IN THE CIRCUIT COURT CRITTENDEN COUNTY

PAM HICKS and JOHN MARK BYERS — **APPELLANTS**

v. **CV-2012-290-6**

THE WEST MEMPHIS, ARKANSAS, POLICE DEPARTMENT; et al. — **APPELLEES**

APPELLANTS' RESPONSE AND BRIEF TO APPELLEE, SCOTT ELLINGTON'S, MOTION TO DISMISS THIRD AMENDED PETITION FOR DECLARATORY JUDGMENT, COMPLAINT FOR VIOLATION OF THE ARKANSAS FREEDOM OF INFORMATION ACT OF 1967, AND APPEAL FROM ADMINISTRATIVE DECISION OF THE APPELLEES, AND MOTION AND BRIEF TO CLOSE THE HEARING TO THE PUBLIC OR, IN THE ALTERNATIVE, FOR IN CAMERA REVIEW

Come now the Appellants, and for their Response and Brief to Appellee, Scott Ellington's (hereinafter, "Appellee"), Motion to Dismiss Third Amended Petition for Declaratory Judgment, Complaint for Violation of The Arkansas Freedom of Information Act of 1967, and Appeal from Administrative Decision of the Appellees (hereinafter "Motion"), and Motion and Brief to Close the Hearing to the Public, or, in the Alternative, for *in camera* review, states:

I. RESPONSE

1. As the Appellants show in their Brief below, the Appellee errs both factually and legally in his Motion.

2. Therefore, the Appellants respectfully request that the Appellee's Motion be denied.

3. Appellants move separately for a hearing in this matter to be closed to the public, or, in the alternative, for *in camera* review of any evidence of an ongoing investigation by the Appellee.

WHEREFORE, Appellants respectfully pray that the Appellee's Motion be denied, that the hearing in this matter be closed to the public, or, in the alternative, for *in camera* review, and for all other proper relief.

II. BRIEF

a. No Offer of Meeting by Appellee

The Appellee

> affirmatively pleads that he has offered to make all responsive and non-exempt records available for Mr. Swindle's inspection and copying, in full compliance with the FOIA. Specifically, Prosecutor Ellington has informed Mr. Swindle by phone numerous times that Prosecutor Ellington will make the file delivered to Prosecutor Ellington by his predecessors available for Mr. Swindle's inspection and copying, at Prosecutor's Ellington's office[.]

Motion, para. 2. Ark. R. Civ. P. 10(c). This is simply false and the Appellee's own exhibits prove such falsity.[1] Specifically, by Appellee's own exhibits, the Appellants below-signed counsel transmitted on the following dates requests to the Appellee for a meeting with the Appellee to review the information requested: July 17, July 18, July 28, July 31 (4:08 p.m.), July 31 (5:24 p.m.); August 6, August 10, August 11, and August 13, 2012.[2] These nine requests for a meeting would make no sense if the Appellee was, as he alleges, actually offering to meet with the Appellants. Therefore, said exhibits actually prove the point of the Appellants, not the Appellee. Therefore, it is unclear why Appellee attached said exhibits.

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[1] See also, Section II. b., *infra*.

[2] The last two communications are from Danny Owens, who, as the Court knows, is an agent of the Appellants. See, Exhibit 1 to the Original Complaint, Exhibit 4 to the First Amended Complaint, Exhibit 7 to the Second Amended Complaint, and Exhibit 11 to the Plaintiff's Third Amended Complaint. Ark. R. Civ. P. 10(c).

b. Response to a Non-Party by Appellee

The Appellee next argues that

> Prosecutor Ellington has received a separate but substantially identical FOIA request from Mr. Laird Williams. Consistent with his response to Mr. Swindle's FOIA request, Prosecutor Ellington responded to Mr. Williams by offering to make all responsive and non-exempt records available for Mr. Williams' inspection and copying, in full compliance with the FOIA . . . Prosecutor Ellington has provided the same substantive response (by telephone) to Mr. Swindle. Notably, in his letter to Mr. Williams, Prosecutor Ellington referred to the fact that he has had email correspondence with Mr. Swindle, and included copies of his email correspondence with Mr. Swindle in his response to Mr. Williams.

Motion, para. 3. Ark. R. Civ. P. 10(c). Here, the Appellee errs both legally and factually. Indeed, legally, the preceding declaration is so odd, Appellants hardly deem it necessary to justify a response. Laird Williams has no connection to the Appellants, nor does the Appellee even make such allegation. Suffice it to say that a response to a non-party cannot be deemed to be a response to a party. Whether the Appellee responded to Appellants' Letter by communicating with Mr. Laird, or his next-door-neighbor, or an imaginary friend has absolutely no relevance in this matter, and he should be sanctioned for even making such a frivolous argument. Ark. Code Ann. §16-22-309.

Factually, the statement is also in error. Below-signed counsel will probably not be allowed to testify that the Appellee did not "provide[ ] the same substantive response (by telephone) to Mr. Swindle."[3] However, if allowed to testify, below-signed counsel is prepared to testify that the Appellee

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[3] Generally, attorneys are not allowed to act as an advocate and as a witness as to contested matters. There is an exception if for both "the nature . . . of legal services rendered in the case" or if the "disqualification of the lawyer would work substantial hardship on the client." Ark. R. P. C. 3.7(a)(2-3). Below-signed counsel is confident that, if necessary, both exceptions could be shown here. Moreover, below-signed counsel never intended that he would be made a witness, as it is the Appellee who has thrust private communications into the record, and thus, opened the door to below-signed counsel testifying. The fact that below-signed counsel could not have anticipated the Appellee opening the door to being needed to testify regarding the false allegations of the Appellee are also relevant in deciding whether the below-signed counsel should be allowed to testify. Ark. R. P. C. 3.7,

has never offered to meet with counsel for the Appellants or offered to meet with the Appellants themselves accompanied by below-signed counsel.

Moreover, the Appellants object to the Appellee's introduction of conversations between counsel. Conversations between counsel were an attempt by below-signed counsel to resolve the Appellee's violation of the Freedom of Information Act without litigation. As the Court knows, and as surely a trial attorney as experienced as the Appellee knows, "[e]vidence of conduct or statements made in compromise negotiations is [ ] not admissible." Ark. R. Evid. 408. If the current matter were a jury trial, the appropriate remedy would be to simply prohibit said communications from introduction by a jury. Because this is a bench trial, the Appellants cannot insulate the fact-finder from the offending information and thus addressed the information above. See, Section II. a., *supra*. However, the release of the privileged communication between counsel is so fundamental in its violation of the Rules of Evidence and established Arkansas Law, that the Appellants re-assert their request for appropriate attorney fees as the most appropriate remedy for this misconduct by the Appellee. Ark. Code Ann. §16-22-309.

Substantively, the offending exhibits prove the Appellants' point, not the point of the Appellee. Specifically, the letter attached by the Appellee to a member of the public, Laird Williams, who is not a party to this action or affiliated with the Appellants, is dated September 12, 2012.[4] As the Court knows, the letter from the Appellants to the Appellee was received by the Appellee on July 12, 2012.

Comment 4.

[4] The date of Mr. Williams' letter to the Appellee is unknown to the Appellants. It is assumed that the Appellee received Mr. Williams' letter within three days of the response by the Appellee. Ark. Code Ann. §25-19-105(c)(B)(i).

See Appellants' Exhibits 12-13 to Third Amended Petition for Declaratory Judgment, Complaint for Violation of The Arkansas Freedom of Information Act of 1967, and Appeal from Administrative Decision of the Appellees, incorporated herein. Ark. R. Civ. P. 10(c). The action against the Appellee was filed on September 4, 2012. Therefore, the response by the Appellee to Mr. Williams was a full two months after the original request by the Appellants, and eight days after the current action was filed. Therefore, even if the response by Appellee to Mr. Williams could somehow be considered to be a substitute for a response to the Appellants (which it is not), it would still be untimely and in violation of the Arkansas Freedom of Information Act. Ark. Code Ann. §25-19-105(c)(B)(i).

Moreover, even if the Response to a non-party unaffiliated with the parties was timely to the Appellees' Request (it was not), it still does not show that said information was shared with the Appellants. In fact, the very opposite is shown by the Appellees' own exhibits. See Appellants' Section II. a., *supra*.

c. "Ongoing" Law Enforcement Investigation

Finally, the Appellee argues that part of the information requested is "related to an open and ongoing law enforcement investigation." Motion, para. 7. Appellants concede that "Undisclosed investigations by law enforcement agencies of suspected criminal activity" are exempt from requests under the Freedom of Information Act. Ark. Code Ann. §25-19-105(b)(6). Appellees also concede that the Supreme Court has also defined "undisclosed investigations" to include ongoing investigations.

However, the Supreme Court has emphasized that exemptions to the Freedom of Information Act are to be construed narrowly. *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992); *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991); *Legislative Joint Auditing Comm. v.*

Woosley, 291 Ark. 89, 722 S.W.2d 581 (1987). Moreover, the Court has emphasized that the above-referenced exemption is restricted to investigations that are truly "ongoing". In 1989, the Court was confronted with a situation where the police department refused to release information in a homicide/suicide investigation.

> The police file in this case included statements from confidential informants. The department does not want to release those statements and argues that such disclosure will detract from effective law enforcement to such a degree that it will operate in derogation, and not in support, of the public interest. Included among the reasons for providing this exemption by interpretation are the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative so that police officers might be completely candid in recording their observations, hypotheses, and interim conclusions. The argument could be well addressed to the General Assembly. We can only interpret the exemption as it is written.
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> The only purpose of the exemption, as written, is to prevent interference with ongoing investigations. *When a case is closed by administrative action, as this one was, the reason for the exemption no longer exists, and the trial court correctly ordered the statements released.* Accordingly, we affirm the ruling of the trial court that the police reports are to be released.

McCambridge v. Little Rock, 298 Ark. 219, 766 S.W.2d 909, 916 (1989) (emphasis added).

Moreover, the Court stopped short of declaring that trial courts must automatically defer to a prosecutor until a prosecutor decides whether a defendant will be charged. Instead of abdicating it fact-finding duty to a prosecutor, the trial court must hold a hearing to determine whether there is, in fact an ongoing investigation. In, *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990), the decision of trial court was affirmed, but for different reasoning than used by the trial court, ruling

> We appreciate Mr. Martin's argument that, by including in ongoing investigations references to closed investigations, the authorities could try to frustrate attempts to obtain information from investigations which are closed and thus not ongoing. Our only

> answer must be that the trial court will have to decide, as a matter of fact in any such case, whether investigations are ongoing or not. In the *McCambridge* case, we obviously did not go as far as Professor Watkins would have had us go in the direction of saying that, for example, the names of confidential informants must be protected from disclosure under the act. Nor do we go so far as the trial court in this case to say that a criminal investigation is not entitled to come within the law enforcement exemption until the subject of the investigation is tried or a decision not to try him or her has been made.

Id. at 542.

Here, as the Court knows, the Appellants' minor children as well as one other minor were murdered in 1993. Three defendants were convicted of these murders in two high-profile jury trials in 1994. Two of the Defendants were sentenced to life-in-prison and the third was sentenced to death. In 2011, the three defendants accepted an "Alford Plea" and were released with time-served.[5] Therefore, the presumption or baseline must be, as in *McCambridge*, that the case is closed by administrative action and the Appellee erred in denying the Appellants' request made pursuant to the Freedom of Information Act.

d. Request to Close Hearing to Public, or, in the Alternative, *In Camera* Review

As shown above, the baseline presumption is that the cases involving the murders of the Appellants' children is closed. Certainly, the Appellee should be allowed to rebut that presumption. However, it is incumbent upon the Appellee to overcome the presumption.

Appellants anticipate that the Appellee will argue that the very request for information and acknowledgment of such by the Appellee proves that there is, in fact, an ongoing investigation. This is

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[5] Based upon the high-profile nature of these cases, certainly the Court can take judicial notice of the convictions described above without testimony or documentary proof. Ark. R. Evid. 201. *See also*, *Baldwin v. State*, 2010 Ark. 412, *Misskelley v. State*, 2010 Ark. 415, and *Echols v. State*, 2010 Ark. 417.

not so. The passive receipt of information by the Appellee does not demonstrate any active or ongoing investigation by the Appellee. There should be a demonstration to the Court of such an ongoing investigation. For example, who is in charge of the investigation? Which law enforcement officers have been assigned to work under the person in charge of the investigation? What has been done in the investigation? What leads are being followed in the investigation? Who is the target of the investigation. What are the things still to be done in the investigation? The Appellee should be required to prove to the Court these things in order to establish that there is, in fact, an ongoing investigation that needs to be protected by exemption from the Freedom of Information Act.

The Appellants appreciate the concerns of the Appellee in disclosing in any information regarding any legitimate ongoing investigation. However, the appropriate remedy to address these concerns would be a hearing closed to the public. *Arkansas Newspaper, Inc. v. Patterson*, 281 Ark. 213, 662 S.W.2d 826 (1984). The Court certainly has the flexibility to order such a closed hearing to protect any supposed ongoing investigation of the Appellee. Ark. R. Civ. P. 78(a)[6]; and 81(c)[7].

In the alternative, and, at the very least, the court should conduct an *in camera* review of the supposed on-going law enforcement investigation. *Johninson v. Stodola*, 316 Ark. 423, 872 S.W.2d 374, 376 (1994).

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[6] "Unless local conditions make it impracticable, each court shall establish regular times, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but *the court* at any time and on such notice as is reasonable, *may make orders for the advancement, conduct and hearing of such motions*." (Emphasis added.)

[7] "When no procedure is specifically prescribed by these rules, the court shall proceed in any lawful manner not inconsistent with the Constitution of this State, these rules or any applicable statute."

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Ken Swindle, hereby state that the above-referenced document was transmitted to David Peeples, via facsimile, (870) 732-7514, and to the Office of the Arkansas Attorney General, via facsimile, (501) 682-8084, this 15th day of October, 2012.

Ken Swindle