IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 4, 2016

CRAIG L. BEENE v. DAN M. ALSOBROOKS

Appeal from the Chancery Court for Dickson County
No. 2011CV401 David D. Wolfe, Chancellor

No. M2015-01876-COA-R3-CV – Filed June 7, 2016

The petitioner sought a writ of mandamus to compel the district attorney general to furnish him with copies of records pertaining to his criminal case. The trial court dismissed the petition, finding that the district attorney general named in the petition had retired, that the statute did not require delivery of records to an incarcerated petitioner, and that the records had been provided in discovery and were no longer available to produce for inspection. The petitioner appeals. We affirm.

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

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S. and KENNY ARMSTRONG, J., joined.

Craig Beene, Whiteville, Tennessee, pro se.

Herbert H. Slatery, III, Attorney General and Reporter; Andree S. Blumstein, Solicitor General; Dawn M. Jordan, Senior Deputy; and Mary M. Bers, Senior Counsel, Nashville, Tennessee, for the appellee, Dan M. Alsobrooks.

MEMORANDUM OPINION[1]

In July 2011, Craig L. Beene ("Petitioner") sent a request to District Attorney General Dan M. Alsobrooks ("Respondent")[2] pursuant to the Tennessee Public Records Act, codified at Tennessee Code Annotated section 10-7-101, et. seq. for "a complete copy of all files" used during the prosecution of his criminal case. Petitioner filed a petition for writ of mandamus to compel the release of the records in September 2011. He voluntarily dismissed his petition in December 2011.

On September 2, 2014, Petitioner filed a motion to compel the release of the documents previously requested in 2011. Attached to the motion was a copy of a subsequent records request, dated June 19, 2014, and correspondence between him and the Comptroller of the Treasury. This motion was treated by the trial court as a re-filing of the original petition against Respondent.[3] General Crouch responded by requesting dismissal of the motion based upon the following grounds: (1) Petitioner was provided a copy of the records in response to discovery in the criminal case; (2) all discovery and records at issue were provided to him; and (3) the records were no longer available because the office no longer maintained the file of his underlying criminal case.

The trial court denied the petition and entered an order of dismissal based upon the following grounds:

> 1. [Respondent] is the former District Attorney General of the 23rd Judicial District, having retired September 1, 2014. Due to his retirement, [Respondent] has no possession of or control over the requested documents.
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> 2. [Tennessee Code Annotated section 10-7-503] allows an individual to request an inspection of documents, and provides that the documents be

[1] Rule 10 of the Rules of the Court of Appeals of Tennessee provides as follows:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated 'MEMORANDUM OPINION,' shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

[2] Respondent retired at the end of his term on August 31, 2014. General W. Ray Crouch, Jr. took office on September 1, 2014.

[3] "Even though the courts cannot create claims or defenses for pro se litigants where none exist, they should give effect to the substance, rather than the form or terminology, of a pro se litigant's papers." *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003) (internal citations omitted).

made available for inspection. [Petitioner] is incarcerated . . . and is not available to make such an inspection of records. To the extent [Petitioner] has requested the documents be photographed and mailed to him at the site of his incarceration, the [c]ourt does not find that to be a proper request under the statute.

3. [General Crouch] has filed a response to [Petitioner's] motion to compel records which stated that a copy of the State's record was previously provided to [Petitioner] in discovery in his criminal case and that his office no longer maintains a file on [his] case. As a result, there are no records available to produce for inspection.

Petitioner filed a timely appeal. This appeal involves issues of law. The trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn. 2008); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

"A writ of mandamus is an extraordinary remedy that may be issued where a right has been clearly established and 'there is no other plain, adequate, and complete method of obtaining the relief to which one is entitled."' *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 479 (Tenn. 2004) (quoting *Meighan v. U.S. Sprint Commc'ns Co.*, 942 S.W.2d 476, 479 (Tenn. 1997)); *see also State ex rel. Ragsdale v. Sandefur*, 389 S.W.2d 266, 269 (Tenn. 1965) ("The writ of mandamus is the proper remedy where the proven facts show a clear and specific legal right to be enforced or a duty which ought to be and can be performed, and relator has no other specific or adequate remedy.")

The Tennessee Public Records Act provides, in pertinent part, as follows:

(a)(1)(A) As used in this part and title 8, chapter 4, part 6, "public record or records" or "state record or records" means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

* * *

(2)(A) All state, county and municipal records shall, at all times during business hours . . . 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.

(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.

(4) This section shall not be construed as requiring a governmental entity or public official to sort through files to compile information; however, a person requesting the information shall be allowed to inspect the nonexempt records.

(5) *This section shall not be construed as requiring a governmental entity or public official to create a record that does not exist*; however, the redaction of confidential information from a public record or electronic database shall not constitute a new record.

Tenn. Code Ann. § 10-7-503(a) (emphasis added). The records custodian is also tasked with providing "an estimate of the reasonable costs to provide copies of the requested material." Tenn. Code Ann. § 10-7-503(a)(7)(C)(ii). Additionally, a public records request may not be denied based upon a person's status as a convicted felon. *Cole v. Campbell*, 968 S.W.2d 274 (Tenn. 1998).

Respondent argues that dismissal of the action was appropriate because he no longer held the office of District Attorney General. The record reflects that Respondent retired a few days prior to the re-filing of the petition. Under these circumstances, leave should have been provided to amend the pleadings to name the proper respondent. *See generally Green v. Metro. Gov't of Nashville*, No. M200101561COAR3CV, 2002 WL 1751436, at *1, n.1 (Tenn. Ct. App. July 30, 2002) (noting that the trial court permitted the petitioner to amend his pleadings to name the proper respondent); *see also* Tenn. R. Civ. P. 15.01 ("[L]eave [to amend a party's pleadings] shall be freely given when justice so requires."). Indeed, General Crouch issued a response to the re-filed petition.

Respondent next argues that dismissal was appropriate because the requested records had already been provided in discovery. We disagree. Petitioner has a right to access his public records and, at the very least, to receive an estimate of the cost to obtain a copy of the records. This right exists regardless of whether such records would be helpful or whether the records were provided in the discovery phase of the underlying case. However, General Crouch indicated to the trial court that the requested records were no longer maintained by his office. The office of the District Attorney General is not required to create a record that does not exist.

With the above considerations in mind, we affirm the denial of the petition and the dismissal of the suit. The case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Craig L. Beene.

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JOHN W. McCLARTY, JUDGE