

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001105-MR

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 17-CI-03489

MICHAEL MAHARREY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.

GOODWINE, JUDGE: Appellant, Lexington-Fayette Urban County Government, Division of Police, (“LFUCG”), appeals from a circuit court order granting summary judgment in favor of Appellee, Michael Maharrey (“Maharrey”), ordering it to disclose all documents regarding surveillance technologies used by the police department under the Kentucky’s Open Records Act (“ORA”).¹

¹ Kentucky Revised Statutes (KRS) 61.870 to 61.884.

Following an unsuccessful CR² 59.05 motion, LFUCG filed this appeal.³ Finding summary judgment was improperly granted, we reverse and remand with instructions to conduct an *in camera* review and an evidentiary hearing on LFUCG's concerns about disclosure of covert surveillance technologies.

BACKGROUND

On July 17, 2017, Maharrey, a free-lance journalist, sent an open records request to LFUCG for all documents relating to eleven surveillance technologies owned, or used, by the police department.⁴ For each, Maharrey requested: (1) purchase orders; (2) grant applications; (3) federal applications; (4) receipts; (5) written policies; (6) training manuals; (7) contracts with vendors;

² Kentucky Rule of Civil Procedure.

³ LFUCG's notice of appeal designated two circuit court orders for appeal: (1) the June 19, 2018, order granting summary judgment to Maharrey; and (2) the July 20, 2018, order denying LFUCG's CR 59.05 motion to alter, amend, or vacate. Only the first order is subject to appellate review. "Orders denying CR 59.05 relief 'are interlocutory, *i.e.*, non-final and non-appealable and cannot be made so by including the finality recitations.'" *Hoffman v. Hoffman*, 500 S.W.3d 234, 236 (Ky. App. 2016) (quoting *Tax Ease Lien Invests. I, LLC v. Brown*, 340 S.W.3d 99, 103 (Ky. App. 2011)); *see also* *Mingey v. Cline Leasing Serv., Inc.*, 707 S.W.2d 794, 796 (Ky. App. 1986) ("Unlike a ruling denying a motion for relief under CR 60.02, a ruling on a CR 59.05 motion is not a final or an appealable order. There is no authority in the rules to ask for reconsideration of a mere order which rules on a motion to reconsider a judgment.") (internal citation omitted).

⁴ (1) Cell site simulators (stingrays); (2) automatic license plate readers; (3) video and audio monitoring and/or recording technology; (4) drones; (5) through-the-wall radar; (6) biometric surveillance technology, including voice recognition, facial recognition, and iris scanners; (7) mobile DNA capture technology; (8) social media monitoring software; (9) radio-frequency I.D. (RFID) scanners; (10) surveillance enabled or capable light bulbs or light fixtures; and (11) tools used to gain unauthorized access to a computer, computer service, or computer network. (R. at 6).

(8) memoranda of understanding with any federal law enforcement agency; and (9) any agreements with other state law enforcement agencies, including but not limited to, Kentucky State Police. (R. at 6).

On July 20, 2017, LFUCG responded stating it “maintain[ed] an inventory of 29 cameras available for a variety of video surveillance applications. Cameras are deployed as needed in support of active investigations in accordance with [standard operating procedures].” (R. at 7). LFUCG owned 824 body-worn cameras, and it released the “General Order for Body-Worn Cameras – G.O. 2015-15 Body-Worn Cameras.” *Id.* It produced twelve pages of documents relating to body worn cameras. LFUCG did not possess ten of the eleven requested surveillance technologies, and, thus, could not provide any documentation. (R. at 7-8).

For the one requested item it did possess—video and audio monitoring and/or recording technology—LFUCG denied Maharrey’s request for “purchase orders, grant applications, federal program applications, purchase receipts, training manuals, and written policies governing the use of any of these technologies and SOP BOI 93-46A [as] exempt pursuant to KRS 17.150(2)(b) [and] (c) and KRS 61.878(1)(m).” (R. at 8).

On August 8, 2017, Maharrey appealed LFUCG's denial to the Attorney General. LFUCG responded, indicating all nonexempt documents would be released. On September 8, 2017, the Attorney General found:

[LFUCG's] initial and supplemental responses lacked specificity required under KRS 61.880(1) and 61.880(2)(c). [LFUCG] failed to satisfy its burden of proving that disclosure of the records in dispute would have a reasonable likelihood of threatening the public safety as required to successfully invoke KRS 61.878(1)(m), and improperly relied upon KRS 17.150(2)(b) and (c); KRS 17.150(2) is facially inapplicable. [LFUCG] cannot produce that which it does not have and thus properly denied request as to nonexistent records.

17-ORD-179.

On September 14, 2017, LFUCG produced 467 pages of records regarding tax payer expenditures for the 29 surveillance cameras, but redacted the equipment's make, model, and manufacturer of the cameras, and withheld training manuals as "an officer safety issue and decrease in effectiveness of investigations." (R. at 3). Two weeks later, LFUCG filed an original action in the Fayette Circuit Court under KRS 61.880(5)(a) and KRS 61.882(3) to appeal the Attorney General's decision.⁵

⁵ Once the Attorney General renders a decision either party then has thirty days within which to bring an action pursuant to KRS 61.882(3) in the Circuit Court. Although the statutes refer to this as an "appeal" of the Attorney General's decision, it is an "appeal" only in the sense that if a Circuit Court action is not filed within the thirty-day limitations period, the Attorney General's decision becomes binding on the parties and enforceable in court. Otherwise, this . . . Circuit Court proceeding is an original action . . . KRS 61.880(5)(a) (The appeal is to be treated "as if it were an action brought under KRS 61.882."). The Circuit Court does not review and is not in any sense bound by the

Maharrey timely answered, and a few months later, the parties filed cross-motions for summary judgment. Following oral arguments, the circuit court granted summary judgment in favor of Maharrey. The circuit court held that LFUCG improperly relied on exemptions under: (1) KRS 17.150(2)(b) and (c), claiming that the release of the models of the cameras and relevant training manuals would threaten the safety of officers and police informants; (2) KRS 61.872(6), claiming the requested information would result in an unreasonable burden to the police department; and (3) KRS 61.878(1)(m), claiming that the requested information would pose a threat to public safety. In sum, the circuit court found LFUCG cited no exemption that would warrant nondisclosure of information under the ORA. Following an unsuccessful CR 59.05 motion, this appeal followed.

On November 30, 2018, Kentucky League of Cities (“KLC”) moved for leave to file an *Amicus Curiae* brief as a representative of municipal law enforcement in Kentucky. By order entered January 3, 2019, this Court granted KLC’s motion.

Attorney General’s decision, nor is it limited to the “record” offered to the Attorney General. KRS 61.882(3) (The circuit court is to “determine the matter *de novo*”).

City of Fort Thomas v. Cincinnati Enquirer, 406 S.W.3d 842 (Ky. 2013).

STANDARD OF REVIEW

Summary judgment is appropriate where there exists no genuine issue of material fact and movant is entitled to judgment as a matter of law. CR 56; *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences from the record are to be viewed in a light most favorable to the nonmoving party. *Id.* Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* at 480 (citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . .” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (internal citations omitted).

Whether an agency has complied with ORA is a question of law reviewed *de novo*. *Medley v. Board of Educ., Shelby County*, 168 S.W.3d 398, 402 (Ky. App. 2004). The Act’s “basic policy” is that “free and open examination of public records is in the public interest[.]” KRS 61.871. “Because the General Assembly has deemed the open examination of some records not to be in the public interest, however, the ORA also provides for exceptions to that general rule of openness.” *City of Fort Thomas*, 406 S.W.3d at 845. The burden of proof is on the public agency opposing disclosure to establish a record is exempt from release.

Id. at 848 (citing *Bowling v. Lexington-Fayette Urban County Gov't*, 172 S.W.3d 333 (Ky. 2005)). Here, KRS 61.872(6) requires proof, by clear and convincing evidence, that the nondisclosure is justified under the ORA.

ANALYSIS

LFUCG contends the circuit court erred in denying its motion for summary judgment, arguing it properly relied on the exemptions set forth in: (1) KRS 17.150(2)(b) and (c); (2) KRS 61.872(6); and (3) KRS 61.878(1)(m). To justify nondisclosure, LFUCG argues generally that a confidential informant's safety would be in jeopardy if the surveilled subjects recognized the covert surveillance cameras and that public knowledge of deployment and concealment methods of the covert surveillance cameras would render its equipment ineffective and replacement models necessary. LFUCG explained that if a targeted subject knew the make and model of the covert surveillance cameras, he or she could avoid detection by researching the specifications on the general internet, such as viewing distance, resolution, range and field of vision. To support its position, LFUCG filed the affidavit of Lt. Jesse Harris. It provides:

Comes the affiant, Jesse Harris, after being duly sworn and states as follows:

1. My name is Jesse Harris. I am employed by [LFUCG] as a Lieutenant in Special Investigations Section.
2. The Division of Police owns three types of covert

surveillance cameras, stationary, hand held and on-person.

3. You must have a verified law enforcement credential to view the vendors' covert surveillance cameras on their website.

4. If a targeted subject knew the make and model of the covert surveillance cameras they could avoid detection by researching the specifications on the internet such as viewing distance, resolution, range and degree of field of vision.

5. The Division of Police has removed stationary surveillance cameras when surveilled subjects have recognized the equipment.

6. Warrants are not needed for covert surveillance cameras in a public place but are obtained to surveil a specific individual or location.

7. The hand held camcorders and on-person covert surveillance cameras are the only means of monitoring confidential informants when they are out of sight.

8. Confidential informants' safety would be in jeopardy if the surveilled subjects were able to recognize the covert surveillance cameras.

9. The hand held camcorders are used mainly for drug deals but are also used to determine if weapons are on specific premises.

10. The on-person cameras are used mainly for drug deals but are also used to determine if weapons are on specific premises.

11. Public knowledge of the deployment and concealment methods of the covert surveillance cameras would make this equipment ineffective and replacement models would need to be purchased.

FURTHER affiant sayeth not.

/s/ Lieutenant Jesse Harris

(R. at 61-62). No additional evidence was offered by either party at that time.

On April 20, 2018, the circuit court heard oral arguments on the cross motions. Both parties proposed an *in camera* review⁶ of the surveillance technologies but were denied. LFUCG argued that in addition to the *in camera* review, an evidentiary hearing was necessary to demonstrate the legitimate concerns as to why the release of the requested records would impair law enforcement operations, jeopardize officer and informants' safety, and demonstrate how criminal targets share this type of law enforcement information to avoid arrest. Both would allow LFUCG to fully develop the record and establish an undue burden under KRS 61.872(6). The circuit court denied LFUCG's request and, instead, granted summary judgment in favor of Maharrey, finding that LFUCG failed to meet its burden of proof, by clear and convincing evidence, that its nondisclosure was exempted under the ORA.

LFUCG argues on appeal that without this method to inform the circuit court of the dangers of making the covert surveillance cameras public, it was hindered in its ability to meet its burden of proof under KRS 61.872(6). We agree. Harris's affidavit is undisputed. Maharrey argues it is insufficient to support nondisclosure. However, for purposes of Maharrey's motion for summary

⁶ KRS 61.882(3) provides for the ability of the circuit court to conduct an *in camera* review of disputed documents. It is a permissive rather than mandatory provision.

judgment, the affidavit must be viewed in the light most favorable to LFUCG. If the circuit court or Maharrey questioned the insufficiency of the affidavit or its validity, examination could flesh it out.

The circuit court found it “hard to believe” that a targeted individual would (1) recognize the make and model of one of the 29 surveillance cameras used in a covert surveillance situation; (2) instantaneously recall the technical data relative to a make and model obtained from a general internet search; and (3) apply it to a given situation to avoid detection or thwart the criminal activity.

Specifically, it found LFUCG:

failed to offer concrete examples of how [the release of information they claim could be used by individuals to ‘circumvent the law’] stems from the release of the models and training manuals for the cameras. The mere contention that the information would pose a safety risk is far too abstract to satisfy the standard of clear and convincing evidence required by statute.

(R. at 105). The circuit court’s findings were premature. The circuit court denied LFUCG’s request for an evidentiary hearing and *in camera* review which could have provided the very “concrete examples” the circuit court referenced.

There are still genuine issues of material fact that exist as to whether a targeted individual would (1) recognize the make and model of one of the 29 surveillance cameras under in a covert surveillance situation; (2) instantaneously recall the technical data relative to a make and model obtained from a general

internet search; and (3) apply it to a given situation to avoid detection or thwart the criminal activity. Hard to believe is not impossible to prove. Once these questions are answered, the circuit court must then analyze whether LFUCG met its burden of proof in relying on its claimed statutory exemptions for nondisclosure.

CONCLUSION

Based on the foregoing analysis, we reverse and remand the judgment of the Fayette Circuit Court with instructions to conduct an evidentiary hearing and, if necessary, an *in camera* review to address LFUCG's concerns regarding disclosure of covert surveillance technologies.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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