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Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000210-MR

LEONARD LAWSON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-01155

OFFICE OF THE ATTORNEY
GENERAL AND JACK CONWAY,
IN HIS OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF KENTUCKY; THE COURIER-
JOURNAL, INC.; LEXINGTON
HERALD-LEADER CO.; AND
THE ASSOCIATED PRESS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CAPERTON AND VANMETER, JUDGES.

VANMETER, JUDGE: Leonard Lawson appeals from a summary judgment entered by the Franklin Circuit Court refusing to grant a permanent injunction to

preclude the release of records held by the Office of the Attorney General of Kentucky (“OAG”). The court granted summary judgment in favor of the Courier-Journal, Inc., Lexington Herald-Leader Co., the Associated Press (hereinafter collectively referred to as “News Media”) and the OAG, dissolving the temporary injunction previously granted. For the following reasons, we affirm.

Lawson is the former owner of Mountain Enterprises, Inc. (“Mountain Enterprises”). In June 1983, Mountain Enterprises pled guilty in federal court to one count of violating the Sherman Antitrust Act, 15 U.S.C.¹ § 1. Around the same time, the OAG was investigating Mountain Enterprises for violations of Kentucky’s civil antitrust law, codified in KRS² 367.175, in connection with bids for state road contracts with the Kentucky Transportation Cabinet (“Cabinet”). In July 1983, Mountain Enterprises entered into a settlement agreement with the OAG which, among other things, required the company to pay a civil monetary fine as compensatory damages and “cooperate fully with the Attorney General” to assist “in the investigation and any resulting civil or criminal action.” In compliance with the agreement, Lawson gave a recorded statement to the OAG, in which he answered questions regarding Mountain Enterprises’ business practices (hereinafter referred to as “the proffer”) to aid the OAG in its investigation of “bid-rigging” of state road contracts. Lawson sold Mountain Enterprises in 2005 and no longer holds any interest in the company.

¹ United States Code.

² Kentucky Revised Statutes.

In 2008, Lawson and others were indicted by a federal grand jury on charges involving a conspiracy to obtain confidential Cabinet cost estimates for certain state road contracts. Following return of the federal indictment, Tom Loftus, a Courier-Journal reporter, submitted an open records request to the OAG seeking release of the proffer. In response, the OAG notified Loftus that Lawson's proffer would be subject to production. Reporters with the Herald-Leader and the Associated Press also submitted an open records request to the OAG for Lawson's proffer.

Lawson then filed the underlying action seeking injunctive relief to prohibit the OAG from releasing the proffer to the News Media. The trial court entered a temporary injunction, enjoining the OAG from disclosing the proffer. The News Media then sought interlocutory relief from the injunction in this court by filing a CR³ 65.07 motion. This court dismissed the motion on procedural grounds, determining that the OAG was not joined as an indispensable party to the action. Thereafter, the News Media filed a CR 65.09 motion in the Kentucky Supreme Court, which affirmed the order of this court dismissing the motion.⁴

Following the denial of interlocutory relief, Lawson sought a permanent injunction to bar release of the proffer. The News Media opposed the permanent injunction and requested the trial court to dissolve the temporary injunction. The parties filed cross-motions for summary judgment. The trial court granted the

³ Kentucky Rules of Civil Procedure.

⁴ *Courier-Journal, Inc. v. Lawson*, 307 S.W.3d 617 (Ky. 2010).

News Media's motion for summary judgment and dissolved the temporary injunction. This appeal followed.

On appeal, Lawson first argues the trial court erred by entering summary judgment in favor of the News Media and finding the proffer was not exempt from Kentucky's Open Records Act. Specifically, Lawson contends the proffer is exempt because it contains "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;" and/or "information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation[.]" KRS 61.878(1)(a) and (h). We disagree.

The policy behind the Kentucky Open Records Act, codified in KRS Chapter 61, "is that free and open examination of public records⁵ is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others." KRS 61.871.

Among the public records excluded from the application of the Kentucky Open Records Act are:

- (a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy; [and]

⁵ "Public record' means all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency." KRS 61.870(2).

...

(h) Records of law enforcement agencies or agencies involved in administrative adjudication 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)(a) and (h).

We first turn to Lawson's argument that disclosure of the proffer would constitute a clearly unwarranted invasion of personal privacy. The law in Kentucky requires this court to apply a two-part test: "First, we must determine whether the information sought is of a personal nature. Second, we must examine whether the public disclosure of this information would constitute a clearly unwarranted invasion of personal privacy." *Cape Publications, Inc. v. Univ. of Louisville Found., Inc.*, 260 S.W.3d 818, 821 (Ky. 2008) (citation omitted). This determination requires this court on a case-by-case basis to weigh antagonistic interests, on one hand the privacy interest and on the other the public good served by disclosure. *Zink v. Commonwealth, Department of Workers' Claims, Labor*

Cabinet, 902 S.W.2d 825, 828 (Ky. App. 1994) (citation omitted). Application of the personal privacy exemption to the Kentucky Open Records Act involves a question strictly of law, and thus, our review is *de novo*. *Cape Publications*, 260 S.W.3d at 821 (citation omitted).

Kentucky courts have recognized that information of a personal nature is the type “which would be likely to cause serious personal embarrassment or humiliation.” *Lexington-Fayette Urban County Gov’t v. Lexington Herald-Leader, Co.*, 941 S.W.2d 469, 472 (Ky. 1997). Personal information has also been characterized as that which “touches upon the personal features of private lives” and of which individuals have some expectation of its privacy. *Zink*, 902 S.W.2d at 828. Most apparent in Kentucky law, is the court’s protection of the “right to be let alone,” i.e., the non-disclosure of identification and contact information of individuals. *Id.* at 828-29 (holding that forms indicating workers’ injuries were personal because they contained individuals’ marital status, number of dependants, wage rate, social security number, date of birth, home address and telephone number which are personal and expected to be private). *See also Lexington H-L Serv., Inc. v. Lexington-Fayette Urban County Gov.*, 297 S.W.3d 579 (Ky.App. 2009) (holding that the identity of a rape suspect constitutes information of a personal nature); *and Kentucky Bd. of Examiners of Psychologists v. The Courier-Journal*, 826 S.W.2d 324 (Ky. 1992) (holding that records of a client who made complaints of sexual misconduct against doctor contained information of highly personal nature).

In the case at bar, we are unable to conclude that the proffer contains any information which could be characterized as rising to a personal level. Lawson contends that because the proffer contains his words regarding his life, the proffer is inherently personal. However, the proffer contains information given by Lawson on behalf of Mountain Enterprises regarding its participation in bid-rigging for state road contracts. Though Lawson may not want his words to be made public, our review of the proffer reveals that it does not contain any information which “touches upon the personal features of private lives,” or “would be likely to cause serious personal embarrassment or humiliation.”

The trial court based its holding on its finding that Lawson had no expectation of privacy because he gave the proffer knowing it could be used in future civil or criminal litigation. In the settlement agreement with the OAG, Lawson was required to provide the information contained in the proffer, and testify in open court if requested. Ultimately, Lawson agreed to provide this information, which he knew could potentially be made public, in order to settle the civil suit against Mountain Enterprises. Thus, the trial court reasoned that disclosure of the proffer would not be a “*clearly unwarranted* invasion of personal privacy.” *Cape Publications*, 260 S.W.3d at 821 (citation omitted) (emphasis added). To a certain extent, Lawson sacrificed his right to privacy of the information in the proffer. *See Zink*, 902 S.W.2d at 828 (individuals who enter the public way, break a law, or inflict a tort on another forfeit their privacy to a certain extent). Furthermore, the contents of settlement agreements have been held to be

subject to disclosure under the Kentucky Open Records Act. *See generally Lexington-Fayette Urban County Gov't*, 941 S.W.2d 469 (Ky. 1997) (holding that settlement agreement “between private citizens and a government entity is a matter of legitimate public concern which the public is entitled to scrutinize[.]”).

Taking into consideration that the proffer contained no information of a personal nature, as well as Lawson’s diminished expectation of privacy to the information, we are compelled to conclude that the public interest, specifically the methods of procuring state road contracts of the Transportation Cabinet, requires disclosure of the proffer under the Kentucky Open Records Act. Despite Lawson’s argument that the passage of time devalues any worth the proffer has to the public, due to the lack of any privacy interest to be accounted for, even the slightest public interest requires disclosure. Accordingly, the trial court properly held that the proffer was not exempt from disclosure under KRS 61.878(1)(a).

Next, we turn to Lawson’s argument that the proffer is exempt from disclosure under KRS 61.878(1)(h) because it was “compiled and maintained by county attorneys or Commonwealth’s attorneys pertaining to criminal investigations or criminal litigation[.]” Per KRS 61.878(1)(h), such records are only exempt from disclosure “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.” The crux of Lawson’s argument is that the OAG filled the shoes of a Commonwealth attorney when it obtained the proffer for

potential use in future criminal investigations. However, regardless of whether the proffer was compiled by the OAG acting as a Commonwealth attorney, the exemption under KRS 61.878(1)(h) is only applicable if the evidence reveals that disclosure of the proffer would harm the agency. Certainly if the proffer would harm the agency, we would expect the OAG to make that argument. No such argument was made here, and nothing in the record supports such a finding. Accordingly, the proffer is not exempt under KRS 61.878(1)(h).⁶

Finally, Lawson argues the trial court applied the wrong legal standard when it dissolved the temporary injunction and denied his motion for a permanent injunction. We disagree.

Injunctive relief is left to the sound discretion of the trial court. *Maupin v. Stansbury*, 575 S.W.2d 695, 697-98 (Ky.App. 1978) (citations omitted). Unless the trial court abused that discretion, we will not set aside the order. *Id.* at 698 (citations omitted).

Lawson contends the trial court was only permitted to dissolve the temporary injunction upon finding that the News Media's rights were being violated and that they would suffer immediate and irreparable injury, loss or damage if the injunction was not dissolved. Lawson's argument is a misinterpretation of the law. CR 65.04(1) requires that prior to the granting of a temporary injunction, a trial court determine that a movant's rights would be

⁶ Though the trial court rejected Lawson's argument on the basis that he lacked standing to assert the proffer was exempt under KRS 61.878(1)(h), we can affirm the trial court's ruling on any grounds supported by the record. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009) (citations omitted).

violated and as a result would “suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action[.]” In the case at bar, the trial court granted Lawson a temporary injunction, finding that such circumstances existed prior to a final judgment. In its final order, the trial court determined that Lawson was not entitled to a permanent injunction since the proffer was not exempt from the Kentucky Open Records Act. Accordingly, the trial court dissolved the temporary injunction, finding the conditions which justified it were no longer present. We find no abuse of the trial court’s discretion.

The order of the Franklin Circuit Court is affirmed.

ACREE, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART, DISSENTS IN PART,
AND FILES SEPARATE OPINION.

CAPERTON, JUDGE: I concur and dissent from the majority opinion based on the following analysis.

A brief review of the Findings of Fact Conclusions of Law, and Order entered by the trial court on January 3, 2011, reveals that the trial court found that the personal privacy exception to the Kentucky Open Records Act did not apply because Lawson “traded away” any privacy interest based on the plain language of the 1983 settlement agreement. Despite the fact that the trial court apparently viewed the information in question, it appears that its determination that the privacy exception did not apply was based on its finding that Lawson waived its application and not on its determination of whether the information therein was of

a personal nature. Thus, the focus of our review is not whether the information is personal but whether the terms of the settlement agreement waive the application of the personal privacy exception for reason that those persons providing the information may be required to testify thereto.

The majority states, “We are unable to conclude that the proffer contains any information which could be characterized as rising to a personal level.” This statement recognizes that the mere fact that a settlement agreement was entered between the parties hereto did not eviscerate the personal privacy exception because if it had, there would be no need for our court to review the information to determine if it rises to the level of a personal nature. With this, I agree. Thus, the mere fact that a settlement agreement requires persons providing information on behalf of a party to testify does not, of itself, waive the personal privacy exception. Further, I agree that *Cape Publications*, cited by the majority, sets the standard of review as *de novo*. However, I disagree with the determination that we can review whether the information could be characterized as rising to a personal level when the trial court so clearly found that it was not applying the personal privacy exception because it was waived. In short, whether the exception applies and whether the information is private are two distinct issues, and there is no finding that the trial court reviewed the information and determined it not to be within the personal privacy exception.⁷ Therefore, I would reverse the opinion of

⁷ The parties to the agreement were the Office of the Attorney General and Mountain Enterprises. No issue was raised concerning the release of names of employees who gave a statement on behalf of Mountain Enterprises in contrast to release of the information without the name of the employee who provided the information. See *Hines v. Com., Dept. of Treasury*,

the trial court and remand for a hearing on whether the information contained in the records was exempt from release because of the personal privacy exception.

I do concur with the majority in finding that KRS 61.878(1)(h) does not apply, but for different reasons. First, by its language, the statutory exemption applies to “law enforcement agencies or agencies involved in administrative adjudication...”. I recall no argument that the Office of the Attorney General be characterized as either. Second, the majority may be interpreted as implying that the records of the commonwealth’s attorney and county attorney may be disclosed at their discretion once the prosecution has ended or a decision has been made not to prosecute. The language of the statute states that:

[R]ecords or information compiled and maintained by the county attorney or Commonwealth’s attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.878 and shall remain exempted after enforcement action, including litigation, is complete or a decision is made to take no action.

KRS 61.878(1)(h).

I believe that the statute clearly exempts these records from the application of the statutes cited without exception.

I concur with the majority in its analysis concerning the dissolving of the temporary injunction.

41 S.W.3d 872 (Ky.App. 2001).

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