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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002466-MR

THE COURIER-JOURNAL AND
LOUISVILLE TIMES COMPANY;
DIX COMMUNICATIONS, INC.,
THE STATE JOURNAL; AND THE
LEXINGTON HERALD-LEADER
COMPANY — APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CI-00637

KENT DOWNEY AND JOHN DOE — APPELLEES

AND NO. 1999-CA-002501-MR

ALBERT B. CHANDLER, AS
ATTORNEY GENERAL FOR THE
COMMONWEALTH OF KENTUCKY — APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 99-CI-00637

KENT DOWNEY AND JOHN DOE — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, McANULTY AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. In these consolidated appeals, The Courier-Journal and Louisville Times Company, Dix Communications, Inc., The State Journal, and The Lexington Herald Leader Company (collectively the Media), and Albert B. Chandler III in his capacity as Attorney General for the Commonwealth of Kentucky (the Attorney General) appeal from orders of the Franklin Circuit Court entered September 7, 1999, and September 27, 1999, which enjoined the Attorney General from releasing any information contained in his files pertaining to the criminal investigation of Kent Downey (Downey).

Downey is the former Director of House Operations for Kentucky's Legislative Research Commission (LRC). As such, he maintained an office in the Capitol Building in Frankfort, Kentucky.

In 1994, Downey and another individual began operating a business known as Entertainment Outings Limited (EOL). EOL sponsored golf and gambling trips in Kentucky and the Carolinas, and it often hired exotic dancers to entertain at these functions. Aside from golf and legal gambling, prostitution and illegal gambling occurred during many EOL-sponsored activities. Many lobbyists, members of Kentucky's General Assembly, and other public officials attended EOL functions. It is undisputed that Downey conducted EOL business from his LRC office with state employees and resources.

In 1996, the Public Corruption Unit of the Attorney General's office (the PCU) began an investigation of Downey's activities. The PCU is a part of the Attorney General's office,

and the investigations it carries out may be prosecuted by a County Attorney, Commonwealth Attorney, the Attorney General's Special Prosecutions Division, or a United States Attorney. The Federal Bureau of Investigation eventually joined the Downey investigation and the United States Attorney's Office ultimately undertook prosecution of the matter. A federal grand jury handed down a 17-count indictment, and Downey ultimately entered a guilty plea pursuant to a plea agreement on two counts and admitted that he used state resources and employees to conduct illegal activities from his state office.

The PCU continued its investigation for some time after Downey entered his guilty plea. Over the course of its entire investigation, the PCU amassed a file consisting of 500 pages of witness interviews, several volumes of documents, and several boxes of other related material. The Attorney General ultimately decided not to conduct its own prosecution of Downey on state charges.

Due to the scandalous and salacious nature of the conduct of Downey and various unidentified public figures during EOL-sponsored events, the ensuing investigation and prosecution sparked a great deal of public interest. Accordingly, many newspapers, including the Appellants herein, filed requests pursuant to Kentucky's Open Records Act (KRS 61.870 et. seq.) seeking to inspect and review the Downey file upon completion of the Attorney General's investigation.

In anticipation of release of the Downey file once the decision was made not to undertake further prosecution, the

Attorney General reviewed the Downey file and redacted all information which was clearly exempted from disclosure under both the Open Records Act and the Criminal History Records Act (KRS 17.150). After completing the initial redaction, the Attorney General wrote to each individual named in the Downey file and invited them to review the redacted file in order to allow the assertion of any individual privacy interest which would exempt disclosure. Only two individuals responded - Downey and an attorney for an individual referred to as "John Doe" (Doe). On May 21, 1999, Downey requested that further redactions be made before release of the file. The Attorney General refused to make further redactions and informed Downey that absent judicial intervention the file would be released on June 8, 1999.

On June 2, 1999, Downey filed a petition with the trial court seeking a temporary injunction enjoining the Attorney General from releasing the file. Downey asked the trial court to conduct an in camera review of the file and order further redaction "of any and all materials exempt from public disclosure under KRS 61.878(1)(a), (i) and (k)." On June 3, 1999, Doe filed a complaint for injunctive relief and declaration of rights in which he argued that information contained in the Downey file pertaining to him was exempt from disclosure under KRS 61.878(1)(a). The two complaints were ultimately consolidated.

The trial court held a hearing on the motions for temporary injunction on June 4, 1999. At the hearing, the trial court expressed its concern that KRS 61.878(1)(h) would be violated if the Downey file was released. The trial court

explained that KRS 61.878(1)(h) was problematic because it exempted investigative records of County and Commonwealth Attorneys from disclosure but not investigative files of the Attorney General and that it could not discern a rational basis for distinguishing between the two. As none of the parties had claimed that the Downey file was exempted from disclosure under KRS 61.878(1)(h), the trial court asked the parties to brief that issue as well as the other issues raised by the two complaints. On the same day, the trial court entered separate orders which (1) granted a temporary injunction precluding the release of the Downey file pending an in camera review and hearing, and (2) granted the Media's motion to intervene.

After the parties submitted their briefs, another hearing was held on July 14, 1999. On September 7, 1999, the trial court entered an opinion and order enjoining the release of the Downey file pursuant to KRS 61.878(1)(h). In so ruling, the trial court stated:

> The Court finds that the General Assembly's failure to include in the Open Records exemption the OAG[1], in its capacity as prosecutor of criminal actions, was the result of mere oversight and not a cognizant determination that OAG investigatory files are substantially different from those of local prosecutors. The General Assembly has created a Unified and Integrated Prosecutor System. It went to great lengths to provide the same authority for all prosecutors, whether they be part of the OAG or local. See KRS 15.200 and 15.210. As previously mentioned, the obvious statutory scheme is for all prosecutors to function in the same capacity in the conduct of their prosecutions. The Court cannot escape the

[1]The trial court referred to the Attorney General as the OAG.

conclusion that given this unified system in which all prosecutors are similarly situated for all practical purposes, it is irrational for the OAG, in its capacity as prosecutor of criminal actions only, to be omitted from the Open Records exemption. The Court is persuaded that the General Assembly simply failed to include the OAG because the OAG does not normally or routinely prosecute criminals. The OAG can, does, and often has the duty to perform this function, with all the same authority of a County or Commonwealth's Attorney. Therefore, the Open Records exemptions should be construed to similarly cover the OAG in its capacity as prosecutor of criminal actions.

The Court is also unpersuaded by the argument that when the OAG does prosecute crime, those crimes always involve public corruption, because KRS 15.190 provides that Commonwealth's Attorneys and County Attorneys may request the OAG's assistance in the conduct of <u>any</u> criminal investigation or proceeding. If the OAG does so, his investigations thereof obviously would be included under the Open Records exemption, and would not be subject to public scrutiny. It is absurd to think the General Assembly intended for County Attorneys' and Commonwealth's Attorneys' files to be exempt, except when they are being assisted by the OAG, even when the matter does not involve public corruption. [footnote omitted]

The reverse situation is also true: if the OAG delegates its prosecutorial responsibility to a local prosecutor, then the investigatory files are protected. One example with which the Court is intimately familiar involves the criminal prosecutions of the Executive Director of the Governmental Services Center, Alice McDonald. [footnote omitted] In those cases, the OAG possessed the authority to prosecute Ms. McDonald, and the Public Corruption Unit conducted the criminal investigation. However, actual prosecution of the case was turned over to the Franklin County Commonwealth's Attorney. Clearly, the OAG cannot argue that the investigative files in the McDonald cases should be protected under the Open Records exemption but the Downey file should not be,

merely because the local prosecutor handled one case and the OAG prosecutor the other.

The Court is aware that it must not create ambiguities, add language to statutes, or second-guess the wisdom of the General Assembly. The Court is not doing so: it is simply acknowledging the General Assembly's clear intent to provide an overall scheme for unified and integrated prosecutors.

Thus, we find the Open Records exemption includes the OAG. Without this construction, the exemption is under-inclusive and unconstitutional in violation of [sections] 2 and 59 of the Kentucky Constitution, as well as the Fourteenth Amendment to the United States Constitution. However, for the reasons mentioned above, there is no rational basis for the General Assembly to distinguish between local prosecutors and the OAG for purposes of this exemption. Both possess files with raw investigatory information, witness statements, and notes, despite the fact that the local police also maintain similar files that are open to the public. The Court is unpersuaded that investigatory OAG files are so different from those of local prosecutors as to make one subject to public disclosure while the others are not. This is not a situation where there is an "imperfect fit between means and ends." Revenue Cab. v. Smith, Ky., 875 S.W.2d 873, 875 (1994), which the courts have held to be constitutional, nor is the Court affected by the OAG's dramatic references to "secret police files." The fact is, the General Assembly found that this type of information came from one sort of prosecutor, and there is no rational reason why it is not worthy of exemption when it is accumulated by a different prosecutor in the same statutory scheme. Therefore, the only constitutional construction of the Open Records exemption is to include in the exemption the OAG in its role as criminal prosecutor.

The Court notes the argument that when a statute is found unconstitutional, the traditional remedy is to strike the exemption. However, the Court is persuaded that in cases such as this, where the clear intent of the General Assembly is to include something in a statute which through mere

> oversight it omitted, the proper remedy is to construe the statute so as to give it the proper constitutional effect, and to include the omitted item.

This was followed by entry of an amended order on September 27, 1999, in which the trial court stated:

> [T]he Downey file is included under the statutory exception provided for under KRS 61.878(1)(h) and is thus statutorily exempt from the provision of Kentucky's Open Records Law, KRS 61.870-61.884.

This appeal followed.

> I. DID THE TRIAL COURT ERR IN CONSTRUING KRS 61.878(1)(h) TO INCLUDE INVESTIGATIVE FILES OF THE ATTORNEY GENERAL?

The Appellants maintain that the clear language of KRS 61.878(1)(h) does not specifically exempt investigatory files of the Attorney General from disclosure under the Open Records Act and that the trial court erred in construing the statute to provide otherwise. Our standard of review is as follows:

> The interpretation of a statute is a matter of law. A reviewing court is not required to adopt the trial court's interpretation, but, rather, must interpret the statute according to the plain meaning of the act and in accordance with its intent.

Commonwealth v. Garnett, Ky. App., 8 S.W.3d 573, 575 (1999).

Our review of this issue is framed by general rules of statutory construction. "In analyzing the Open Records Act . . . we are guided by the principal that "under general rules of statutory construction, we may not interpret a statute at variance with its stated language"." Hay v. Kentucky Industrial Revitalization Authority, Ky., 907 S.W.2d 766, 768 (1995), citing Taylor v. Newburg, Ky., 841 S.W.2d 181, 183 (1992). If a statute

is clear and unambiguous, there is no discretion to interpret or construe it and it must be applied as written. Hay, 907 S.W.2d at 769. "We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994). "The primary rule is to ascertain the intention from the words employed in enacting the statute and not to guess what the Legislature may have intended but did not express." Gateway Construction Company v. Wallbaum, Ky., 356 S.W.2d 247, 249 (1962). Additionally, the Open Records Act itself provides guidance in this area:

> The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records 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. [emphasis added]

KRS 61.871. Based on the foregoing authority, we must conclude that the trial court erred in finding that the Downey file is exempt from disclosure pursuant to KRS 61.878(1)(h).

KRS 61.878 contains a list of public records which are exempted from review under the Open Records Act in the absence of a court order. At issue here is the exemption provided by KRS 61.878(1)(h), which precludes the release of:

> Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detection 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. [emphasis added]. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884[.]

This statute is not ambiguous. It clearly provides that the investigatory files of County and Commonwealth Attorneys remain exempted from disclosure even after litigation has been concluded or a decision not to prosecute has been made. The Attorney General is not mentioned or alluded to in this provision. "It is a primary rule of statutory construction that the enumeration of particular things excludes the idea of something else not mentioned." Smith v. Wedding, Ky., 303 S.W.2d 322, 323 (1957). Thus, under general rules of statutory construction and the strict construction mandate of KRS 61.871, the trial court erred in exempting the Downey file from disclosure under KRS 61.878(1)(h).

We realize that in holding as it did the trial court was attempting to remedy what it perceived to be a legislative oversight in failing to include the Attorney General in the scope

of KRS 61.878(1)(h). However, even if the exclusion of the Attorney General came about as a result of legislative error, the judiciary is powerless to correct it by reading the Attorney General into the statute.

> The courts may supply clerical or grammatical omissions in obscure phrases or language of a statute in order to give effect to the intention of the Legislature, presumed or ascertainable from the context, or to rescue the act from an absurdity. [citation omitted] But where a statute on its face is intelligible, the courts are not at liberty to supply words or insert something or make additions which amount, as sometimes stated, to providing for a casus omissus, or cure an omission, however just or desirable it might be to supply an omitted provision. It makes no difference that it appears the omission was mere oversight. [citations omitted]. . . . To insert or supply by construction the limitations contended for would be an act of legislation and not an act of judicial construction. The statute by construction cannot be extended or enlarged beyond its fair import.

Hatchett v. City of Glasgow, Ky., 340 S.W.2d 248, 251 (1960).

See also, Watkins v. Mooney, Ky., 71 S.W. 622 (1903).

> The judiciary is but one of the three component parts of our form of government. Its duty is to interpret and construe laws, not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the Legislature had in view, the remedy is legislative action, and not judicial construction.

Western Southern Life Ins. Co. v. Weber, 209 S.W. 716, 718 (1919).

We caution that in so ruling, we are not finding that the trial court erred in granting the temporary injunction precluding release of the Downey file, nor are we holding that

the file must be released. We simply find that the trial court erred in exempting the Downey file from disclosure under its construction of KRS 61.878(1)(h), and we remand the matter back to the trial court to consider the applicability of any other relevant provision of KRS 61.878 including, but not limited to, those subsections raised by the Appellees in their respective complaints.

II. DID THE TRIAL COURT ERR IN FINDING KRS 61.878(1)(h) TO BE UNCONSTITUTIONAL AS WRITTEN?[2]

The Appellants maintain that the trial court erred in finding KRS 61.878(1)(h) as written to be under-inclusive and thus violative of Sections 2 and 59 of the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution. We note that the tests for constitutionality under the Fourteenth Amendment and Sections 2 and 59 of the Kentucky Constitution are

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[2]The Attorney General's argument that we cannot consider this argument due to non-compliance with KRS 418.075, which requires a party challenging the constitutionality of a statute to serve a copy of the petition on the Attorney General, is not well taken. The stated purpose of KRS 418.075 is to bring the constitutional challenge to the Attorney General's attention and afford him the opportunity to be heard. KRS 418.075(1).

In this case, the Attorney General was the named defendant in both lawsuits, and there has been no allegation that the Attorney General was not served with copies of the underlying pleadings. We assume that counsel for the Attorney General was present at the June 4th hearing when the trial court expressed its concerns regarding KRS 61.878(1)(h). Downey raised the constitutionality of KRS 61.878(1)(h) in his brief before the trial court and both the Media and the Attorney General responded in their respective briefs. Therefore, despite the fact that neither Downey nor Doe amended their complaints to directly challenge the constitutionality of KRS 61.878(1)(h), the purpose of KRS 418.075(1) was met in that the Attorney General was put on notice of the challenge and afforded an opportunity to be heard.

the same. Commonwealth, Revenue Cabinet v. Smith, Ky., 875 S.W.2d 873, 878 (1994).

> Where the classification enacted by the legislature in the statute has a reasonable basis, such law does not constitute special or local legislation within the prohibition of Section 59 of the Kentucky Constitution nor does it deny the equal protection guaranteed by the United States Constitution.

Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446, 452 (1994). As the challengers of the constitutionality of KRS 61.878(1)(h), Downey and Doe bear the burden of "dispelling any conceivable basis which might justify the legislation." Buford v. Commonwealth, Ky. App., 942 S.W.2d 909, 911 (1997). This is a difficult burden to meet as any consideration regarding the constitutionality of a statute begins with "the strong presumption in favor of constitutionality." Kentucky Harlan Coal Co., 872 S.W.2d at 456. Having reviewed the parties' arguments regarding this issue, we do not believe that the Appellees have met their burden of proof.

We believe that a reasonable basis exists for the failure of the General Assembly to include the Attorney General under KRS 61.878(1)(h). Aside from having the power to prosecute cases, the Attorney General differs from County and Commonwealth Attorneys in that he has the ability to undertake his own investigations, especially in areas involving public officials, and decide whether prosecution is warranted. While there may be no distinction between County/Commonwealth Attorneys and the Attorney General in regard to their prosecutorial abilities under Kentucky's Unified and Integrated Prosecutor System (KRS 15.700

et seq.), there are differences in their investigative powers. As the Media illustrates in its brief on appeal:

> [T]he Attorney General performs investigative functions in criminal cases, as well as prosecutorial functions. Local prosecutors, on the other hand, prosecute cases that state or local police investigate. Records in the possession of state or local police departments remain open under the Open Records Act. Therefore, an avenue exists for the public to insure that fair, consistent, and effective enforcement of the criminal statutes is occurring.

If the purely investigatory records of the Attorney General were to be included in the scope of KRS 61.878(1)(h), there would never be any information available to the public under the Open Records Act for any crime which the Attorney General acted as both investigator and prosecutor.

As we previously noted, the Open Records Act requires strict construction of its provisions in order to ensure free and open examination of public records. KRS 61.871. If the investigatory files of the Attorney General were back-doored into the exemption provided by KRS 61.878(1)(h), this purpose would be defeated. Thus, we find that a rational basis exists for the exclusion of the Attorney General from KRS 61.878(1) and that the trial court erred in finding otherwise.

Having considered the parties' arguments on appeal, the orders of the Franklin Circuit Court entered September 7, 1999, and September 27, 1999, are reversed and this matter is remanded to the trial court with instructions to consider the applicability of any other relevant provisions of KRS 61.878,

including but not limited to, those raised by the Appellees in their respective complaints.

ALL CONCUR.

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