No. W2023-00293-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

JOSE MARCUS PERRUSQUIA,

Plaintiff/Appellant,

v.

FLOYD BONNER, JR. AND STEVE MULROY,
in their official capacity,

Defendants/Appellees.

On Appeal From the Shelby County Chancery Court
Case No. CH-22-0820-III

BRIEF OF DEFENDANT-APPELLEE FLOYD BONNER, JR.

R. Joseph Leibovich (BPR #17455)
Angela M. Locklear (BPR #033024)
Shelby County Attorney's Office
160 North Main Street, Suite 950
Memphis, Tennessee 38103
(901) 222-2100
joe.leibovich@shelbycountytn.gov
angela.locklear@shelbycountytn.gov

Attorneys for Respondent Floyd Bonner, Jr.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellee-Respondent Floyd Bonner, Jr. ("Bonner" or "Respondent") is not directly involved in the subject of issues 1-3 in Petitioner-Appellant's Opening Brief ("Br."), and will therefore not address those issues other than to state that his suggested answer to them would be "No."

Respondent would rephrase Petitioner's issues 4 and 5 as follows:

4. Are the Sheriff and the DA required by the Tennessee Public Records Act ("TPRA"), including Tenn. Code Ann. § 10-7-504(m)(1)(E), to produce video footage recorded May 29, 2018, inside the Shelby County Jail's Law Enforcement Lobby?

Suggested Answer: No.

5. Did the Sheriff and the DA knowingly and willfully withhold public records in violation of the TPRA such that Petitioner should be awarded reasonably attorneys' fees and costs pursuant to Tenn. Code Ann. § 10-7-505(g) for both the proceedings before this Court and the trial court?

Suggested Answer: No.

STATEMENT OF THE CASE

Respondent does not substantively dispute Petitioner-Appellant Marc Perresquia's ("Petitioner" or "Perrusquia") Statement of the Case. However, it bears noting that Petitioner appears to have abandoned any request that injunctive relief in this matter would include a requirement that Respondent Bonner directly provide the video in question to anyone other than

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the District Attorney. *See* Transcript of Proceedings From January 25, 2023 ("Tr."), R. v. 4 at 7:7-9:1[1]; Petitioner-Appellant's Opening Brief ("Appellant's Brief"), p. 9-10.

STATEMENT OF THE FACTS

Bonner does not substantively dispute Petitioner's recitation of the facts, except as set out herein.

The video sought by Petitioner was taken by surveillance cameras inside the Shelby County Jail facility on May 29, 2018. (Petition for Access to Public Records and To Obtain Judicial Review of Denial of Access ("Petition"), R. v. 1 at 7).[2] The requested video includes footage inside the sallyport and the Law Enforcement Lobby ("LEL") of the jail. (R. v. 3 at 316; see R. v. 2 at 170, 223). The sallyport is located inside Jail property. This area looks like an enclosed parking lot, and it is where detainees are initially brought to the facility following arrest. Declaration of George Askew ("Askew Decl.") (R. v. 2 at 232, ¶ 8). The LEL is connected to the sallyport, and it is where detainees are taken immediately after clearing the sallyport. (*Id.* at ¶ 9).

Surveillance videos inside the jail facility – and particularly inside the LEL – can show multiple detainees who could be identified from that video. (*Id.* at ¶ 12). Inside the sallyport and the LEL, surveillance footage includes both audio and video. In the sallyport, detainees are asked for medical information by a nurse, and in the LEL surveillance shows various stages of detainee processing and can include personal information. (*Id.* at ¶ 14).

[1] Volume 4 of the record did not contain any Bates numbering, so page references to this volume will be to the page number contained on the transcript pages.

[2] References to Volumes 1-3 of the record will refer to the Bates number at the bottom right, eliminating zeroes before the actual number.

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Video from inside the facility can provide information as to the locations of surveillance cameras, and can show the Jail layout, which can give detainees advance knowledge of paths within the facility, as well as identify blind spots in security for the hiding of contraband. (*Id.* at ¶¶ 7,10). The Jail has had issues in the past with detainees dropping or hiding weapons and drugs in the LEL. (*Id.* at ¶ 10).

STANDARD OF REVIEW

Respondent Bonner does not dispute that the proper standard of review for questions of law is *de novo*. However, the determination of whether to award attorney fees is in the discretion of the trial court and should be reviewed under an abuse of discretion standard. *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App.2015) (citations omitted).

SUMMARY OF ARGUMENT

Under the plain wording of the TPRA, Respondent Bonner is under no legal requirement to produce the video in question as a public record. The relevant statute, Tenn. Code Ann. § 10-7-504(m)(1) states "records that are directly related to the security of any government building shall be maintained as confidential and shall not be open to public inspection. . . . "

The statute's plain language states that segments of video "**may** be made public when they include an act or incident involving public safety or security or possible criminal activity." Tenn. Code Ann. S 10-7-504(m)(1)(E) (Emphasis added).

The plain statutory language states there is discretion – but no compulsion – to release relevant surveillance videos in certain circumstances. Therefore, Respondent was within his rights to not publicly release the video in question.

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Furthermore, to the extent that Petitioner alleges that the video should have been released to him, such an argument has been waived. At the hearing on this matter in the trial court and in the briefing in this case, it is apparent that Petitioner is seeking an order for Bonner to re-release the video only to the co-Respondent, the District Attorney for Shelby County Tennessee.

Finally, even if the Court were to agree with Petitioner's position that the video in question should be released, there is no basis upon which Petitioner should be awarded attorney fees and expenses. First and foremost, Bonner did provide the District Attorney General for the 30th Judicial District ("DA")[3] with a copy of the video in question so that office could conduct an investigation as to whether any charges should be brought as a result of what was captured. After determining that no charges would be filed, the DA returned the video to the Shelby County Sheriff's Office.

When Petitioner originally requested documents from the Shelby County Sheriff's Office, he was advised that the case file was available for inspection, but that the video would be withheld. (Declaration of Jose Marcus Perrusquia..., (Perrusquia Decl.), R. v. 1, at 133-135, ¶¶ 8-13). At that time, the Sheriff's Office relied on the TPRA's provisions protecting the confidentiality of videos involving the security of public buildings found at Tenn. Code Ann. § 10-7-504. *Id.* at 133-34, ¶ 9; 135, ¶ 13).

The Sheriff's Office has consistently and reasonably relied on the plain wording of the TPRA in its decision to not provide the video in question to the public, and attorney fees would be inappropriate. This is even more the case in light of Petitioner's apparent abandonment of his argument that the records should be produced directly to him, as well as the trial court's agreement with Respondent's interpretation of the statute.

[3] The DA is a state employee and is not a part of Shelby County Government. The DA is separately represented in this matter.

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ARGUMENT

I. The Tennessee Public Records Act does not require the Shelby County Sheriff's Office to release the surveillance video taken inside the Shelby County Jail.

Under the Tennessee Public Records Act ("TPRA"), Tenn. Code Ann. §§ 10-7-101, *et seq.*, counties within Tennessee generally have a responsibility to allow inspection of public records to Tennessee citizens. Tenn. Code Ann. §10-7-503. However, there are exceptions. The TPRA states in Tenn. Code Ann. § 10-7-504 ("Confidentiality of certain records"):

> (m)(1) Information and records that are directly related to the security of any government building shall be maintained as confidential and shall not be open to public inspection. For purposes of this subsection (m), "government building" means any building that is owned, leased or controlled, in whole or in part, by the state of Tennessee or any county, municipality, city or other political subdivision of the state of Tennessee. Such information and records include, but are not limited to:
> ...
>
> (D) Information and records that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entity; and
>
> (E) Surveillance recordings, whether recorded to audio or visual format, or both, except segments of the recordings **may** be made public when they include an act or incident involving public safety or security or possible criminal activity. In addition, if the recordings are relevant to a civil action or criminal prosecution, then the recordings **may** be released in compliance with a subpoena or an order of a court of record in accordance with the Tennessee rules of civil or criminal procedure. The court or administrative judge having jurisdiction over the proceedings shall issue appropriate protective orders, when necessary, to ensure that the information is disclosed only to appropriate persons. Release of any segment or segments of the recordings shall not be construed as waiving the confidentiality of the remaining segments of the audio or visual tape.

Tenn. Code Ann. § 10-7-504(m) (emphasis added).

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The surveillance video in question does not relate to public safety. The footage only shows an altercation between a Memphis Police Department officer and a single individual. (R. v. 3 at 316, ¶ 1).[4] There is not a broad issue implicit in this brief encounter.

Furthermore, the video in question is not relevant to any current criminal prosecution or civil action. This leaves Petitioner with the argument that the video contains "possible criminal activity." And, while the detainee pled guilty to assault related to the incident (R. v. 1 at 5, ¶ 12), Respondent Bonner is not required to release the video under the plain language of the TPRA. The statute clearly states such recordings "**may** be made public" and "**may** be released". The TPRA does not say such video **shall** or **must** be released. The language is discretionary, and not mandatory.

The distinction between the meanings of these words is significant. The Tennessee Supreme Court has stated that the use of the word "may" "ordinarily connotes **discretion or permission**; and it will not be treated as a word of command unless there is something in the context or subject matter or the act or statute under consideration to indicate that it was used in that sense." *In re Est. of Rogers*, 562 S.W.3d 409, 424 (Tenn. Ct. App., 2018) (quoting *Colella v. Whitt*, 308 S.W.2d 369, 371 (Tenn. 1957)) (emphasis added).

Both the plain wording of the statute and the context in which it is used demonstrate that the use of the word "may" gives the custodian of records discretion to release the video in question but does not require it. The context of the TPRA subsection in which that language is found demonstrates this.

[4] The surveillance video was reviewed *in camera* by the Chancellor at the trial court, but it is not a part of the technical record.

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Had the legislature intended that the disclosure be mandatory, the TPRA could have used the word "shall" or "must" in Tenn, Code Ann. § 10-7-504(m)(1)(E) as it did elsewhere in the same subsection of the TPRA itself. *Compare* Tenn. Code Ann. § 10-7-504(m)(1) ("Information and records that are directly related to the security of any government building **shall** be maintained as confidential and **shall** not be open to public inspection")(emphasis added) with Tenn. Code Ann. § 10-7-504(m)(1)(E) ("segments of the [surveillance] recordings **may** be made public when they include an act or incident involving public safety or security or possible criminal activity.")(emphasis added) *See, also* Tenn. Code Ann. § 10-7-503(a)(2)(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. . . . ") (emphasis added).

Taken in context of the TPRA itself, the legislature presumably used different words in the Act for a reason; the fact that it chose to use "may" in the relevant part of the Act and "shall" elsewhere even in the same subsection demonstrates that the language in Tenn. Code Ann. §10-7-504(m)(1)(E) was intended to be discretionary.

Respondent's reasons for not releasing the videos are directly related to the security of a government building. George Askew ("Askew"), an Assistant Chief Jailer for the Shelby County Jail, provided a declaration to the trial court setting forth numerous reasons as to why surveillance videos inside the Jail should not be released. (Askew Decl., R. v. 2 at 231-233**).**

In the December 19, 2022 Declaration, Askew stated he had been Assistant Chief Jailer since September 2022, previously served as a Jail Chief Inspector, and had been employed by the Shelby County Sheriff's Office since November 1987. (*Id.* at 231, ¶¶ 1-4). Askew stated he is familiar with operations and security at the Jail. (*Id.*, ¶ 5).

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Askew stated the public release of surveillance video from inside Jail property raises significant security concerns as it can alert people to the location of surveillance cameras and can reveal locations where detainees can hide weapons and other contraband. (*Id.* at 232, ¶¶ 6-7, 10). Issues have arisen at the Jail because of individuals hiding and dropping such items in the facility. (*Id.*, ¶ 10).

In addition, Askew stated in his declaration that the release of such internal surveillance video can provide individuals with knowledge of the layout of the Jail facility, including security blind spots and hiding locations. (*Id.* at ¶ 11).

Furthermore, there are detainee privacy issues with surveillance video inside the Jail. Detainees are initially brought to the sallyport, and then are moved into the Law Enforcement Lobby. (*Id.*, ¶¶ 8-9). Video inside the facility, particularly inside the LEL, can depict multiple detainees, who may be identifiable from the video. (*Id.*, ¶ 12). In addition, audio from recordings can include medical information given by detainees to a nurse. (*Id.*, ¶ 14).

The TPRA's use of permissive language that video surveillance footage showing potential criminal conduct **may** be made public gave the governmental entity a choice as to whether to release the footage.

The Shelby County Sheriff's Office was correct to not provide the requested material for public consumption based on the significant security and detainee privacy concerns set out above.

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II. Petitioner has waived his arguments for direct release of the surveillance video to him.

It appears that Petitioner abandoned his request that Respondent Bonner turn over the video in question directly to him. The following exchange between counsel for Petitioner and the trial court demonstrates this based on a request for three forms of relief in addition to fees[5]:

> [Petitioner's Counsel ("Counsel")] …The first is for the sheriff, and this will make a little bit more sense after I explain the facts, but for the sheriff to provide the DA with a copy of the footage. For the DA to retain that copy of the footage. For the DA to retain that copy of the footage. And then, that moving forward, that the DA retain or be required to retain items it receives when it's making a charging decision, and receipts and reviews in making a charging decision.
>
> …
>
> [The Court ("Court"] Let's go back over your request for injunctive relief to make it clear. Were there three separate requests for injunctive relief?
>
> [Counsel] Yes. I believe that's how we have it broken out in the petition itself, Your Honor.
>
> [Court] For the Sheriff to provide the footage to the DA?
>
> [Counsel] Correct.
>
> [Court] And then the DA to retain the footage. And then what was the third thing?
>
> [Counsel] The third one was – and I'll read from the petition just to make sure I get it right.
>
> [Court] Well, just repeat what you just said.
>
> [Counsel] ...for the DA's office to retain copies of the materials that it reviews when making charging decisions, receives and reviews - -
>
> [Court] In the future?
>
> [Counsel] - - in the future. Correct, Your Honor.

(Transcript, R. v. 4 at 7:15-9:1).

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[5] The fees issue will be discussed *infra*.

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Although Perresquia's petition sought an order requiring that both the DA and the Sheriff's Office be ordered to provide the footage (R. v. 1 at 18), it is apparent that at the hearing, Petitioner abandoned the request as to the Sheriff's Office. The issue was, therefore, not before the trial court. The Tennessee Supreme Court has noted "As a general rule, 'questions not raised in the trial court will not be entertained on appeal.'" *City of Cookeville ex rel. Cookeville Regional Med. Ctr. v. Humphrey*, 126 S.W.3d 897, 905-906 (Tenn. 2004) (quoting *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)).

Here, the issue of whether Respondent Bonner should produce the video directly to Petitioner was abandoned and not before the trial court at the time the trial court made its ruling. Indeed, Petitioner-Appellant's Brief sets this out in the Statement of the Case. (Appellant's Brief, at pp. 9-10). Therefore, this Court should not consider this issue.

III. Petitioner is not entitled to attorney's fees.

Even if the Court agrees with Petitioner that parts of the video in question should be released, a grant of attorney's fees would be improper. The TPRA states that a trial court may award attorney's fees against a governmental entity that violates the Act in limited circumstances:

> If the court finds that the governmental entity…refusing to disclose a record, **knew that such record was public** and willfully refused to disclose it, **such court may, in its discretion**, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity. . . .

Tenn. Code Ann. §10-7-505(g) (emphasis added).

Whether or not to award attorney's fees is entirely within the discretion of the trial court, and such a determination is subject to review only for abuse of discretion. *Clarke v. City of Memphis*, 473 S.W.3d 285, 290 (Tenn. Ct. App.2015). However, such fees should only be considered if the governmental entity willfully refused disclosure. *Id.* In effect, a governmental

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entity's denial of a records request must have an absence of good faith before a court should even consider the discretionary award of fees. *Id.* (citing *Friedman v. Marshall Cnty*, 471 S.W.3d 427, 438 (Tenn. Ct. App. 2015)).

The analysis for willfulness "emphasizes the component of the statutory standard that the entity or its officials know that the record sought is public and subject to disclosure. It evaluates the validity of the refusing entity's legal position supporting its refusal; critical to that determination is an **evaluation of the clarity, or lack thereof, of the law of the issue involved**." *Conley v. Knox County Sheriff*, 2022 WL 289275 at *5 (Tenn. Ct. App., Feb. 1, 2022) (appeal denied August 3, 2022) (quoting *The Tennessean v. City of Lebanon*, 2004 WL 290705, at *9 (Tenn. Ct. App. Feb. 13, 2004) (emphasis added).

In this case, and as discussed *supra*, the plain language of the statute says surveillance videos **may** be released or made public by a governmental entity under certain circumstances. This use of "may" instead of "shall" could certainly lead a governmental entity to believe that it is not required to turn over surveillance videos that are outside of the strict prohibition.

As discussed *supra*, the reasons weighing against disclosure were not capricious. The Shelby County Sheriff's Office has legitimate concerns about safety and there are significant detainee privacy issues related to the videos in question.

Furthermore, Respondent has shown good faith in its release of documents to Petitioner. Petitioner agrees that the Shelby County Sheriff's Office did provide portions of its investigative file regarding the incident other than the video footage. (See R. v. 1 at 6, ¶ 18; R v. 1 at 134, ¶ 10). Respondent was not attempting to wholesale deny access to detailed information regarding the incident. It only withheld the footage for all the reasons discussed herein. There was certainly no bad faith in Respondent's response to Petitioner's request.

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The trial court's ruling demonstrates that Respondent was not acting in bad faith in exercising discretion regarding the video. A sitting Chancellor agreed with Respondent's interpretation of the statute. (R. v. 3 at 319, ¶¶ 3-5). Even if this Court were to determine that the trial court erred, it is apparent that Respondent did not unreasonably interpret the language of the statute as being discretionary when a court made the same interpretation.

Finally, as discussed *supra*, Petitioner abandoned the argument that Respondent Bonner should have directly given him the video in question. Considering this, there would be no basis for Respondent Bonner to be required to pay fees under any circumstances. And, in any event, the awarding of attorney's fees lies within the sound discretion of the trial court, and it should remain up to the trial court to determine if attorney fees are appropriate should this Court reverse any other portion of the trial court's Order Denying Petition for Access to Public Records (R. v. 3 at 316-321).

IV. Respondent Bonner defers to the DA on the issues that only affect him.

The remaining issues raised by Petitioner on appeal do not affect Respondent Bonner directly. To that end, and to the extent there is no conflict with any of his positions, Respondent Bonner defers to the DA's arguments on those issues.

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CONCLUSION

For all the above reasons, Respondent Bonner requests that this Court affirm the trial court's Order Denying Petition For Access to Public Records in its entirety and provide him with any other relief to which the Court determines he is entitled.

Respectfully submitted,

/s/ R. Joseph Leibovich
R. Joseph Leibovich (BPR #17455)
Angela M. Locklear (BPR #033024)
Shelby County Attorney's Office
160 North Main Street, Suite 950
Memphis, Tennessee 38103
(901) 222-2100
joe.leibovich@shelbycountytn.gov
angela.locklear@shelbycountytn.gov

Attorneys for Respondent
Floyd Bonner, Jr.

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CERTIFICATE OF SERVICE

I certify that the foregoing has been served via U.S Mail and/or the Court's electronic filing system on September 12, 2023 on the following:

Paul R. McAdoo
Reporters Committee for Freedom of the Press
6688 Nolensville Road, Suite 108-20
Brentwood, Tennessee 37027

Michael Stahl
Office of the Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202-0207

/s/ R. Joseph Leibovich
R. Joseph Leibovich
Attorney for Respondent-Appellee
Floyd Bonner, Jr.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this filing complies with the word-count limit set forth in Tenn. R. App. P. 30(e). Based on the word-count function of Microsoft Word, the total word count for all printed text in the body of the brief exclusive of material omitted by Tenn. R. App. P. 30(e) is 3,507 words. The text of this brief is 12-point Times New Roman. Respondent-Appellee Bonner has not included a Rule 27 (e) Addendum as all relevant statutory provisions have been put into the body of this brief. Furthermore, such an Addendum would be redundant to the one filed by Petitioner-Appellant.

/s/ R. Joseph Leibovich
R. Joseph Leibovich
Attorney for Respondent-Appellee
Floyd Bonner, Jr.

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