

*** NOT DESIGNATED FOR PUBLICATION ***

PHILLIP MONROE

*

NO. 2013-CA-0259

VERSUS

*

COURT OF APPEAL

**NEW ORLEANS POLICE
DEPARTMENT AND THE
NEW ORLEANS CHIEF OF
POLICE**

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-3864, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

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**PAUL A. BONIN
JUDGE**

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(Court composed of Chief Judge James F. McKay, III, Judge Terri F. Love, Judge Paul A. Bonin)

McKAY, C.J., CONCURS IN THE RESULTS.

Phillip Monroe, #123031
LA. STATE PENITENTIARY
Oak-2, Main Prison West
Angola, LA 70712

PLAINTIFF/APPELLANT/IN PROPER PERSON

Ronal Serpas
In this Capacity as Superintendent of Police
New Orleans Police Department
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New Orleans, LA 70119

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City of New Orleans
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VACATED AND REMANDED

JUNE 19, 2013

Phillip Monroe, a prisoner confined to the Louisiana State Penitentiary at Angola, appeals the denial of his petition for a writ of mandamus directed to the Superintendent of the New Orleans Police Department, Ronal Serpas. Mr. Monroe sought under the Public Records Law from Superintendent Serpas the estimated cost for copies of specified police reports so that he could pursue post-conviction relief. Having received no response from the superintendent, who is the custodian of the records sought, after the expiration of statutory delays Mr. Monroe instituted these mandamus proceedings.

The district judge *pro tem*, acting in response to an order from this court,¹ scheduled a contradictory hearing on written briefs only. The trial judge denied relief without any written reasons or other explanation. Because we find that Mr. Monroe was entitled to mandamus relief, we vacate the trial judge's ruling and remand to the district court for further proceedings.

¹ See *Monroe v. New Orleans Police Department*, No. 2012-C-1325 (La. App. 4 Cir. 10/8/12) (unpub.).

I

The right of access to public records is a fundamental right, guaranteed by the state constitution. *See* La. Const. art. XII, §3. And access to public records may only be denied when the law specifically and unequivocally denies access. *Id.*

The Public Records Law sets forth the means by which a person may obtain access to public records. Any person of the age of majority may inspect, copy, or reproduce any public record. La. R.S. 44:31 (B). “For all public records, except public records of state agencies, it shall be the duty of the custodian of such public records to provide copies to persons so requesting.” La. R.S. 44:32 C (1)(a). “The custodian may establish and collect reasonable fees for making copies of public records.” *Id.* “Any person, as provided for in R.S. 44:31, may request a copy or reproduction of any public record and it *shall be the duty of the custodian* to provide such copy or reproduction to the person so requesting.” La. R.S. 44:32 C(1)(d) (emphasis added).

Mandamus is a writ directing a public officer to perform duties set forth in La. C.C.P. art. 3863. *See* La. C.C.P. art. 3861. A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty. La. C.C.P. art. 3863.

Any person who is denied the right to a copy of a record by the custodian or the passage of five days, may institute proceedings for the issuance of a writ of mandamus. La. R.S. 44:35 A. If such a proceeding is instituted, the trial court has jurisdiction to issue a writ of mandamus ordering the production of any records improperly withheld from the person seeking disclosure. La. R.S. 44:35 B. The burden is on the custodian to sustain his action. La. R.S. 44:35B.

Here, the record reflects that on July 11, 2011, Mr. Monroe requested of Superintendent Serpas that he provide him with the cost of the copies requested. There is nothing in the record from the superintendent suggesting that he did not receive the written request from the prisoner nor is there any explanation why he failed to inform Mr. Monroe of the cost of obtaining copies of the public records. Obviously, Mr. Monroe, a prisoner, was not able to review and inspect the records in person. Thus, Mr. Monroe was entitled to institute these proceedings when he had received no response for almost one year.

II

Our review of the record indicates that the police reports which Mr. Monroe was seeking from Superintendent Serpas are public records. Mr. Monroe requested a copy of the police report regarding his January 4, 1998 arrest, in order to file an application for post-conviction relief. The records of law enforcement agencies which are deemed public can be found in La. R.S. 44:3. That statutory provision provides in pertinent part:

A. Nothing in this Chapter shall be construed to require disclosures of records, or the information contained therein, held by the offices of the attorney general, district attorneys, sheriffs, police departments, Department of Public Safety and Corrections, marshals, investigators, public health investigators, correctional agencies, communications districts, intelligence agencies, or publicly owned water districts of the state, which records are:

(1) Records pertaining to pending criminal litigation or any criminal litigation which can be reasonably anticipated, until such litigation has been finally adjudicated or otherwise settled, except as otherwise provided in Subsection F of this Section; or

* * *

(4)(a) The records of the arrest of a person, other than the report of the officer or officers investigating a complaint, until a final judgment of conviction or the acceptance of

a plea of guilty by a court of competent jurisdiction. However, the initial report of the officer or officers investigating a complaint, but not to apply to any followup or subsequent report or investigation, records of the booking of a person as provided in Louisiana Code of Criminal Procedure Article 228, records of the issuance of a summons or citation, and records of the filing of a bill of information shall be a public record.

(b) The initial report shall set forth:

(i) A narrative description of the alleged offense, including appropriate details thereof as determined by the law enforcement agency.

(ii) The name and identification of each person charged with or arrested for the alleged offense.

(iii) The time and date of the alleged offense.

(iv) The location of the alleged offense.

(v) The property involved.

(vi) The vehicles involved.

(vii) The names of investigating officers.

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C. Whenever the same is necessary, judicial determination pertaining to compliance with this section or with constitutional law shall be made after a contradictory hearing as provided by law. An appeal by the state or an officer, agency, or department thereof shall be suspensive.

La. R.S. 44:3.

Next, we must determine whether Mr. Monroe is a “person” under the Public Records Act. The Public Records Act provides that any person of the age of may obtain a copy of any public record, except as otherwise provided by law.

La. R.S. 44:31(B)(2). An exception is provided in the Public Records Act itself as,

[P]erson does not include an individual in custody after sentence following a felony conviction who has exhausted his appellate remedies when the request for public records is not limited to grounds upon which the individual could file for post-conviction relief under Code of Criminal Procedure Article 930.3. Notwithstanding the provisions contained in La. R.S. 44:32, the custodian may make an inquiry of any individual who applies for a public record to determine if such individual is in custody after sentence following a felony conviction who has exhausted his appellate remedies and the custodian may make any inquiry necessary to determine if the request of any such individual in custody for a felony conviction is limited to grounds upon which such individual may file for post-conviction relief under Code of Criminal Procedure 930.3.

La. R.S. 31.1.

By bill of information filed March 18, 1998, Mr. Monroe was charged with simple burglary of an inhabited dwelling. After trial, a jury found Mr. Monroe guilty of the responsive verdict of unauthorized entry of an inhabited dwelling. On April 26, 1999, Mr. Monroe was adjudicated a third felony offender and was sentenced to serve life imprisonment at hard labor without benefit of parole. This Court affirmed. *See State v. Monroe*, 99-2909 (La. App. 4 Cir. 11/21/00) (unpub.), writ denied, 2000-3510 (La. 11/16/01), 802 So.2d 621. Thus, Mr. Monroe exhausted his appellate remedies. Now, Mr. Monroe, a prisoner, is permitted access to public records when the request is limited to grounds upon which he may file for post-conviction relief. *State ex rel. Leonard v. State*, 96-1889, p.1 (La. 6/13/97), 695 So.2d 1325.

Post-conviction relief is available to a petitioner in custody after sentence only on the following grounds:

- (1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;
- (2) The court exceeded its jurisdiction;
- (3) The conviction or sentence subjected him to double jeopardy;

- (4) The limitations on the institution of prosecution had expired;
- (5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or
- (6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana.
- (7) The results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.

La. C.Cr.P. art. 930.3.

The record lacks evidence, much less proof, that the Superintendent as the custodian of the requested arrest records made inquiries pursuant to La. R.S. 31.1. Mr. Monroe did not state how the requested records would support the enumerated grounds for post-conviction relief. Mr. Monroe, however, did not have to explicitly state how the requested records would support an application for post-conviction relief. *Wiggins v. District Attorney East Baton Rouge Parish*, 07-2398, p.3 (La. App. 1 Cir. 6/21/02) (unpub.), 2008 WL 2064979. Additionally, although the time limitation for the filing of an application appears to have run, the state may assert that as a defense at the time of the filing of the application for post-conviction relief. *See State ex rel. Leonard v. State*, 96-1889, p.1, 695 So.2d at 1325. The tolling of the time limitation to file an application for post-conviction relief is not a valid reason to deny access to a public record. *Id.*

Because the record before us lacks evidence that the Superintendent made any inquiry to determine if the requested record is limited to grounds upon which Mr. Monroe may file for post-conviction relief and because the record before us lacks evidence that the Superintendent provided written notification to Mr. Monroe that the requested record is not a public record along with the provision of law

supporting such a conclusion,² the Superintendent, as the custodian of the records of the NOPD, should have been ordered to provide Mr. Monroe with an estimate of the costs of reproducing a copy of the records requested by Mr. Monroe. *State ex rel. Leonard v. State*, 96-1889, p.1, 695 So.2d at 1325. *See also State ex rel. Garrett v. State*, 2012-1949, p.1 (La. 1/11/13), 106 So.3d 542; and *State ex rel. Walton v. State*, 2011-0690, p.1 (La. 2/17/12), 82 So.3d 271.

Thus, on the basis of this record, we find that the writ of mandamus should have been made peremptory. We remand the matter to the district court for it to issue the writ of mandamus directed to the Superintendent to provide Mr. Monroe with an estimate of the costs of reproducing a copy of the records requested by Mr. Monroe. The writ should be issued within ten days of the finality of this judgment.

III

Mr. Monroe contends that the trial judge committed error in failing to award civil penalties as provided in La. R.S. 44:35. That statutory provision allows for the award of civil penalties for the arbitrary or capricious refusal to respond to a request or to provide written notification as mandated by La. R.S. 44:32. Because we find that the trial judge did not reach the merits of an award of civil penalties, we direct the trial judge on remand to conduct an appropriate contradictory hearing

² La. R.S. 44:32 D provides:

In any case in which a record is requested and a question is raised by the custodian of the record as to whether it is a public record, such custodian shall within three days, exclusive of Saturdays, Sundays, and legal public holidays, of the receipt of the request, in writing for such record, notify in writing the person making such request of his determination and the reasons therefor. Such written notification shall contain a reference to the basis under law which the custodian has determined exempts a record, or any part thereof, from inspection, copying, or reproduction.

in order to determine whether the superintendent's refusal to respond to Mr. Monroe's public records request was arbitrary or capricious.

REMAND INSTRUCTIONS

Within ten days of the finality of this judgment, the trial judge is to make the writ of mandamus peremptory and order Superintendent Ronal Serpas to inform Mr. Monroe of the cost of the copies of the records he is seeking. Also, in connection with the issuance of the writ, the trial judge is directed to consider taxing the costs of the proceedings in the district court against Superintendent Serpas. *See* La. C.C.P. art. 5186; La. R.S. 13:5112 A, and *State, Dept. of Transportation and Development*, 12-384 (La. App. 5 Cir. 12/11/12), 106 So. 3d 1124.

The trial judge shall conduct an appropriate contradictory hearing in order to determine whether the superintendent's refusal to respond to Mr. Monroe's public records request was arbitrary or capricious and render a judgment as authorized by La. R.S. 14:35.

DECREE

The trial court ruling dated December 7, 2012, denying mandamus relief, is vacated. The matter is remanded to the district court for further proceedings in accord with our Remand Instructions. All costs of the appeal are taxed to Superintendent Serpas. *See* La. C.C.P. art. 2164.

VACATED AND REMANDED

