

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 14, 2015

**ANTHONY HODGES v. DISTRICT ATTORNEY GENERAL - 20TH
JUDICIAL DISTRICT**

**Appeal from the Chancery Court for Davidson County
No. 131680III Ellen H. Lyle, Chancellor**

No. M2014-02247-COA-R3-CV –Filed April 27, 2016

Inmate brought petition under Tennessee Public Records Act seeking review of the District Attorney General's handling of his request that he be furnished copies of records relating to his prosecution. The trial court held that the Attorney General did not deny the request but, rather, that the petitioner failed to advance the costs of copying the records and, accordingly, was not entitled to relief. Finding no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KENNY W. ARMSTRONG, JJ., joined.

Anthony Hodges, Tiptonville, Tennessee, Pro Se, appellant.

Herbert H. Slatery, III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; and Linda D. Kirklen, Assistant Attorney General, for the appellee, District Attorney General, 20th Judicial District.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from a petition filed pursuant to Tenn. Code Ann. § 10-7-505 by Anthony Hodges, an inmate incarcerated at the Northwest Correctional Complex, for review of the response of the District Attorney General for the 20th Judicial District to Mr. Hodges' request for access to records relating to his criminal case.

Mr. Hodges filed a petition in the Davidson County Chancery Court on December 4, 2013, naming then-District Attorney General Victor S. Johnson, III, as Respondent, and seeking the following relief:

13. Petitioner prays that this Honorable Court finds that based upon the statutory language of Tennessee Code Annotated § 10-7-503(a)(2)(B) the Respondent have [sic] failed to abide by the time limits for well over six (6) months without justifying any reasons for noncompliance of its obligatory duty to respond and as such, the delay cause[d] by its noncompliance constitutes a denial of petitioner's request to inspect and access the public documents maintained by the Respondent's office.

14. The Petitioner further prays that the Court will assess all reasonable costs against the Respondent for its willful actions in not complying with the statutory time limits and assessing the fees against Respondent for obtaining the records.

15. The Petitioner further prays that the Court will assess the court costs and all out of pocket expenses that petitioner spent prosecuting this action.

In support of the relief requested, Mr. Hodges alleged that in March 2013 he requested to inspect the public records relating to his case which had been compiled by the office of the Davidson County District Attorney; that he received a letter from the District Attorney's office, setting forth the procedures for inspection of the records, together with a schedule of costs and fees for copies; that he forwarded a check from his inmate trust account in the amount of \$50.00 to prepay the cost; that he received no reply for six months and consequently sent a letter to the District Attorney's office inquiring why his request had not been processed; that he received a letter in response, enclosing the \$50.00 check he had previously sent and advising that the total cost to copy the records was \$794.03, which would have to be prepaid.

General Johnson filed a response to the Chancery Court petition, setting forth the history of correspondence with Mr. Hodges; contending that his request had not been denied and, accordingly, the seven day period for responding at Tenn. Code Ann. § 10-7-503(a)(2)(B) did not apply to Mr. Hodges' request; and asserting that the petition should be dismissed.

The trial court thereafter issued a Memorandum Opinion and Order dismissing the petition; in so doing, the court stated:

The record establishes that the respondent has complied with Tennessee law by making the records available at a reasonable cost for copying, and the

Petitioner has not paid the reasonable charge. Additionally, the Court finds from the record that there has been no unjustified delay on the part of the Respondent.

Mr. Hodges thereafter filed a motion to alter or amend the judgment or, alternatively, for a new trial; General Johnson filed a motion to correct a mistake in the Memorandum and Order. In his motion, Mr. Hodges asserted that Tenn. Code Ann. § 10-7-505 required that he be given a hearing on his petition, and that the court made some erroneous factual findings in the order dismissing the petition. The court denied Mr. Hodges' motion and granted General Johnson's motion, correcting the statement in the Memorandum and Order that "Petitioner actually paid the estimated total cost of \$794.03" to read "the Petitioner never paid the estimated total cost of \$794.03."

Mr. Hodges appeals, contending that the court erred in disposing of the case as a motion to dismiss rather than as a motion for summary judgment; in finding that General Johnson did not unjustifiably delay in responding to his request; and in adopting a procedure for the disposition of the case which eliminated an evidentiary hearing and gave General Johnson a "tactical advantage."

II. DISCUSSION

A. Standard of Review

Review of the trial court's findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Kaplan v. Bugalla*, 188 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *Kaplan*, 188 S.W.3d at 635.

B. The Nature of the Proceeding

The pertinent statutes governing access to public documents and judicial review are Tenn. Code Ann. § 10-7-503(a)¹ and § 10-7-505(a)-(d)². Read together, the statutes

¹ Tenn. Code Ann. § 10-7-503(a)(2) provides that:

(a)(2)(A) All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

contemplate that once a request for inspection of records is made, the custodian of records

(B) The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days:

(i) Make the information available to the requestor;

(ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or

(iii) Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce the record or information.

(3) Failure to respond to the request as described in subdivision (a)(2) shall constitute a denial and the person making the request shall have the right to bring an action as provided in § 10-7-505.

² Tenn. Code Ann. § 10-7-505(a)-(d) states:

(a) Any citizen of Tennessee who shall request the right of personal inspection of any state, county or municipal record as provided in § 10-7-503, and whose request has been in whole or in part denied by the official and/or designee of the official or through any act or regulation of any official or designee of any official, shall be entitled to petition for access to any such record and to obtain judicial review of the actions taken to deny the access.

(b) Such petition shall be filed in the chancery court or circuit court for the county in which the county or municipal records sought are situated, . . . Upon filing of the petition, the court shall, upon request of the petitioning party, issue an order requiring the defendant or respondent party or parties to immediately appear and show cause, if they have any, why the petition should not be granted. A formal written response to the petition shall not be required, and the generally applicable periods of filing such response shall not apply in the interest of expeditious hearings. The court may direct that the records being sought be submitted under seal for review by the court and no other party. The decision of the court on the petition shall constitute a final judgment on the merits.

(c) The burden of proof for justification of nondisclosure of records sought shall be upon the official and/or designee of the official of those records and the justification for the nondisclosure must be shown by a preponderance of the evidence.

(d) The court, in ruling upon the petition of any party proceeding hereunder, shall render written findings of fact and conclusions of law and shall be empowered to exercise full injunctive remedies and relief to secure the purposes and intentions of this section, and this section shall be broadly construed so as to give the fullest possible public access to public records.

will respond to the requester within seven days by either: making the records available; denying the request in writing; or completing a form stating the length of time necessary to produce the requested documents. When there has been a denial of access, the requesting party may obtain judicial review by filing a petition in Chancery Court; the court's role is to pass judgment on the justification for the nondisclosure of records, placing the burden of proof on the custodian of records, rather than the petitioner.

There is no requirement in Tenn. Code Ann. § 10-7-505 that the court hold an evidentiary hearing on the petition, and we do not assign error to the trial court's disposition of this petition on the record presented. As noted in Tenn. Code Ann. § 10-7-505(b), there is an interest in disposing of petitions to obtain access to records expeditiously, and the procedure adopted by the court accomplished this purpose. In his brief on appeal, Mr. Hodges states that “[a]s a result of not holding an evidentiary hearing, the petitioner was not able to make a showing that the time that has elapsed in this case, was not justified and that the trial court should not have dismissed his case.” We respectfully disagree. The Response raised the issue of whether Mr. Hodges' request had in fact been denied, such as to invoke the review procedure at § 10-7-505. Copies of the correspondence between Mr. Hodges and General Johnson were included among the exhibits to the Petition and the Response to the petition. The pleadings and exhibits fully set out the factual basis of the allegations of the petition and allowed the court to consider the reason stated by General Johnson that Mr. Hodges did not have the records he requested.

Mr. Hodges argues that “the trial court considered matters outside the petition that had been submitted by the Respondent and should have been treated as one for summary judgment.” In this regard, it appears that Mr. Hodges believes that the court disposed of the petition by granting a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02. This is not accurate; as noted above, the trial court disposed of the petition on its merits, considering the record before it.

C. The Merits of the Petition

Mr. Hodges asserted in his petition that “in March 2013, he requested inspection of the public records regarding his criminal case . . . as compiled by the Office of the Davidson County District Attorney General” and that he received a reply dated March 26, 2103, wherein General Johnson stated in pertinent part:

The above styled file is available for your inspection according to the following procedure:

1. Specific arrangements to inspect the above file must be made with sufficient notice in order for a staff member to retrieve the file from archives; protect any confidential items; and arrange to be present during

the actual inspection of the file. **Under no circumstances will this office provide you with a copy of some or all of this file at no cost. You may have a representative review personally the file and indicate what items should be reproduced, or you may request that certain designated portions of the file be reproduced and mailed to you. The costs and procedures outlined below apply to either option.**

* * *

4. Notations of any items you wish copied will be made, and if the copies are made by this office, you will be charged at the rate of \$.15 per page for black and white and \$.50 per page for color copies and \$15.00 per hour of staff time. However, should you require a large number of copies, we reserve the right to have such copies produced by a private contractor who will provide a cost estimate for your approval.
5. Files that contain audio tapes, video tapes, DVD's or CD's will be reproduced for a charge of \$20.00 per item.
6. All costs associated with the production and copying of our files by either our office or an outside contractor shall be paid prior to the time of delivery. The office will accept as payment only cash or money orders made payable to the District Attorney's Office.

The record shows that Mr. Hodges responded on April 22 by sending a check for \$50.00 with the following explanation:

I have reviewed the procedures and the fee schedule for obtaining copies of all records that I am requesting, however, I am enclosing payment of \$50 to prepay the cost as it may be necessary to retrieve the file of documents and provide me an accounting of the number of documents.

* * *

As soon as the file has been retrieved, I would appreciate a quick reply advising me of the total cost for copying the file(s).

The next correspondence was a letter from Mr. Hodges to General Johnson dated October 24, wherein Mr. Hodges states that he was writing "to inquire into the reasons why your office did not process my request for a copy of the case file regarding my prosecution"; Mr. Hodges concludes by stating that "a prompt response is expected pursuant to Tenn. Code Ann. § 107-503 [sic]." General Johnson responded by letter on October 29, stating:

The cost to have these records copied and mailed to you is seven hundred ninety-four dollars and three cents (\$794.03). We are returning the fifty (\$50.00) money order addressed to this office by you, as it does not cover the cost of your request. Should you remain interested in obtaining these copies, please send a check in the exact amount listed above payable to the Office of the District Attorney General. Please see below for a breakdown of the costs as provided to us by an outside vendor.^{3]}

As noted earlier, in his petition Mr. Hodges sought to have the court determine that General Johnson “failed to abide by the time limits for well over six (6) months without justifying any reasons for noncompliance of its obligatory duty to respond”; he contended that the “delay caused by its noncompliance constitutes a denial of petitioner’s request to inspect and access” the documents. General Johnson asserted, and the trial court so held, that Mr. Hodges’s request was not denied but, rather, he had been given the cost for reproduction of the records and had not paid it; thus, he was not entitled to any relief under Tenn. Code Ann. § 10-7-505.

General Johnson’s March 26, 2013 letter advised Mr. Hodges to make arrangements to have the file inspected so that particular items could be copied; that an outside vendor would be used if a large number of copies was requested; and that all costs associated with the request would have to be paid prior to copying. Mr. Hodges asserts in his brief that, in his initial letter to General Johnson, he requested the estimated cost for the following: “(1) All interview reports completed by Metro detectives; (2) All supplemental Metro Police reports completed by officers; (3) All Metro Police property and evidence reports; (4) All Metro Police 911 calls transcripts of such calls; (5) All forensic reports; (6) Autopsy reports; and (7) a copy listing all discoverable evidence.”⁴ He states that the April 2 letter, enclosing the \$50.00 check, was to “pay the fees for completing the process of retrieving, assessing and copying the designated portions of the documents in the casefile as expeditiously as possible.”

Several matters were clear from General Johnson’s letter: first, that the file was available for inspection by Mr. Hodges or his designee to determine what records would be copied; second, that the copying costs would have to be paid in advance; and third, that more specification than the list of items which may have been identified by Mr. Hodges in his

³ Included in the letter was a cost breakdown for duplication of 2,500 black and white documents, 100 color documents, 20 cassette tapes, and conversion of two VHS tapes to DVD.

⁴ Mr. Hodges states that a copy of his initial letter was not attached to the Petition because he “expected some form of evidentiary hearing to be held before the court to present a copy of the letter as evidence that his letter conforms to a request described in paragraph No. 1.” To the extent Mr. Hodges felt that this letter was germane to the proceedings, he had the opportunity to present the same to the court as an attachment to the various pleadings he filed.

initial letter was necessary to determine the costs of copying. Tenn. Code Ann. § 10-7-503(a)(7)(B) states that the request for inspection or copying “shall be sufficiently detailed to enable the records custodian to identify the specific records to be located or copied.” Under the statutory scheme, inspection of the records precedes copying; the statute does not impose an additional obligation on General Johnson to search the file and determine which records fell within those listed by Mr. Hodges.

The record does not preponderate against the trial court’s finding that Mr. Hodges was provided with an opportunity to access the documents related to the prosecution of his case for a reasonable fee and that the fee had not been paid. The trial court correctly held that Mr. Hodges’ request was not denied and that he had no right to relief under Tenn. Code Ann. § 10-7-505.

The record also supports the trial court’s determination that there was no unreasonable delay in responding to Mr. Hodges’ request. While the date of the first letter Mr. Hodges wrote is not in the record, he makes no complaint that the March 26, 2013 letter from General Johnson, advising him of the procedure that was to be used in responding to his request and the cost of copies, was delayed or not timely. As noted above, Mr. Hodges did not respond appropriately to the procedure set forth in General Johnson’s letter, and upon his further inquiry six months later, he was promptly furnished the cost of copying the entire file, an amount he did not pay. We discern no delay in General Johnson’s responses to Mr. Hodges’ letters.

III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

RICHARD H. DINKINS, JUDGE