

RENDERED: FEBRUARY 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000186-MR

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF THE KENTUCKY STATE POLICE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 17-CI-00346

SARAH TEAGUE

APPELLEE

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: GOODWINE, MAZE, AND NICKELL, JUDGES.

GOODWINE, JUDGE: The Appellant, Commonwealth of Kentucky, Department of Kentucky State Police (KSP), appeals a judgment of the Franklin Circuit Court awarding attorney fees, costs, and penalties to Appellee, Sarah Teague, based upon its conclusion that KSP willfully denied Teague's open records request. Having

reviewed the record in conjunction with applicable legal authority, we affirm the judgment of the circuit court.

BACKGROUND

In 1995, Heather Teague was abducted from a beach in Henderson, Kentucky. No arrest has been made in her disappearance. Beginning in 2004, Heather's mother, Appellee, Sarah Teague, made a series of open records requests to the KSP regarding its investigation into Heather's abduction and disappearance.

In 2016, KSP denied the open records request which is the subject of this appeal. In this latest request, Teague sought all records relating to the 911 call reporting Heather's abduction; records showing the chain of custody and the names of those involved in handling the records; the names of those present at a 2008 meeting at which KSP allowed Teague and her attorney to listen to the 911 recording; and all mugshot records of a certain suspect from the Webster and Henderson County Jail in 1995. Citing Kentucky Revised Statute ("KRS") 17.150(2)(d), exempting records of law enforcement agencies from disclosure until prosecution has been completed, and KRS 61.878(1)(h), exempting records which would harm the agency by prematurely releasing information to be used in a future prosecution, KSP denied Teague's latest request on the stated basis that its investigation was still open, active, and ongoing and that the premature release of the requested records could result in prejudice to potential witnesses; might

adversely color witnesses' recollections; and might result in bias to a potential jury pool. Teague appealed KSP's denial of her request to the Attorney General of Kentucky who upheld KSP's denial of disclosure. Teague challenged the Attorney General's decision in Henderson Circuit Court. After KSP successfully argued that venue was properly in Franklin Circuit Court, the Henderson Circuit Court transferred Teague's appeal to that forum.

Franklin Circuit Court thereafter granted Teague leave to file a supplemental open records request seeking: 1) all 911 calls in all formats concerning Heather's abduction; 2) the chain of custody concerning each individual recording; and 3) the specific dates and times in 2008 and 2016 when KSP played the recordings for Teague and her counsel, indicating which recording was heard on which date. KSP denied Teague's supplemental request, again citing KRS 17.150(2)(d) and KRS 61.878(1)(h). Teague appealed the denial of her supplemental request to the Attorney General who deferred to the pending action in Franklin Circuit Court. All the requested records were subsequently submitted to the circuit court for an *in-camera* review.

The circuit court ultimately concluded that KSP had failed to sustain its burden of proving entitlement to the statutory exemptions and required KSP to release all the requested records. Teague then filed a motion to alter or amend that judgment arguing that the circuit court erred in failing to address her request for

attorney fees, costs, and penalties against KSP based upon its pattern of willfully withholding the records. In January 2018, the circuit court granted Teague's motion, concluding that KSP had willfully withheld the records and awarding Teague \$9,406.25 in attorney fees, \$203.92 in costs, and \$14,100.00 in penalties.

After KSP filed a notice of appeal from the order granting Teague's motion to alter or amend the judgment, the parties submitted an agreed order reducing the amount of the penalty to \$13,725.00. The circuit court signed the parties' agreed order and KSP then filed a supplemental notice of appeal.

STANDARD OF REVIEW

In determining whether a willful violation of the Open Record Act has occurred, the trial court's "decision on the issue of willfulness is a finding of fact and, as such, will not be disturbed [on appeal] unless clearly erroneous." *Cabinet for Health and Family Services v. Courier-Journal, Inc.*, 493 S.W.3d 375, 384 (Ky. App. 2016) (quoting *Bowling v. Lexington-Fayette Cty. Gov't*, 172 S.W.3d 333, 343-344 (Ky. 2005)). A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

ANALYSIS

The primary issue in this appeal is whether the circuit court erred in determining that KSP willfully withheld the records contained in Teague's open

records request, thereby triggering the award of attorney's fees, costs, and penalties. KSP's justification for denying Teague's request centers on the exemptions to disclosure set out in KRS 17.150(2)(d) and KRS 61.878(1)(h). The first of these statutes permits criminal justice agencies to withhold from inspection portions of records under the following circumstances:

(2) Intelligence and investigative reports maintained by criminal justice agencies are subject to public inspection if prosecution is completed or a determination not to prosecute has been made. However, portions of the records may be withheld from inspection if the inspection would disclose:

...

(d) Information contained in the records to be used in a prospective law enforcement action.

KRS 17.150(2)(d).

Similarly, KRS 61.878(1)(h) provides in pertinent part that:

(1) the following public records are excluded from the application of KRS 61.870 to 61.884 . . .

(h) Records of law enforcement agencies . . . 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.

In rejecting KSP's defense of its failure to release the requested records, the circuit court noted that "[e]ssentially, KSP relied on the fact that the

twenty-two (22) year old case has not been solved or ‘closed,’ and that release of these records could ‘tip off’ those involved in the crime, bias a potential jury pool, or ‘adversely color witness recollections of the event.’” Citing *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013), the circuit court found KSP’s arguments unpersuasive, noting that the law clearly requires KSP to articulate a “factual basis” for relying on the exemptions, as well as to demonstrate that release of the records “poses a concrete risk of harm in the prospective action.”

As noted by the circuit court, KSP has reiterated the same basis for refusing to release any of the records since they were first requested in 2004. Thus, the circuit court determined that rationale offered by KSP was vague, speculative, and, given the twenty-two years expended in investigation, constituted extremely remote *possibilities*. We agree with the circuit court that to accept KSP’s “incredibly vague, speculative, and remote concerns” under the circumstances of the case would be unreasonable. A mere parroting of the statutory language does not satisfy the requirement of a *factual* basis for denial of an open records request.

In addition, review of the record discloses that KSP allowed Teague to see the chain of custody of the reel-to-reel recording, discussed with her where the recording had been stored, and even played the 911 tape for her on two different occasions. In our view, each of these actions undermines KSP’s argument that to

divulge the requested information would, or even might, damage their investigation or potential prosecution.

In *Cabinet v. Courier-Journal*, *supra*, this Court offered guidance for determining whether an agency has willfully withheld records for purposes of the imposition of the penalties set out in KRS 61.882(5):

Willful action “connotes that the agency withheld records without plausible justification and with conscious disregard of the requester’s rights.” *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 854 (Ky. 2013). The circuit court’s “decision on the issue of willfulness is a finding of fact and, as such, will not be disturbed [on appeal] unless clearly erroneous.” *Bowling v. Lexington–Fayette Urban Cnty. Gov’t*, 172 S.W.3d 333, 343–344 (Ky. 2005). . . . If the circuit court awards attorneys’ fees, costs, or penalties, the amount thereof is within the discretion of the circuit court and may be only disturbed on appeal when an abuse of discretion is manifest. *City of Fort Thomas*, 406 S.W.3d at 854.

493 S.W.3d at 384. Review of the record in this case convinces us that the circuit court’s findings are supported by substantial evidence and therefore cannot be set aside as clearly erroneous.

As to the other two issues raised by KSP, we perceive no error.

KSP’s contention that the opinion of the Kentucky Attorney General demonstrates its good faith in denying Teague’s request is belied by the long and tortuous route she was forced to pursue in order to obtain relief in the Franklin Circuit Court.

Furthermore, KSP's pattern of vague denials over the course of many years is more than sufficient to support the imposition of penalties.

Finally, KSP argues that Teague's "tactics and actions" extended the length of the case increasing the amount of attorney fees, costs, and penalties imposed. As an initial matter, we note that KSP failed to preserve the issue of excessive attorneys fees and costs in its motion to amend the circuit court's order of January 5, 2018. In that motion, KSP argued only that the circuit court erred in assessing a \$25 per day penalty for the period from November 27, 2017, to December 11, 2017, a period of 15 days. KSP's motion was ultimately resolved by agreed order adopted by the circuit court reducing the penalty from \$14,100 to \$13,725. We agree with Teague that, in order to preserve the issues of excessive costs and attorneys fees, KSP was required to give the circuit court an opportunity to correct the issues by including them in its motion to amend. In *Ford Motor Credit Co. v. Swarens*, 447 S.W.2d 53 (Ky. 1969), the former Court of Appeals explained the purpose behind the preservation requirement:

We have held that whether damages awarded are excessive may not be considered on appeal if the appealing party has failed to present that question to the trial court. *Commonwealth Dept. of Highways v. Williams*, Ky., 317 S.W.2d 482; *Kentucky & Indiana Terminal Railroad Co. v. Martin*, Ky., 437 S.W.2d 944. One of the reasons for the rule is that the trial court must be given an opportunity to effectively rule on the issue. Where the trial court is without power to rule on the

question, then no effective opportunity to correct any error is afforded on the trial level.

Id. at 56. Thus, we will not predicate error on issues upon which the circuit court had no opportunity to rule.

However, we note that, were the issues properly before us, we would nevertheless fully concur in the circuit court's resolution of KSP's argument. To compensate for any delay occasioned by Teague's manner of prosecuting her case, the circuit court amended its order to eliminate some requested attorney fees and penalties which were due to the fact that Teague originally filed her action in the wrong venue. "If the circuit court awards attorneys' fees, costs, or penalties, the amount thereof is within the discretion of the circuit court and may be only disturbed on appeal when an abuse of discretion is *manifest*." *Courier-Journal*, 493 S.W.3d at 384 (emphasis added). Nothing in this record would allow us to set aside, as an abuse of the circuit court's wide discretion, its amended judgment imposing attorney fees, costs, and penalty for KSP's willful refusal of Teague's open records requests without providing a factual basis for its action. In sum, we perceive no manifest abuse of discretion in the award at issue in this appeal.

CONCLUSION

Based upon the foregoing, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cody Weber
Frankfort, Kentucky

BRIEF FOR APPELLEE:

James “Chip” Adams II
Madisonville, Kentucky