appeal. The Enquirer argues that *Skaggs* does not hold that all investigatory records must be withheld until the sentence is complete.

The Court in *Skaggs* stated:

> While we agree with the appellant that if portions of the file were otherwise discoverable, KRS 61.878(4) would make it incumbent upon the Commonwealth Attorney to "separate the excepted material and make the nonexcepted material available for examination," the issue is moot because the entire file is protected from disclosure until the prosecution of the appellant is completed.

Id. at 391. Because *Skaggs* addressed files maintained by the Commonwealth's Attorney, we are not bound by the above language since it applies to records

compiled by and for law enforcement agencies. KRS 61.878(1)(h) exempts law enforcement agency records only in the event that: 1) the agency can demonstrate harm by a showing that disclosure would reveal the identity of an unknown informant; or 2) the agency can demonstrate harm by the premature release of information to be used in a prospective law enforcement proceeding.

Unfortunately, there are no guidelines contained in the statutes about what constitutes "harm" or "premature release" of information, and there is little in the way of caselaw to guide us. It is therefore the task of this Court to make such a determination. It is the practice of the Commonwealth to construe statutes liberally with an eye towards promoting the intent of the legislature. KRS 446.080. Words and phrases are to be afforded their common meanings. *Id.* However, due to the diverse nature of information contained within various enforcement actions, whether the release of sensitive information is to be considered "harmful" or "premature" is best decided on a case-by-case basis. Because the purpose of an open records law is to promote the free exchange of public records, we apply the most liberal construction possible to the exemptions of KRS 61.878(1)(h). We are further persuaded by the strict construction of exemptions mandated by KRS 61.871. We also look to the interpretation other jurisdictions have given to the phrases "harm" and "premature release" within their law enforcement record exemptions. Unfortunately we are unable to find another state that uses the same exemption language as Kentucky.

A large portion of the states follow the language of the federal open records act, known as the Freedom of Information Act ("FOIA"). *See* 5 U.S.C. 552. FOIA provides an exemption for law enforcement records if it can be shown that such records:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C.A. § 552(b)(7).

Many states, including Alaska, Connecticut, Washington D.C., Idaho, Illinois, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, New York, and South Carolina, have modeled their own law enforcement record exemptions after the guiding language found in FOIA. *See* Alaska Stat. 40.25.120(a)(6); Conn. Gen. Stat. Ann. 1-210(b)(3); D.C. Code 2-534(a)(3); Idaho Code Ann. 9-335(1); 5 IL ST 140/7(1)(d); Kan. Stat. Ann. 45-221(a)(10); La. Rev. Stat. Ann. 44:3; Md. Code Ann., State Gov't 10-618; Mich. Comp. Laws Ann. 15.243; Miss. Code Ann. § 25-61-3; Mo. Ann. Stat. 610.100; N.Y. Pub. Off. Law 87; Ohio Rev. Code Ann. 149.43; S.C. Code Ann. 30-4-40. Other states allow for

a law enforcement record exemption only in the event that disclosure might result in a compromise to public safety or is contrary to public interest. *See*, *e.g.*, Ala. Code 36-12-40; Cal. Gov't Code 6254; Colo. Rev. Stat. 24-72-204; 51 Okla. Stat. Ann. 24A.8; Wyo. Stat. Ann. 16-4-203.

KRS 61.878 does not specifically cite to instances in which the release of information is to be considered "harmful" or "premature." FOIA, however, offers a fairly inclusive look at specific harms that could result from the disclosure of investigatory information, including interference with enforcement proceedings, deprivation of a fair trial, identity of a confidential source, and circumvention of the law. Although these examples are not expressly stated in KRS 61.882, the showing of such circumstances may be sufficient to indicate a "harmful" or "premature release" of information in any given case. The Supreme Court of the United States has held that exemptions to FOIA must be narrowly construed and that it is the burden of the denying agency to show that an exemption is applicable. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989). Although we are not bound by this holding, our desire to make public records more accessible is best achieved by similarly placing the burden of proof of an exemption to the Kentucky Open Records Act on the agency denying the request or any portion of the request. It is the opinion of this Court that, with regard to the majority of the City's file, the City has failed to meet this burden.

Failure to Impose Fees, Costs, and Sanctions

The Enquirer's next argument on appeal is that they were entitled to fees, costs, and sanctions due to the City's total refusal to furnish even previously released materials. The Enquirer argues that the trial court erred by not considering the effect of preexisting disclosures of the requested items before denying access. In other words, the Enquirer's argument is that the blanket denial of the request was unlawful because any harm from disclosure had already occurred when the documents were previously released. Again, we agree. The City should have provided the Enquirer with any materials which had been previously released. Such materials would have included whatever was previously released to other media sources and whatever had been made public during trial by means of discovery or trial exhibits. The City's failure to provide these materials was in direct violation of KRS 61.871, as suggested by the trial court's June 2009 order to place those items on display. The City argued that the Enquirer's request was too broad. However, there is nothing in KRS 61.872 which requires a request for public records be detailed. *Commonwealth v. Chestnut*, 250 S.W.3d 655 (Ky. 2008). If the request is clear in identifying the information sought, the request is sufficient.

Nonetheless,

> [i]f the application places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under

> this section shall be sustained by clear and convincing evidence.

KRS 61.872(6). The City offered no evidence or suggestion that the Enquirer's request created an unreasonable burden or was intended to disrupt the essential functions of the police department. Therefore, the request should not have been denied without evidence that the release of information was harmful and premature, pursuant to KRS 61.878. Under these facts, the Enquirer argues that the trial court erred in denying the imposition of fees, costs, or sanctions against the City due to its alleged willful withholding of the trial evidence and the videotapes. Again, we agree.

The trial court may award costs, fees, and sanctions to any party prevailing in a court action brought under the Kentucky Open Records Act, if the records at issue were willfully withheld. KRS 61.882. This manner of award is at the discretion of the trial court. *Id.* The Enquirer argues that the trial court erred in finding that its records request was vague as a matter of law, and we agree. As we have already discussed, there is no requirement that a records request be painstakingly detailed, so long as the information sought is identifiable. Furthermore, the City never suggested that the Enquirer's request constituted an unreasonable burden. The Enquirer should have prevailed in its action against the City and should have also collected costs, fees, and/or sanctions. *See Bowling v. Lexington-Fayette Urban County Government*, 172 S.W.3d 333, 343 (Ky. 2005). The trial court's failure to make such an award was an abuse of discretion.

Imposition of the Privacy Exemption

The Enquirer's final argument on appeal is that the trial court erred when it applied the privacy exemption to the redacted portions of the videotape recordings. The Enquirer maintains that any privacy interest of the McCaffertys' minor children was minimal and was outweighed by the public's interest. We disagree. "Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" are exempt from the Kentucky Open Records Act. KRS 61.878(1)(a).

The Enquirer argues that the videotapes are of public interest because they reveal the competency and training of the person making them, allow the public to determine if the police are fulfilling their statutory duties, and allow the public to evaluate the efficiency of police work. We are not convinced. Obviously, the privacy rights of minor children require a greater degree of consideration than the privacy rights of adults. As the trial court pointed out, the McCafferty children are also victims of the crime against their father. After reviewing the footage of the interior of the McCaffertys' home, the trial court found that releasing the videotapes in their entirety, merely for the sake of giving the public a view of the crime scene, would constitute a clearly unwarranted invasion of the minor children's privacy. The trial court further observed that the redacted portions of the videotapes did not contain footage of investigative work pertinent to the crime. However, it noted that photographs used as evidence, and

which had been made available to the public, provided a more accurate representation of the actual work product produced pertinent to the criminal investigation. The Enquirer has failed to show that the public's interest in the competency of the City's investigative work outweighs the privacy interests present here. This is especially true given that no allegations have been made challenging the competency of the City's investigation into Mr. McCafferty's death. The trial court accurately balanced the public's interest in the redacted videotape footage with the personal privacy of the McCaffertys' minor children, and we discern no error in its conclusion.

For the foregoing reasons, the May 10, 2010 order of the Campbell Circuit Court is affirmed in part and otherwise reversed in part, and remanded with instructions to determine which portions of the investigative record were willfully withheld and which portions were appropriately withheld for reasons provided for in KRS 61.871, KRS 61.872, KRS 61.878, and KRS 61.882. The trial court is further instructed to award attorney's fees, costs, and/or sanctions to the Enquirer based upon its findings and as it sees fit.

LAMBERT, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KELLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority's opinion regarding the release of the unredacted videotapes. However, because it appears that the majority has engaged

in impermissible fact-finding, I respectfully disagree with the majority's opinion regarding the imposition of sanctions. I would affirm the judgment of the circuit court and, because I see no need for remand, any further discussion of the interpretation and/or application of KRS 61.878 and *Skaggs v. Redford*, 844 S.W.2d 389 (Ky. 1992), is unnecessary.

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